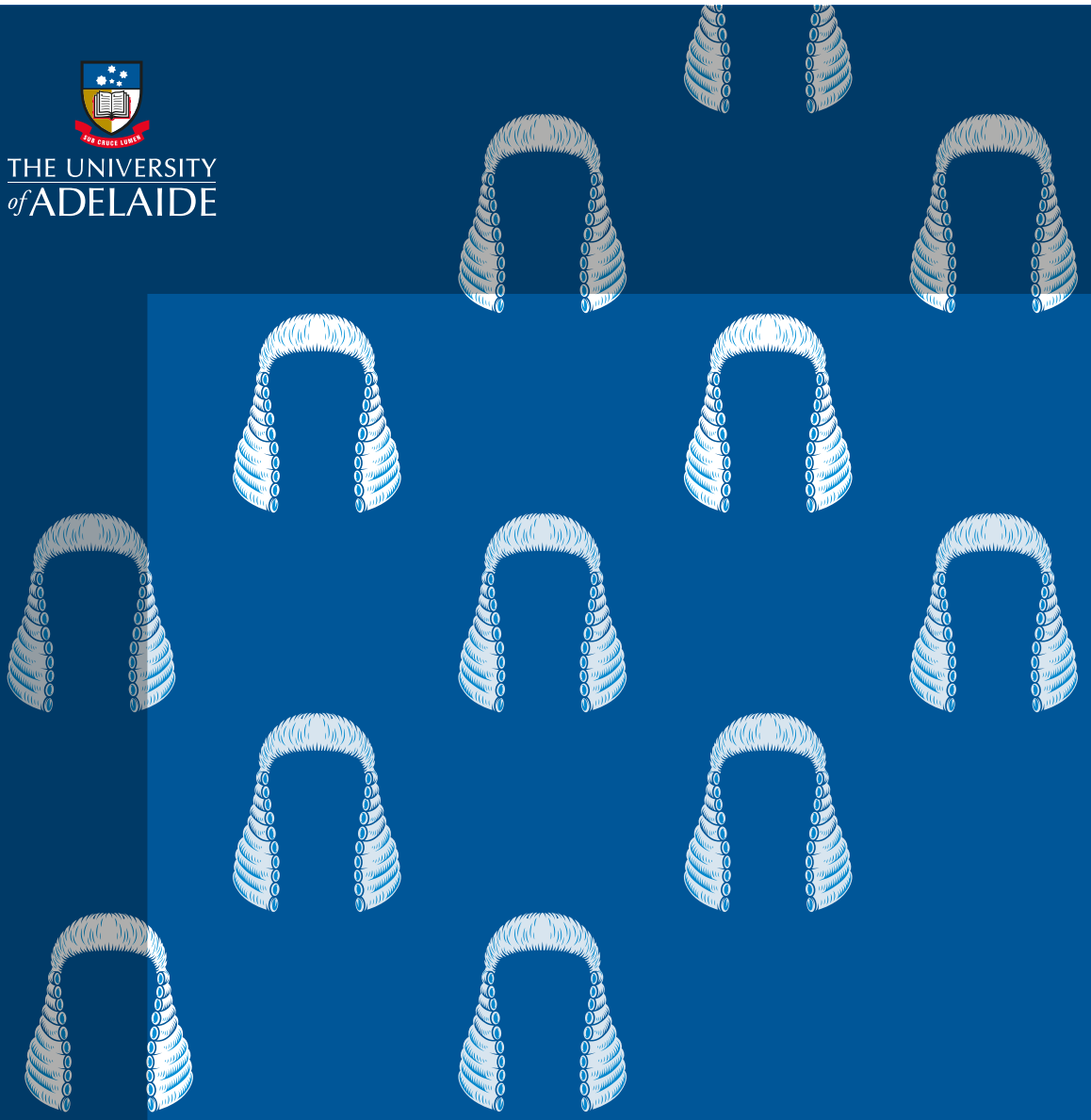

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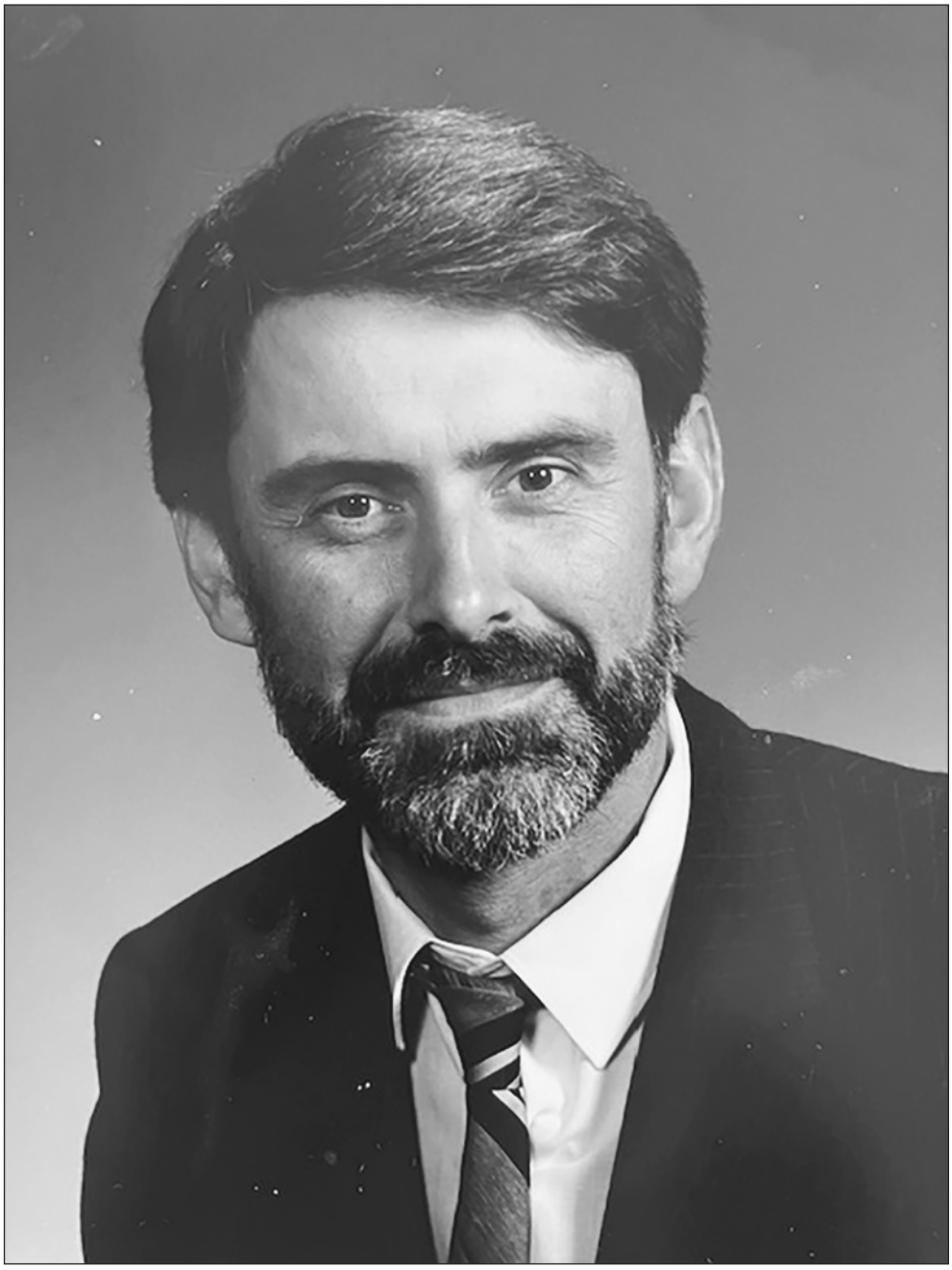

Adrian John Bradbrook FAAL
Bonython Chair in Law and Professor of Law Emeritus

P T Babie and Richard Sletvold***

IN MEMORIAM: ADRIAN JOHN BRADBROOK FAAL, 1948–2024

I Introduction

In the European history of Australia, only a few scholars can be said to have shaped the very nature of Australian property law and so of the Anglo-Australian law itself: scholars like B A Helmore, T P Fry, Peter Butt, Carol Sappideen, R T J Stein, Susan V MacCallum, and Anthony P (Tony) Moore. Counted among their number in this select *numerus clausus* of the most eminent Australian property scholars was Adrian John Bradbrook,[1] who passed away in Adelaide on 23 June 2024. A scholar of immense ability, in a career that spanned over 50 years, including 36 years as a member of the Adelaide Law School, Adrian had a towering international reputation in property law, energy law, and environmental law, both as a scholar and as a leader of law reform.

Adrian John Bradbrook was born in Portsmouth, England, the only child of Arthur and Edna Bradbrook, on 21 April 1948. He received most of his early education at The Portsmouth Grammar School, before going up to the University of Cambridge in 1966. There, he won a Foundation Scholarship and went on to graduate BA with a first in the Law Tripos, later promoted to MA by seniority in 1972. While fed on the usual fare of law subjects at Cambridge, it was Roman Law that clearly influenced the course of his later career. While he initially decided to take the subject because he had studied Classics (Latin and Greek) in his A-levels, it made such an impact on him that he enrolled also for the Advanced Roman Law subject. Moreover, it

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* Bonython Chair in Law and Professor of Law, Associate Dean of Law (International), Adelaide Law School, The University of Adelaide. We are deeply grateful to Judith Gardam for conversations which she had with P T Babie as we were writing this tribute, and for her support and encouragement. Our warmest thanks also to Frances Cartwright, Ustinia Dolgopol, John Emerson, Robert Fowler, Paul Leadbeter, Ian Leader-Elliott, Horst Lücke, Kathleen McEvoy, Rosemary Owens, and Alexandra Wawryk for offering their thoughts and recollections. This tribute also draws upon Paul Babie, 'The Wily Quadruped Meets a Saucy Intruder: How Life and Law Intersect' in Paul Babie and Paul Leadbeter (eds), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014) 1, 1–21, including two interviews with Adrian Bradbrook (P T Babie, Adelaide, 21–22 February 2012).

** Special Counsel, FAL Lawyers.

1 See, e.g., Ken Mackie, Elise Bennett Histed and John Page, *Australian Land Law in Context* (Oxford University Press, 2012) liv.

gave him a chance to use his Greek, forcing him to focus his attention to detail, and proving to be very good training for a future in legal scholarship.

In 1970, Adrian earned an LLM at Osgoode Hall Law School, York University in Canada, followed by two degrees at the University of Melbourne: a PhD in residential tenancy law in 1975, and an LLD for his thesis on solar energy law in 1987. On the strength of his scholarship in property law, Adrian earned a second PhD, by publication, from Cambridge in 1994. His final academic credential came in 2001, when he was awarded the Dr iur (*honoris causa*) by the University of Mannheim.

Adrian began his career in the academy as an Assistant Professor of Law at Dalhousie University in Canada from 1970 to 1972, before taking up a Senior Lectureship at the University of Melbourne from 1972 to 1979, and later being promoted to Reader in Law at Melbourne in 1980. He joined the Adelaide Law School as a Professor of Law in 1988 at the age of only 40, and went on to hold the John Bray Chair in Law from 1991 to 1995. In 1995, he was appointed the sixth holder of the Bonython Chair in Law, which he held until his retirement in 2011. The Chair in Law of the University of Adelaide was established in 1883, and later endowed by the Hon Sir John Langdon Bonython KCMG in 1926 as the Bonython Chair. Adrian became the eleventh holder of the Chair in Law of the University, and the sixth holder of the Bonython Chair in Law. On his retirement in 2011, Adrian was conferred the title of Bonython Professor of Law Emeritus.

In 1977, Adrian met Judith Gardam, whom he would marry in 1980. They spent the next 46 years together, with their four daughters from previous marriages — Fiona, Frances, Georgia, and Selena — and became proud grandparents to Nessa, Freyja, Levi, Ella, Bleue, and Phoenix. Like Adrian, Judith would also become an internationally recognised scholar in her own right, first at the Melbourne Law School and later at the Adelaide Law School, establishing herself as an expert in international law.

II Scholarship

Adrian's LLM thesis on child custody law at Osgoode offered the first glimpse of the intellectual power he would bring to bear on any area of law he explored. In assessing the traditional way of resolving child custody cases, Adrian argued that rather than showing any objective rules, the guiding principles were in fact very subjective. The keystone chapter of his thesis surveyed judges of the former Ontario High Court of Justice on their attitudes towards child protection law. Using an early form of qualitative empirical legal research, Adrian concluded that the outcome of such disputes depended not on any identifiable legal criteria, but on nothing more significant than the judge assigned to the case. Ultimately published in the *Canadian Bar Review*,[2] this realist conclusion is founded upon one of the earliest

2 Adrian Bradbrook, 'An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Workings of the Child Custody Adjudication Laws' (1971) 49(4) *Canadian Bar Review* 557, which was an abridged version of Adrian

examples of qualitative empirical legal research in Canadian or Australian legal literature. It remains influential to this day.[3]

In 1980, following his arrival in Melbourne, Adrian co-authored a book with Marcia Neave on easements and restrictive covenants.[4] And while he would edit a casebook on tax during his time at Melbourne,[5] it was in the area of real property that Adrian would have his most significant and lasting impact on Australian law. His book *Poverty and the Residential Landlord–Tenant Relationship,*[6] published in 1975 as part of the Commonwealth Commission of Inquiry into Poverty, led to the gradual enactment of residential tenancies legislation and the establishment of Residential Tenancies Tribunals in Australia, which were later subsumed into the modern generalist civil and administrative tribunals.[7] In fact, it was Adrian's work that created this entirely new field of law, until then regarded as simply a part of the law

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Bradbrook, 'The Inter-Parental Conflict Over Ownership of Children: Judicial Discretion versus Behavioral Science' (LLM Thesis, York University, 1970).

3 See, e.g.: Elizabeth Sheehy and Susan B Boyd, 'Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases' (2020) 42(1) *Journal of Social Welfare and Family Law* 80, 81; Suzanne Williams, *Through the Eyes of Young People: Meaningful Child Participation in BC Court Processes* (Report, International Institute for Child Rights and Development, 2006) 184.

4 Published the following year as Adrian J Bradbrook and Marcia A Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 1st ed, 1981). It is now in its third edition and, such is the influence of the title, it is now named in honour of Adrian Bradbrook and Marcia Neave: Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011).

5 Yuri Grbich, Adrian Bradbrook and Kevin Pose (eds), *Revenue Law: Cases and Materials* (Butterworths, 1990). Owing to demand, it was reprinted by Butterworths in 1994 with a supplement prepared by Yuri Grbich. See Yuri Grbich, *Revenue law: Cases and Materials Grbich, Bradbrook and Pose. Supplement 1994 / prepared by Yuri Grbich* (Butterworths, 1994).

6 Adrian J Bradbrook, *Poverty and the Residential Landlord–Tenant Relationship* (Australian Government Publishing Service, 1975). This was the published result of his doctoral research: Adrian Bradbrook, 'The Law Relating to the Rights and Duties of Landlords and Tenants Concerning Residential Premises: A Re-Assessment' (PhD Thesis, The University of Melbourne, 1975).

7 See, e.g.: Ronald Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field?' in Brian R Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 274, 277; Adrian J Bradbrook, 'Residential Tenancies Law — The Second Stage of Reforms' (1998) 20(3) *Sydney Law Review* 402, 402–5. It seems fitting that it was the Dunstan Labor Government in South Australia, where Adrian would ultimately find his home, which led the way in adopting the majority of the Commission's recommendations and enacting them in the *Residential Tenancies Act 1978* (SA) (later repealed and replaced by the *Residential Tenancies Act 1995* (SA)): at 404. The Hon D H L Banfield, in his second reading speech for the Residential Tenancies Bill 1978 (SA) noted that '[i]n particular, the Bill relies upon the recommendations of the report of A J Bradbrook, MA, LLM, entitled "Poverty and the Residential Landlord–Tenant Relationship" prepared for the Australian Commission

of leases. While not a few people criticised him as being anti-landlord, for Adrian it was simply a matter of doing justice and ensuring a level playing field. And it revealed his passion for working in areas that contained what he called a substantial 'human factor'. This work alone established Adrian as a leader, law reformer and outstanding scholar — both nationally and internationally.

Perhaps, though, Adrian will be remembered by most as one of the first authors, with Susan V MacCallum and Tony Moore, of *Australian Real Property Law*, now in its seventh edition.[8] Its companion volume, *Australian Property Law: Cases and Materials*,[9] is now in its fifth edition. Both are found on lawyers' and law students' bookshelves around the country, known simply as 'Bradbrook, MacCallum, and Moore'. Similarly, his book *Commercial Tenancy Law*,[10] now in its fifth edition, and *Bradbrook and Neave's Easements and Restrictive Covenants in Australia*,[11] now in its third edition, have both become standard references for practitioners. Add to this his more recent textbook with Rosemary Lyster, *Energy Law and the Environment*,[12] and Adrian's enormous contribution to the teaching and practice of law is clear. By the time of his retirement, Adrian had published 24 books — including several new editions of his most significant works in property law — and well over 100 articles and book chapters, not to mention talks, papers, public lectures, and countless other forms of scholarly work and service.[13]

It was through his research into easements that Adrian discovered the American law relating to solar access easements, and it was that project that would occupy much of his time in the latter part of his career; he would go on to take the same approach to wind energy and, finally, to geothermal energy. This opened his interest in energy efficiency as part of a state's economy and in international law. He published extensively in these fields, as he had in property law, and was the recipient of major Australian Research Council Discovery and other grants for his work. As with residential tenancies legislation, in energy law, and especially solar energy law, Adrian's work again drove the development of both scholarship and law reform, not only in Australia, but globally. In an effort to show the way for legislative reform protecting solar access, Adrian explored the common law easement and

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of Inquiry into Poverty, and the Law Reform Committee of South Australia in its 35th report relating to standard terms in tenancy agreements': South Australia, *Parliamentary Debates*, Legislative Council, 22 February 1978, 1706 (D H L Banfield).

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

9 Adrian Bradbrook et al, *Australian Property Law: Cases and Materials* (Thomson Reuters, 5th ed, 2016).

10 Clyde E Croft, Robert S Hay and Luke Virgona, *Commercial Tenancy Law* (LexisNexis, 5th ed, 2023).

11 Bradbrook and MacCallum (n 4).

12 Rosemary Lyster and Adrian Bradbrook, *Energy Law and the Environment* (Cambridge University Press, 2012).

13 See the Select Bibliography that follows this tribute.

the equitable restrictive covenant as possible means of legal innovation. Regulatory reforms have since followed his lead.[14] Perhaps the most important recognition of Adrian's undoubted international reputation and leadership in energy and climate law came when he was appointed Chair of the Working Group on Energy Law and Climate Change for the International Union for Conservation of Nature ('IUCN', formerly the World Conservation Union) and through his work on a number of UN projects relating to energy law.[15] Prior to his retirement, Adrian would also join with his wife Judith, to combine their formidable talents and expertise to consider the human rights implications under international law of access to energy.[16]

To mark Adrian's retirement in 2011, his distinguished contributions to scholarship and teaching were honoured by his colleagues in a *Festschrift* published by the University of Adelaide Press.[17]

III Service

Adrian's relaxed manner belied his manifold talents, and he made major contributions to service at every institution he served, as well as to the wider scholarly community.[18] His first experience of decanal administration came at Melbourne when he served as Deputy Dean from 1978 to 1979 and from 1984 to 1988. During the first of those terms, the Dean of Law at Melbourne, Colin Howard, nominated Adrian as Head of the Australian Law Teachers Association, the first non-decanal holder of that post. And at Adelaide, Adrian served in a range of administrative positions, most notably as the 29th Dean of Law from 1991 to 1995. His deanship was marked both by innovation — taking a more sustained approach to research, and internationalising both the focus and the status of the Adelaide Law School[19] —

14 For a survey of such progress, see generally Adrian J Bradbrook, 'Solar Access Law: 30 Years On' (2010) 27(1) *Environmental and Planning Law Journal* 5.

15 See, e.g.: Adrian J Bradbrook, 'Promotion of National Legislation for Energy Conservation: Advocacy for Market Transparency and Sustainable Development' in Economic and Social Commission for Asia and the Pacific, *Guidebook on Promotion of Sustainable Energy Consumption: Consumer Organizations and Efficient Energy Use in the Residential Sector*, UN Doc ST/ESCAP/2207 (April 2002) 50; Adrian J Bradbrook and Richard L Ottinger (eds), *Energy Law and Sustainable Development* (Paper No 47, IUCN, 2003); Adrian J Bradbrook and Eva Maria Duer, 'Energy, Renewable Energy and Nuclear Energy' in United Nations Environment Programme, *Training Manual on International Environmental Law* (9 February 2006) 341.

16 See, e.g.: Adrian Bradbrook and Judith Gardam, 'Energy and Poverty: A Proposal to Harness International Law to Advance Universal Access to Modern Energy Services' (2010) 57(1) *Netherlands International Law Review* 1.

17 Paul Babie and Paul Leadbeter (eds), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014).

18 Email from Ustinia Dolgopol to P T Babie, 7 July 2024.

19 Email from Horst Lücke to P T Babie, 4 July 2024. Sadly, Horst Lücke passed away on 26 September 2024 and, as such, it was not possible to obtain his permission to use this comment.

and by unfailing kindness, generosity, and straightforwardness.[20] Every subsequent Dean has continued Adrian's approach and expanded his pioneering work.[21]

While most of his working life was spent in the academy, Adrian never lost sight of the practical impact of legal scholarship in the practice of law and in the wider community. While at Dalhousie, Adrian completed articles of clerkship with Stewart, MacKeen & Covert, then Atlantic Canada's largest law firm, and was admitted to practice in Nova Scotia. And in 1992, he was elected a Fellow of The Institute of Arbitrators Australia, serving as a Grade 2 Arbitrator. He took this opportunity to further serve the community by spreading his knowledge of arbitration law through offering suggestions on how best to teach arbitration to non-lawyers;[22] providing a clear overview of the commercial arbitration legislation;[23] and offering suggestions for further reforms.[24] Adrian also served as a member of the Residential Tenancies Tribunal of South Australia — a body his law reform work had helped create — for 20 years from 1991 to 2011.[25]

Adrian's enduring international stature in every field of his expertise is evidenced by his fellowship and membership of various boards of editors and in his visiting

20 Email from Kathleen McEvoy to P T Babie, 4 July 2024.

21 Dolgopol (n 18).

22 See Adrian J Bradbrook, 'Teaching Arbitration to Non-Lawyers' (1999) 17(3) *The Arbitrator* 173.

23 See Adrian J Bradbrook, 'The Commercial Arbitration Legislation' in Vicki Waye (ed), *A Guide to Arbitration Practice in Australia* (Institute of Arbitrators and Mediators Australia, 2nd ed, 2001) 55.

24 See Adrian J Bradbrook, 'Section 27 of the Uniform Commercial Arbitration Acts: A New Proposal for Reform' (1990) 18(4) *Australian Business Law Review* 214, republished as Adrian J Bradbrook, 'Section 27 of the Uniform Commercial Arbitration Acts: A New Proposal for Reform' (1990) 9(3) *The Arbitrator* 107.

25 Adrian served on the Residential Tenancies Tribunal of South Australia from 12 July 1991 until 1 April 2011, except for a sabbatical in 1997: 'DPCA, 90/16/81' in South Australia, *South Australian Government Gazette*, No 81, 4 July 1991, 204; 'PCA 8/1993CS' in South Australia, *South Australian Government Gazette*, No 61, 30 June 1994, 1966; 'MCNA 8/93CS' in South Australia, *South Australian Government Gazette*, No 74, 29 June 1995, 2979; 'OCBA 8/93CS' in South Australia, *South Australian Government Gazette*, No 125, 16 November 1995, 1343; 'OCBA8/93CS' in South Australia, *South Australian Government Gazette*, No 129, 23 November 1995, 1413; 'OCBA 008/93CS' in South Australia, *South Australian Government Gazette*, No 125, 31 October 1996, 1460; 'OCBA 008/93 CS' in South Australia, *South Australian Government Gazette*, No 2, 8 January 1998, 4; 'OCBA 008/93CS' in South Australia, *South Australian Government Gazette*, No 169, 26 November 1998, 1601; 'ATTG 7/99CS' in South Australia, *South Australian Government Gazette*, No 182, 16 November 2000, 3197; 'OCBA 013/02CS' in South Australia, *South Australian Government Gazette*, No 124, 7 November 2002, 4043; 'ATTG 0057/03CS' in South Australia, *South Australian Government Gazette*, No 21, 13 March 2003, 864; 'OCBACS 002/05PT2' in South Australia, *South Australian Government Gazette*, No 9, 16 February 2006, 548.

appointments. He was, for instance, a member of the boards of the *Journal of Energy and Natural Resources Law*, the *Australasian Journal of Natural Resources Law and Policy,* the *Journal of Renewable Energy Law and Policy*, and the *Australian Property Law Journal.* At various times, Adrian held prestigious visiting professorships at the University of Calgary, the University of Poitiers, Paris-Descartes University, the University of Mannheim, and the University of Marburg. He also held visiting research positions at Queens' College, Cambridge, McGill University, the former International Academy of the Environment in Geneva, the University of Colorado, and the University of Hong Kong.

IV Reflections

One could be forgiven for thinking that the pace and quality of Adrian's scholarship and service left little time for personal pursuits. In fact, over the course of his life, he also pursued musical interests at an advanced level. His grandmother, herself a concert pianist, nurtured his interest in the piano, an instrument he continued to play until he was 15. While he might have gone to London and the musical academy, musical pursuits were placed on hold for 30 years until, in his early forties, he took them up again. This time, he concentrated on the flute and then the saxophone, before coming full circle to the piano. His musical interests added to the richness of his presence in the law school setting and in the wider community.[26]

Adrian's contributions to legal scholarship and to the Adelaide Law School were truly colossal. But all of that cannot even begin to capture what Adrian was as a person: kind, generous, and available always to provide wisdom and guidance when it was needed most. Yet all of this was done with a grace, a dignity, and an approach that always made a companion feel at ease.[27] This allowed him to have a profound impact on so many scholars whose careers were launched under his mentoring.[28] As Paul Leadbeter remembers: 'Adrian was a supportive colleague who gave me a number of opportunities to be involved in activities he was involved in'.[29] And many, including one of the authors of this tribute, remember well Adrian's sage scholarly advice: 'Never write a presentation without turning it into an article!' His rationale was that having done all the work to prepare the paper for presentation, one should then go the extra step and publish.[30] Many early career researchers today would do well to heed that advice!

All of which made it very easy to enjoy Adrian's company, so much so that it was easy to forget that when in the presence of Adrian, one was in the presence of true greatness. As Peter Richings, a fellow Old Portmuthian, put it:

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26 McEvoy (n 20).

27 Email from Alexandra Wawryk to P T Babie, 4 July 2024.

28 Ibid.

29 Email from Paul Leadbeter to P T Babie, 2 July 2024.

30 Ibid.

> [Adrian] had been a regular at our relatively frequent lunch meetings of [Portsmouth Grammar old scholars] living in Adelaide … He had an illustrious career … and to our embarrassment we hadn't realised the extent of his qualifications while we still had an opportunity to discuss them. He will be remembered by us for the lively discussion we frequently embarked on and the good natured way he engaged with us setting us correct in all matters of law![31]

For all who knew him,[32] this perhaps best captures who Adrian was: both 'the quintessential academic, deeply devoted to his research and scholarship'[33] with an 'extraordinary academic career'[34] and, perhaps more importantly, as a colleague, mentor, and friend, with so very many accomplishments and interests.[35]

Adrian's loss is so deeply felt by all who knew and worked with him, in so many ways. Still, we are comforted by the knowledge that for a time, which now seems so brief, we had the privilege to bask in the warmth of that light that burned so brightly for so many.

We offer Judith, Fiona, Frances, Georgia, Selena, Nessa, Freyja, Levi, Ella, Bleue, and Phoenix our very deepest sympathy and heartfelt condolences. To them, Adrian was not only a scholar, but a beautiful person and a loving husband, father, and grandfather.[36]

Vale Adrian John Bradbrook.

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31 Peter Richings, 'Club News: Adrian Bradbrook', *PGS Connect* (Blog Post, 7 July 2024) <https://www.connect.pgs.org.uk/news/club-news/235/235-Adrian-Bradbrook>.

32 Email from John Emerson to P T Babie, 4 July 2024; Email from Ian Leader-Elliott to P T Babie, 4 July 2024.

33 Email from Robert Fowler to P T Babie, 4 July 2024.

34 Email from Rosemary Owens to P T Babie, 1 July 2024.

35 Ibid; Leadbeter (n 29).

36 Email from Fran Cartwright to P T Babie, 6 July 2024.

The Late Emeritus Professor Adrian John Bradbrook FAAL
Dr iur (h c) (Mannheim) LLD (Melbourne)
PhD (Cantab) LLM (York) MA (Cantab)

Bonython Professor of Law Emeritus in the University of Adelaide 2011–24
Dean of the Faculty of Law in the University of Adelaide 1991–95
Bonython Professor of Law in the University of Adelaide 1995–2011
John Bray Professor of Law in the University of Adelaide 1991–95
Professor of Law in the University of Adelaide 1988–91
Reader in Law in the University of Melbourne 1980–88
Senior Lecturer in Law in the University of Melbourne 1972–79
Assistant Professor of Law in Dalhousie University 1970–72

Sometime Visiting Professor of Law
in the University of Calgary,
à l'Université de Poitiers,
à l'Université Paris Descartes (Paris V),
an der Universität Mannheim, and
an der Philipps-Universität Marburg

Sometime Researcher in Law
in Queens' College in the University of Cambridge,
in McGill University,
in the University of Colorado,
in the University of Hong Kong, and
in the International Academy of the Environment

Former Barrister and Solicitor of the Supreme Court of Nova Scotia
Former Barrister and Solicitor of the Supreme Court of Victoria

Former Fellow of the Australian Academy of Law
Former Fellow of the Center for Environmental Legal Studies in Pace University
Former Fellow and Member of the Board of Directors of the International Energy Foundation
Former Fellow of the Australian Institute of Energy
Former Member of the International Bar Association's Academic Advisory Group to the Section on Energy, Environment, Resources and Infrastructure
Former Fellow of The Institute of Arbitrators Australia

Former Consultant to the United Nations (UN-DESA, UNEP, UNDP)

Former Chair of the International Union for Conservation of Nature (IUCN)

Former Member of the Board of Editors of
the *Journal of Energy and Natural Resources Law*,
the *Australasian Journal of Natural Resources Law and Policy*,
the *Journal of Renewable Energy Law and Policy*, and
the *Australian Property Law Journal*

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The South Australian Residential Tenancies Tribunal database maintained by the Australasian Legal Information Institute (available at the time of publication at www.austlii.edu.au) contains a number of decisions made by Adrian Bradbrook in his capacity as a member of the Residential Tenancies Tribunal of South Australia, which have not been included in this bibliography.

P T Babie*

FORUM INTRODUCTION: SIMON PALK AND PROPERTY

During a conversation with Simon Palk in 2024, I mentioned to him that I was re-reading those chapters of S F C Milsom's *Historical Foundations of the Common Law*[1] on land law and equity, to which Simon replied: 'Oh yes, what Milsom does with that is genius!' Thinking back on that conversation, I have thought that much of what Simon has said to me about land law and equity over the years is, too, genius — especially his explanation of the Torrens system. Others feel the same way. In late 2023, as part of a Law Foundation of South Australia project titled 'Modernising the *Real Property Act 1886* (SA)', I met with a group of South Australian property law scholars at the Adelaide Law School. As the discussion unfolded around the esoterica of Torrens title, it turned again and again to insights which each of us had gained from Simon about the intricacies of that system of title by registration — South Australia's unique gift to those places which trace their modern common law to received English law.[2] Everyone recounted at least one story of how Simon had not only explained something that we did not know, but also did so in a way that had remained with us for years. The conversation soon turned to the impact that Simon, as a teacher, had had on us, and on his students — his lessons were so clearly explained that we could remember the details years later. In short, there was much in what he had taught us that is, simply, genius.

In my own case, I came to the Adelaide Law School as a Lecturer in 1999 and was appointed to the Property Law teaching team with Adrian Bradbrook, Simon Palk, Rob Fowler, and Janey Greene. And there began a great friendship with each of those fine scholars and teachers. I spent many hours with Simon in that first year discussing property law and the Torrens system. As things transpired, I would ultimately come to be the coordinator of the Property Law subject once the original team left the University. What I learned from Simon, though, came to structure the Property Law course when I first coordinated it, and it continues to do so today.

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1 S F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd ed, 1981).

2 On reception in Australia, see Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2(1) *Adelaide Law Review* 1. In Canada, see J E Cote, 'The Introduction of English Law into Alberta' (1964) 3(2) *Alberta Law Review* 262. In New Zealand, see David V Williams, 'The Pre-History of the English Laws Act 1858: *Mcliver v Macky* (1856)' (2010) 41(3) *Victoria University of Wellington Law Review* 361. See also *A-G (A) v Huggard Assets Ltd* [1951] SCR 427, revd [1953] AC 420 (Privy Council).

As those of us at that workshop in late 2023 continued to reminisce, it became obvious to each of us that we should honour Simon and his property law legacy in a more formal way. From this emerged the idea for this Forum. Enthusiasm for the project was unanimous. Simon's influence, indeed, has been nothing less than genius.

I Simon Palk

Simon Palk was born in November 1948 in Sidmouth, Devon County, England.[3] He was educated at Kelly College, a boarding school on the edge of Dartmoor. Founded in 1877, the school had from the outset a connection to Cambridge University; its first Headmaster, Robert West Taylor, was an erstwhile Fellow of St John's College, Cambridge. And so, having excelled at Kelly, Simon gained a place at Selwyn College, Cambridge. He obtained a double first in 1972, taking the BA (Law) and the LLB. The MA and LLM, respectively, followed by right in 1978.[4]

Simon entered the academy immediately upon his graduation from Cambridge, taking his first lectureship at Leicester University, where he remained for two years, from 1973 until 1974. He taught property law for the first time at Leicester, and that would become the subject for which he was known over the course of his career. He also taught international law, as well as some related property topics. In 1975, he returned, for one year, to his alma mater, taking a fellowship at Fitzwilliam College. While he could have remained at Cambridge, the political and social climate of the time was decidedly gloomy, so Simon began looking for opportunities elsewhere. For someone of his calibre, one soon came; in late 1975, Simon took up a position at the Adelaide Law School, where he would remain for 30 years, until his retirement in 2005.

Simon's greatest influence and lasting legacy came as a teacher. He soon made his mark within the suite of property law subjects at the Adelaide Law School: Property Law, Equity, Intellectual Property, Advanced Property, and Succession in the LLB program, and Land Transactions and Equitable Remedies in the LLM program, as well as a range of allied property subjects. As I have already explained, generations of Adelaide Law School graduates can still remember what they learned in one or more of these subjects. Before I took up my own position at the Adelaide Law School, I met with two Adelaide graduates who were completing the BCL at Oxford, and Simon was one of the members of academic staff about whom they spoke as being of the very highest standard; they recounted in glowing terms what they had learned in his subjects.

But Simon's reputation was built through his scholarship as well. While the corpus of his work was perhaps smaller than others, what he wrote made a profound

3 This short biography is based upon an interview which the author conducted with Simon Palk in Adelaide on 2 December 2024.

4 'The Cambridge MA', *University of Cambridge* (Web Page) <https://www.cambridgestudents.cam.ac.uk/your-course/graduation-and-what-next/cambridge-ma#>.

impact. In the finest tradition of the scholar, Palk's contributions illuminate fine points of law that would otherwise receive little attention, revealing deep insights to the careful reader. Thus, his work on the nature of property,[5] succession,[6] planning law,[7] real property,[8] residential tenancies,[9] and intellectual property[10] continues to provide guidance today. Indeed, it might surprise Simon to know that his work continues to make an impact in one of the ways only dreamed of by most members of the legal academy — in reported decisions. In 2021, Blokland J of the Northern Territory Supreme Court, in *Re Hartung*[11] wrote

> [t]he document marked 'A' which is annexed to Herbert's affidavit is partially formatted in a pseudo-gothic style which is often seen in kits that people use to draft their own wills. Simon Palk observes 'the printed will form has ironically not made life easy for the Do-it-Yourself testator'. The format has not however been the problem here. The title states, 'This is the last Will and Testament of Me', followed by the words, 'Horst Paul Hartung of 14 Larapinta Drive, Alice Springs in the State of [the] Northern Territory.'[12]

Justice Blokland cites 'Informal Wills: From Soldiers to Citizens' — an article written by Simon in 1976.[13] This is a textbook example of the difficulty faced by legal scholars regarding the lag between output and impact in the development of law. That said, the recognition of Simon's work 46 years following its publication demonstrates the prescient quality of his research. I found Simon's 'The Residential Tenancies Act, 1978 (SA) and the Protection of Tenants against Succession to the

5 Simon N L Palk and Rebecca Bailey, '"Property" and Discretionary Trusts Under the Family Law Act, 1975–1976' (1977) 6(1) *Adelaide Law Review* 131.

6 Simon N L Palk, 'Informal Wills: From Soldiers to Citizens' (1976) 5(4) *Adelaide Law Review* 382 ('Informal Wills'); Simon N L Palk, 'Hotchpot — or Hotchpotch' (1981) 7(4) *Adelaide Law Review* 506.

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10 Simon N L Palk, 'Copyright: Basic Structure and Basic Principles' (Adelaide University Continuing Education Law Papers, 10 July 1986).

11 [2021] NTSC 51.

12 Ibid [4].

13 Palk, 'Informal Wills' (n 6).

Original Landlord'[14] to be invaluable in writing a piece I published in 2021 on the overriding legislation exception to indefeasibility,[15] a theme to which I return in my article in this Forum. There is little doubt that Simon's legacy continues, through his teaching and his scholarship. It is that legacy which we honour in this Forum.

II The Forum

The Forum contains seven articles. The first — Paula Zito's 'Understanding Property and Intellectual Property Laws: A Tangible and Intangible Intersection'[16] — explores an ongoing interest of Simon's: intangible property rights and intellectual property. Zito discusses how property and intellectual property law cover two distinct types of property: tangible (physical items like land) and intangible (non-physical assets like goodwill). Despite their differences, these two realms often intersect in interesting ways. For property developers, buyers and sellers, it is crucial to know what can and cannot be done with building plans. This is where copyright law comes into play, influencing property law from various perspectives. For instance, when developing a new building, the copyright implications of the building plans must be considered. Similarly, sellers and buyers need to be aware of these laws to avoid legal pitfalls. By understanding how these laws intersect, navigating the complexities of property development and transactions becomes more effective. Zito's article delivers a concise and practical summary of the legal framework related to building copyright. It offers valuable advice on the tangible and intangible intersection of property and intellectual property laws and what property developers, buyers and sellers should know in order to handle a building designer's plans appropriately.

The other six contributions deal with real property law. In 'Restrictive Covenants and the Real Property Act 1886 (SA): Time for Reform?',[17] Brendan Grigg and Hossein Esmaeili explore how the *Real Property Act 1886* (SA) ('*RPA*') does not recognise the restrictive covenant as an interest in land. This is despite the reality that for approximately the last 100 years lawyers and conveyancers have adopted a practice of attaching restrictive covenants to other registerable instruments that are registered pursuant to what is now s 128B of the *RPA*. The practice has been upheld in a number of decisions of the Supreme Court of South Australia and in one decision of the High Court of Australia.[18] In other Australian jurisdictions (other than

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14 Palk, 'Protection of Tenants' (n 9).

15 Matthew Anibal Fuentes-Jiménez and Paul Babie, 'The Residential Tenancy Agreement as an Exception to the Indefeasibility of Title' (2021) 29(1) *Australian Property Law Journal* 51.

16 See Paula Zito, 'Understanding Property and Intellectual Property Laws: A Tangible and Intangible Intersection' (2025) 46(1) *Adelaide Law Review* 28.

17 See Brendan Grigg and Hossein Esmaeili, 'Restrictive Covenants and the *Real Property Act 1886* (SA): Time for Reform?' (2025) 46(1) *Adelaide Law Review* 40.

18 See: *Blacks Ltd v Rix* [1962] SASR 161; *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227; *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382; *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9; *Deguisa v Lynn* (2020) 268 CLR 638; *Jaggumantri v Registrar-General* [2023] SASC 74; *Re Rayo* [2024] SASC 3.

the Australian Capital Territory), the equivalent conveyancing practice prompted legislative recognition of restrictive covenants, to varying degrees, enabling their registration or notification on the certificate of title to the burdened land. Grigg and Esmaeili's article argues for similar legislative recognition in South Australia to ensure certainty and clarity in the use of restrictive covenants. It examines the common law and equitable origins of the restrictive covenant, considers the ways Australian Torrens title systems deal with restrictive covenants, and concludes with recommendations for the reform of the law in relation to restrictive covenants in South Australia.

Teresa Somes and Eileen O'Brien's 'Housing, Older People and Abuse in Australia'[19] explores private home ownership in the context of an ageing population. Private home ownership brings advantages to the elderly because it provides a source of wealth and ontological security. Increasing home values and the accumulation of assets — however modest — over time has provided many older people with a comfortable 'nest-egg' in later life that serves as a buffer against the vagaries of financial insecurity in older age. However, an unfortunate downside to these outwardly fortunate circumstances is that older people may become vulnerable to various forms of elder abuse, often rooted in the acquisitiveness and expectations of those in a relationship of trust with them. Indeed, in an environment of declining housing affordability and constrained economic circumstances, the home can become a site of competing interests leaving the older person in conflict with family, which can make them vulnerable to abuse. Somes and O'Brien's article explores elder abuse perpetrated by family members who are associated with the older person's ownership of a private dwelling from two perspectives: (1) the home as a setting; and (2) the home as a target for abuse. The article also exposes the disconnect between prevention strategies and the implementation of meaningful legal responses to this issue — a challenge that will only intensify with our ageing population.

In my own piece, 'Judicial Federalism and *Sub Silentio* Amendment of the *Real Property Act 1886* (SA): What It Is and Why It Matters, or, How I Learned to Stop Worrying and Love the *Uniform Torrens Title Act*',[20] I continue my analysis of an issue which Simon considered in his own research: the overriding legislation exception to indefeasibility.[21] Through an examination of ss 6, 10, and 11 — three intriguing provisions found in the *RPA* — I argue that while those provisions represent the Parliament's attempt to entrench Torrens system indefeasibility of title by imposing

19 See Teresa Somes and Eileen O'Brien, 'Housing, Older People and Abuse in Australia' (2025) 46(1) *Adelaide Law Review* 63.

20 See P T Babie, 'Judicial Federalism and *Sub Silentio* Amendment of the *Real Property Act 1886* (SA): What It Is and Why It Matters, or, How I Learned to Stop Worrying and Love the *Uniform Torrens Title Act*' (2025) 46(1) *Adelaide Law Review* 93. The title of the article is adapting the title of the classic political satire 'Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb' (Stanley Kubrick (dir), Columbia Pictures (UK), 1964).

21 Palk, 'Protection of Tenants' (n 9).

'manner and form' requirements on future alterations to the *RPA*, judicial consideration, at least of s 6, means that the attempt has, to a great extent, failed.[22] The important part of the story, though, is the role that courts play in sorting out what these entrenching or 'manner and form' provisions might mean. In working that out, one must also account for the fact that the courts, in interpreting those provisions, are themselves amending the legislation *sub silentio*. Often overlooked, judicial interpretation operates in plain sight. And when it engages in the interpretation or construction of a statute for the purposes of clarifying its operation and application, a court amends, and possibly even repeals, parts of that legislation.

The final three pieces provide a view of Torrens title from other jurisdictions to which it has travelled. In 'Where Torrens Failed',[23] John V Orth outlines how the early days of the Torrens system in the United States looked promising. Its spread through the country was rapid — by the early 20th century, it had been adopted in almost half of America's states. Today, however, Torrens is all but obsolete in America. Orth's article examines what went wrong. For one thing, a workable, if cumbersome, system of title assurance — relying on recorded deeds, warranties of title, and title insurance — already existed. For title holders, the process of petitioning for Torrens registration was unfamiliar, often expensive and protracted, and invited risk from adverse claimants. Pragmatic factors such as market preferences for title insurance, lawyerly skepticism born of unfamiliarity and potential loss of business, and a characteristic American distrust of government all helped to seal its fate. Ultimately, Torrens, for all its advantages, failed to displace established systems of title assurance.

In 'Mr Frazer versus Mr Walker: Who Would Win Now?',[24] Ben France-Hudson takes a fresh look at *Frazer v Walker*.[25] This case may have established the primacy of immediate indefeasibility of title, but it is hard not to feel sorry for Mr Frazer, who because of his wife's 'irregularities' lost ownership of his farm to Mr Walker. The occasionally harsh operation of immediate indefeasibility has sat uneasily with many ever since. Recently, New Zealand has legislated for a judicial discretion to alter the land transfer register in cases of manifest injustice[26] with the desire to provide a route for people in Mr Frazer's position to get their property back, unencumbered. France-Hudson's article considers what might have happened for Mr Frazer had these provisions existed at the time he brought his case. There are considerable ambiguities in the statutory drafting, and it is unclear how the statutory guidelines informing the exercise of the discretion will be applied. It seems very unlikely, however, that the courts would have exercised the discretion to remove the forged mortgage. There is a strong argument that Mr Walker is not within the

22 See, e.g., *South-Eastern Drainage Board (South Australia) v Savings Bank of South Australia* (1939) 62 CLR 603.

23 See John V Orth, 'Where Torrens Failed' (2025) 46(1) *Adelaide Law Review* 112.

24 See Ben France-Hudson, 'Mr Frazer versus Mr Walker: Who Would Win Now?' (2025) 46(1) *Adelaide Law Review* 119.

25 [1967] 1 AC 569.

26 See *Land Transfer Act 2017* (NZ) ss 54–7.

jurisdiction of the court's discretion. Ultimately, the courts appear likely to take a conservative approach that upholds immediate indefeasibility wherever possible. Mr Walker is still likely to win his argument with Mr Frazer. However, this is likely to be very expensive for Mr Walker and our sympathies in relation to the case may become more balanced as a result. Whether this increased uncertainty is worth it remains to be seen, but it will make the policy choices underpinning New Zealand's land transfer system even more explicit.

Finally, in 'Defining Fraud in the Torrens System: A Legislative Approach',[27] Michelle Neumann writes on the statutory definition of fraud found in Canadian Torrens jurisdictions. Fraud regarding real property presents a high risk of serious harm as owner-occupied dwellings are the largest household asset and mortgages comprise the largest component of household debt. Although fraud is one of the main exceptions to indefeasibility of title under the Torrens system, the interpretation of Torrens title fraud remains riddled with uncertainty and disagreement. Neumann's article examines the meaning of Torrens title fraud developed by the courts, highlighting areas of uncertainty in the interpretation of fraud, and analyses how statutory definitions of fraud introduced in Canadian Torrens jurisdictions seek to clarify the meaning of fraud under Canada's Torrens system. Neumann then considers the subsequent adoption of a statutory definition of fraud in New Zealand under the *Land Transfer Act 2017* (NZ), contrasting the approach to defining fraud in New Zealand with the approach adopted in Canadian Torrens jurisdictions.

27 See Michelle Neumann, 'Defining Fraud in the Torrens System: A Legislative Approach' (2025) 46(1) *Adelaide Law Review* 135.

*Paula Zito**

UNDERSTANDING PROPERTY AND INTELLECTUAL PROPERTY LAWS: A TANGIBLE AND INTANGIBLE INTERSECTION

Abstract

Property and intellectual property law cover two distinct types of property: tangible (physical items like land) and intangible (non-physical assets like goodwill). Despite their differences, these two realms often intersect in interesting ways. For property developers, buyers and sellers, it is crucial to know what can and cannot be done with building plans. This is where copyright law comes into play, influencing property law from various perspectives. For instance, when developing a new building, the copyright implications of the building plans must be considered. Similarly, sellers and buyers need to be aware of these laws to avoid legal pitfalls. By understanding how these laws intersect, navigating the complexities of property development and transactions becomes more effective. This article delivers a concise and practical summary of the legal framework related to building copyright. It offers valuable advice on the tangible and intangible intersection of property and intellectual property laws and what property developers, buyers and sellers should know to handle a building designer's plans appropriately.

I Introduction

This article delves into the fascinating intersection of real and intellectual property ('IP'), a topic that Simon Palk is deeply passionate about. As one of Simon's students from the early 1990s, I vividly remember his enthusiasm for exploring these intersections. Simon's dedication to this field is evident in his 1986 writing on copyright law.[1] Therefore, it is truly fitting to write about building copyright in this forum of the *Adelaide Law Review* dedicated to Simon.

In Australia, copyright is an unregistered IP right that protects an expression of an original idea and arises when an original work is created.[2] An 'original work'

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1 Simon N L Palk, 'Copyright: Basic Structure and Basic Principles' (University of Adelaide Law School Continuing Education, 10 July 1986).

2 *Copyright Act 1968* (Cth) s 32 ('*Copyright Act*').

must meet the originality requirement in accordance with the *Copyright Act 1968* (Cth) ('*Copyright Act*').[3] This requires that a creator has used some independent intellectual effort to create a work that is more than a mere copy of a work already in existence.[4] Where a work meets the originality test, and is a literary, dramatic, musical or artistic work, its protection is dealt with under pt III of the *Copyright Act*. Subject matter outside that scope is protected under pt IV of the *Copyright Act*.

Building plans are classified as 'artistic works' under s 10(1) of the *Copyright Act*, as they are drawings. Furthermore, a building that is created from those plans is also an 'artistic work' for the purposes of s 10(1) of the *Copyright Act*. Therefore, copyright can subsist in both the drawings of a building, such as plans, and the building itself.

A copyright owner of drawings and/or a building is afforded exclusive rights under the *Copyright Act* to use, reproduce, and communicate their work to the exclusion of all others.[5] Consequently, building designers have exclusive rights to: (1) reproduce the work in a material form; (2) publish the work; and (3) communicate the work to the public.

Unless otherwise agreed, the building designer owns the copyright in the IP, including the building plans and drawings, and any detailed descriptions.[6] Building plan copyright can exist in various forms, including hand-drawn house plans or software-created works.[7] What is not protected by copyright are ideas, styles, and techniques involved in building constructions.[8]

Furthermore, building designers who are copyright owners also have moral rights that are personal to them.[9] This means that they have the right of attribution, a right against false attribution and the right of integrity.[10] Unlike copyright, moral rights cannot be assigned or licenced and so property developers, buyers and sellers need to be aware of the potential infringement they might be liable for in changing a building designer's drawings, plans and building.[11]

Lack of clarity and understanding about copyright in building plans can be problematic for property developers, buyers and sellers. Without this knowledge, they

3 Ibid.

4 *IceTv Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 474 [33] (French CJ, Crennan and Kiefel JJ) ('*IceTV*').

5 *Copyright Act* (n 2) s 31(1)(b).

6 Ibid s 10(1).

7 *Look Design and Development Pty Ltd v Edge Developments Pty Ltd* [2022] QDC 116, [26] ('*Look Design*').

8 *Donoghue v Allied Newspapers Ltd* [1938] Ch 106, 109 ('*Donoghue*').

9 *Copyright Act* (n 2) pt IX.

10 Ibid.

11 Ibid s 195AN(3).

can face significant challenges. Developers may assume that purchasing land or obtaining planning permission includes the rights to use existing building plans. However, the copyright remains with the original creator, such as a building designer or architect. Using building plans without proper permission from the original creator can lead to legal action for copyright infringement that can result in significant liability and even injunctions that stop or delay development.[12] Addressing these issues early in the development process and obtaining legal advice on building copyright can help to mitigate the risks associated with copyright infringement of building plans. Accordingly, this article provides a clear and practical overview of the legal landscape surrounding building copyright, offering valuable insights into what developers, buyers and sellers can do with a building designer's plans.

II What is Copyright?

A *Requirements*

The basic concept behind copyright is that a creator of an original work, such as a building designer, should have the right to exploit their work through reproduction, publication, and communication to the public without others being allowed to copy their creative output.[13] The grant of these exclusive rights provides an incentive to innovate. In Australia, there are no formal requirements to obtain copyright protection and there is no procedure for registering a copyright interest.[14] Instead, for copyright to subsist in Australia, it is required that the work, such as a building plan, meet the following criteria as set out in the *Copyright Act*. The work must:

- *Be expressed in material form*[15] — copyright does not protect ideas, styles, techniques, or concepts. The ideas must be expressed in a material form to be protected. Therefore, the ideas that generate a building plan are typically expressed in a 2D material form such as a drawing and/or plan by a building designer. The building designer creates an artistic work by putting the ideas, that perhaps their client has come to them with, on paper. Eventually the building plan will lead to a building, another expression of an idea in a material form, except now 3D.
- *Be created by an identifiable author*[16] — there must be an identifiable person who creates the artistic work, and for a building plan this would typically be a building designer or an architect. Such a person might also use computer

12 See generally ibid pt III div 2.

13 Alexander Bates, 'Artistic Works Industrially Applied: A Comparison of Copyright/Designs Law in Australia and New Zealand' (1993) 17(2) *University of Queensland Law Journal* 247, 248.

14 Ibid.

15 *Copyright Act* (n 2) ss 10(1), 22(1).

16 *Donoghue* (n 8); *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 264 ALR 617, 630–1 [37] ('*Telstra Corporation*').

software to create a drawing or plan, but they must use independent intellectual and creative effort in doing so to be identifiable as an author.[17]

- *Fall within the definition of a 'work' or 'other subject matter'* — under s 10(1) of the *Copyright Act*, an 'artistic work' relevant to building can include the following: sketches, building drawings, architectural drawings, computer aided drawings, diagrams, charts and plans, completed buildings and building structures, photographs of buildings, and building models. Furthermore, written materials, such as written submissions to support planning applications are 'literary works', as are marketing communications and articles.[18] However, this article focuses on 'artistic works' for the purposes of evaluating the legal landscape relating to copyright in building plans and drawings.
- *Be 'original'* — this requires that a building plan be created with some 'independent intellectual effort' that is 'not merely copied from another work'.[19] It needs to have a point of distinction satisfying the requirement that someone has put effort into creating something different rather than just copying someone else's work.
- *Be connected in some way to Australia* — this means that the author of the artistic work must be a 'qualified person' for the purposes of the *Copyright Act*; this is defined as an Australian citizen or a person resident in Australia.[20] Where an artistic work is a building, it must be situated in Australia.[21]

Assuming that all these requirements have been met, copyright in building plans will automatically come into existence, without need for registration or notification.[22] This, of course, carries with it certain rights.

B *Rights Copyright Provides*

Pursuant to s 31(1)(b) of the *Copyright Act*, copyright provides the author of an artistic work, the exclusive rights to: (1) reproduce the work in a material form; (2) publish the work; and (3) communicate the work to the public — which means to make available online or electronically transmit a work.[23] Copyright in artistic works exists for the life of the author plus 70 years.[24]

The 'author' is the creator of the work and is the owner of any copyright subsisting in the work.[25] Therefore, as the creator of a building drawing or plan, the building designer automatically owns the copyright that subsists in that piece of work. They

17 *Telstra Corporation* (n 16) 683 [334].

18 *Copyright Act* (n 2) s 10(1).

19 *IceTV* (n 4) 474 [33] (French CJ, Crennan and Kiefel JJ).

20 *Copyright Act* (n 2) s 32(4).

21 Ibid s 32(3).

22 Ibid s 32.

23 Ibid ss 10(1), 22(1).

24 Ibid s 33.

25 Ibid s 35(2).

have the legal right to be acknowledged as the original creator of the work. While clients might provide a building designer ideas about what they want included in their building plans, ideas are not protected by copyright.[26] It is the expression of those ideas in material form, in a drawing and/or plan, in which copyright will subsist and that belongs to the designer of the drawing and the plans.

Accordingly, in creating a plan, or even a building model, a building designer will have the exclusive rights to reproduce, publish and communicate the work. These rights are commercial in nature and enable the building designer to make money from their creative effort. These rights act as an incentive for creators to continue their innovation, which is what IP laws are primarily focused on achieving. Building designers, as copyright owners, can copy and reproduce their drawings and plans. The only way that someone else can use a copy of a building designer's drawings or plans is if the building designer assigns[27] their copyright in the building drawings and plans to someone else or licences[28] the copyright to someone else.

If a building designer assigns copyright to someone else — such as their client for whom they have created the building plan (assignee) — they will lose control over the copyright, unless the assignment document includes an express provision to the contrary and limits the assignment.[29] This means that in the future, the building designer would not be able to prevent the assignee from further assigning or licensing all, or part, of the copyright in the building plans, or from altering the building plans in any way. However, as will be explained later, the way in which the assignee — the new copyright owner — deals with the copyright in the building plan may be constrained by a recognition of the building designer's moral rights as the original creator of the work.

On the other hand, if a building designer licences the copyright to someone else, such as the client for whom they have created the building plan (licensee), in exchange for monetary consideration (licence fee), the building designer still owns the copyright but allows the licensee to use it.[30] A licence can be exclusive or non-exclusive.[31] Pursuant to an exclusive licence, the building designer authorises the licensee to take advantage of the exclusive rights the building designer has in relation to the copyright in the building plans to the exclusion of anyone else — except for the designer.[32] Exclusive licences must be in writing and signed.[33] The significance of an exclusive licence is its irrevocability, except in accordance with the terms of the

26 *Donoghue* (n 8) 109.

27 *Copyright Act* (n 2) s 196(1).

28 Ibid s 196(4).

29 Ibid s 196(2).

30 Ibid s 119.

31 *Primary Health Care Ltd v Commissioner of Taxation* (2010) 186 FCR 301, 338 [151] ('*Primary Health Care*').

32 *Copyright Act* (n 2) s 119.

33 Ibid s 10(1).

written licence and in the case of infringement. A licensee can commence proceedings for infringement pursuant to s 119 of the *Copyright Act*. A licence might also be non-exclusive, which means that a building designer can licence the copyright to more than one licensee. Non-exclusive licences do not need to be in writing and are revocable at will.[34]

III How Can Copyright in Building Plans Be Infringed?

In the absence of an assignment or licence of copyright, anyone who attempts to reproduce, publish, or communicate a building drawing or plan, without the permission of the copyright owner, potentially infringes copyright. If someone were to produce a building drawing or plan that uses a substantial part of a building designer's original work without their permission, that person would be likely to have infringed the building designer's copyright. For example, a client might engage a building designer to create building plans for their proposed home. The client might take those building plans to another builder, without the original building designer's permission. The second builder then builds the house according to the building plans. Copyright would be infringed by both the client and the second builder as the house built would be a reproduction of the original building designer's copyright.

An artistic work, such as a building plan, is taken to have been reproduced if a version of that work is produced in a 2D or 3D form, such as a built home.[35] Whether there has been a 'reproduction' is determined by reviewing if there is an objective similarity between the alleged reproduction and the copyright work, such that one is recognisable as a copy of the other.[36] The *Copyright Act* provides that a 'substantial part' of the copyright work must be reproduced.[37] This is determined not on the *quantity* of the copyright work taken, but on the *quality* of the work taken.[38] Infringement will occur where an important part of the copyright work is reproduced, even if in terms of quantity that part is small.[39] In determining if a part of a work that is reproduced is substantial, an important question is the degree of originality of the particular form of expression taken.[40] While the skill and labour expended by the author may indicate that the part is highly original, this is not determinative.[41] Thus, a part may be regarded as substantial due to its qualitative originality, even though it might be comparatively small in quantitative terms.

34 *Primary Health Care* (n 31) 338 [151].

35 *Copyright Act* (n 2) s 21(3).

36 *Look Design* (n 7) [31].

37 *Copyright Act* (n 2) s 14(1).

38 *IceTV* (n 4) 509 [155] (Gummow, Hayne and Heydon JJ); *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 172 FCR 580, 592–3 [66] ('*Elwood Clothing*').

39 *IceTV* (n 4) 509 [155] (Gummow, Hayne and Heydon JJ).

40 Ibid 480 [52].

41 Ibid.

For an artistic work, such as a building plan, this can be determined on a visual comparison of the copyright work and the alleged reproduction.[42]

It is useful to look at how courts have determined this 'substantial part' test in relation to building plans. In *Look Design and Development Pty Ltd v Edge Developments Pty Ltd*, the District Court of Queensland decided that an infringing building plan drawing must adopt the '*essential features and substance* of the copyright work' which is assessed by looking at the original copyright work *as a whole*.[43] In this case, the second defendants, Mr and Ms Flaton, hired the plaintiff, a project home building company, to create housing plans for them. The plaintiff created what is referred to in the case as the 'Revision B Plan.' Eventually, communication between the parties ceased. The Flatons then engaged the first defendants to create another house plan, which the first defendants used to build the house.[44] The defendants argued several points against the plaintiff's copyright infringement claim, including that the 'Revision B Plan' house plans did not qualify for copyright because they were created using computer software without any creative intellectual effort.[45] However, the District Court of Queensland rejected this argument, finding that the plaintiff had invested considerable time, effort, and skill in developing the plans.[46] Moreover, the Court decided that the second defendants had provided the 'Revision B Plan' to the first defendants with the explicit intention of reproducing them.[47] Consequently, the Court found that a 'substantial part' of the original work had been infringed by the first defendants, both in the new housing plans and the subsequently developed property.[48]

In *D'Annunzio v Willunga Projects Pty Ltd*,[49] decided in the District Court of South Australia, the applicant contracted to buy three vacant lots in Willunga, South Australia, from Graeme Edward Inkley. The applicant planned to create a 35-lot subdivision and hired consultants, including Mr Davidson, to survey the land and draft the plans. These plans included lot sizes, road layout, and stormwater drainage. Mr D'Annunzio claimed he and Mr Davidson jointly authored the plans which the District Court accepted. Mr D'Annunzio could not complete the purchase, and in August 2020, Mr Inkley sold the land to the respondents. Mr D'Annunzio later found out that Willunga Projects had subdivided the land and was selling the lots. He claimed this infringed his copyright on the plans.[50] The Court found that while there were certain generic qualities to the subdivision, there were enough substantial

42 See, e.g., *Elwood Clothing* (n 38) 594 [74], 595 [80].

43 *Look Design* (n 7) [37], quoting *Henley Arch Pty Ltd v Luckey Homes Pty Ltd* [2016] FCA 1217, [163] (Beach J) (emphasis added).

44 *Look Design* (n 7) [3].

45 Ibid [14].

46 Ibid [26].

47 Ibid [40].

48 Ibid [56].

49 [2021] SADC 36.

50 Ibid [4]–[10].

similarities between the 2018 plans by D'Annunzio and Davidson and the Willunga Projects plan to support infringement of copyright.[51]

Lastly, in *Coles v Dormer*,[52] unsuccessful bidders at a house auction decided to build a replica of the house nearby. Concerned about the uniqueness and value of their purchased property, the successful buyer, Coles, obtained the copyright for the building plans from the architect via an assignment. Coles then sought an injunction from the Supreme Court of Queensland, claiming that the replica build by the Respondent infringed their copyright.[53] The Court examined four issues: (1) originality of the building plans; (2) validity of the copyright assignment; (3) infringement of the building plans and the house construction; and (4) appropriate remedies.[54]

The Court held in favour of Coles on the first three issues, noting that the exclusive rights of the owner of an original copyright work include the right to reproduce a 2D work in 3D form.[55] The Court found that the reproduction of the building plans was evident due to identical errors in both the original and infringing versions.[56] However, it deemed demolition of the defendants' home too harsh and instead ordered exterior changes to the value of $60,000 to be made to the defendants' home so that it would no longer be identical to Coles' home.[57] The Court awarded additional damages to Coles for copyright infringement after Coles proved that they had informed the defendants that they were the owner of the copyright in the building plans, and had asked to see the defendants' plans, which the defendants refused to provide.[58]

Together, these cases demonstrate that if an original building plan is reproduced without the copyright owner's consent, copyright infringement is likely. The test will be whether a substantial and qualitative part of the copyright work has been reproduced, which may be assessed on a visual comparison between the copyright work and the alleged reproduction.[59] If there has been a reproduction of a substantial part, then copyright will be infringed.[60]

51 Ibid [37].

52 (2015) 117 IPR 184.

53 Ibid 185–6 [2]–[6].

54 Ibid 187 [16].

55 Ibid 186 [13]–[14].

56 Ibid 198 [75].

57 Ibid 202 [100]; *Coles v Dormer (No 2)* [2017] 1 Qd R 63, 68 [26] ('*Coles v Dormer (No 2)*').

58 *Coles v Dormer (No 2)* (n 57) 67–8 [23]–[24].

59 *Elwood Clothing* (n 38) 595 [80].

60 *Copyright Act* (n 2) pt III div 2.

IV How To Avoid Copyright Infringement

It is imperative that property developers, buyers and sellers obtain a building designer's permission to use their copyright work *before* attempting to use and reproduce building drawings and plans. The best way to avoid an infringement is to obtain an assignment, followed by an exclusive licence or at least a non-exclusive licence. These should be in writing to ensure that permission to use the copyright is express and to avoid confusion and uncertainty about what can be done with the copyright work.

In the absence of explicit consent of the copyright owner, usage of building plans can be a grey area. Where a property developer, buyer or seller wants to use or adapt a building designer's drawings or plans — perhaps by taking it to another builder to build the house for them or adapt the building drawing — they should first obtain the building designer's written permission. They will likely need to pay the building designer a licence fee to do so, and certain restrictions might be placed on the licence by the building designer. In any event, obtaining a licence, or even better, an assignment, is prudent and may allow a property developer to avoid copyright infringement.

Even minor alterations may lead to infringement. This is because the 'substantial part' test is based on the *quality* of the work taken, not the *quantity* of the work taken, as explained above.[61] If a property developer, buyer or seller modifies one or two rooms of a building plan, but keeps the overall plan intact, they might still be liable for copyright infringement. Similarly, if a distinctive or significant element of a plan remains, even if it is small in quantity, it may also infringe copyright, if it is recognisable as a key feature of a plan.

Building designers can protect their work from infringement by ensuring effective clauses are included in their service agreements with clients that protect their copyright and other IP. The clauses should be as clear as possible about the building designer retaining copyright ownership in any building drawings, plans and/or models they create for their clients. The service agreement should also be explicit that, in the absence of a written assignment or licence arrangement, the client will not be able to use the copyright work.

While not required, as registration of copyright does not exist in Australia, it would be sensible for building designers to include the © symbol on their drawings. This might serve as a reminder to property developers, buyers and sellers that the building drawings and plans are subject to copyright.

Furthermore, property developers, buyers and sellers should be persistent in enquiring as to where a building idea has come from. For example, property developers could avoid liability for copyright infringement by probing into where the client has

61 *IceTV* (n 4) 509 [155] (Gummow, Hayne and Heydon JJ); *Elwood Clothing* (n 38) 592–3 [66].

sourced their inspiration, or a sketch they present. This is also important from the point of view of avoiding an infringement of a building designer's moral rights.

V Moral Rights

Unlike copyright, moral rights cannot be assigned or licenced to someone else.[62] Moral rights remain with the author of the artistic works for their life plus 70 years.[63] This is because moral rights are personal to the author of the copyright work. They are owed to individual creators and not to organisations and businesses.

The *Copyright Act* provides for three main categories of moral rights:

1. attribution — the right to be credited as the creator of an original work;[64]
2. against false attribution — the right not to have someone else credited as the creator of the original work;[65] and
3. integrity — the right not to have an original work treated in a derogatory manner that impacts on the creator's honour and reputation.[66]

A *Attribution*

A building designer has the right to be identified as the author of an artistic work where their artistic work is reproduced, published, exhibited or communicated.[67] In those circumstances, their identification as the author of a building drawing, plan or design must be clear and reasonably prominent.[68] An identification will be taken to be reasonably prominent if their name is included on each reproduction of their work so that anyone acquiring the reproduction will have notice of the building designer's identity.[69] In the absence of such identification, this moral right will be infringed.

Correspondingly, if a building designer is hired to design a plan or drawing, then that building designer should be attributed as the creator of the design. However, where the building designer works for a building firm (such as a project home builder company) it is typical for employees to agree to moral rights consents in their employment agreement. As a result, employers are not required to credit those employees as creators of their work for client projects. Typically, individual employee building designers are not attributed as creators of various parts of a

62 *Copyright Act* (n 2) s 195AN(3).

63 Ibid ss 195AM(2), 195AM(3).

64 Ibid s 193.

65 Ibid s 195AC.

66 Ibid s 195AK.

67 Ibid ss 193, 194(2).

68 Ibid s 195AA.

69 Ibid s 195AB.

building project. In such circumstances, it is reasonable not to identify the individual employee as the author.[70] On the other hand, if a firm hires a special contractor building designer to work on a project, then it is likely that the contractor will want to be attributed for the creation of the plan and the firm should allow this to happen to avoid moral rights infringement.

B *Against False Attribution of Authorship*

Pursuant to s 195AC of the *Copyright Act*, the author of an artistic work has a right not to have authorship of the work falsely attributed.[71] The focus is on the attributor inserting or affixing their name or someone else's name on a work so as to falsely imply they are the author of the work in the knowledge that the person falsely attributed is not the author. Therefore, a building designer has the right not to have a person falsely attribute themselves as the author of the building designer's work by, for example, falsely affixing their name to the work or a reproduction of the work.[72]

C *Integrity*

The right of integrity provides the author of copyright work with the right not to have their work subjected to derogatory treatment. Section 195AK of the *Copyright Act* provides:

> (1) ***Derogatory treatment***, in relation to an artistic work, means:
>
> (a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or
>
> (b) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or
>
> (c) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.[73]

Harm caused to an author's honour or reputation does not need to be direct monetary loss, but can include the intangible effects of a person's derogatory treatment of an author's work.[74] This can, in part, be assessed according to the author's subjective experience of the harm.[75]

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70 Ibid s 195AR.

71 Ibid s 195AC.

72 Ibid s 195AE(2).

73 Ibid s 195AK.

74 *Perez v Fernandez* (2012) 260 FLR 1, 17 [96].

75 Ibid 15–16 [87]–[88].

Consider the following scenario. A property developer hires a renowned building designer to create building plans and obtains an assignment of the copyright in the plans from the designer. However, no agreement is made regarding the building designer's moral rights. During construction, the client requests changes and the developer, believing they have the right given the copyright assignment, makes the alterations. The building designer later notices the changes and claims they harm their personal brand and reputation. As the building designer did not consent to the changes, and the developer did not follow the legal notification requirements under s 195AT of the *Copyright Act*,[76] the building designer may claim moral rights infringement.[77] This claim would be made on the basis that the changes distort their work and damage their reputation. The building designer should have been provided written notice by the developer allowing the designer to record or consult on the proposed changes. The developer could face damages or be forced to stop construction, wasting time and resources.

Overall, moral rights ensure that creators of artistic works, such as building designers, are properly attributed for their work and that their creations are not subjected to derogatory treatment that could harm their reputation. The law safeguards these rights by requiring property developers, buyers and sellers to identify, acknowledge and honour building designers' work and creativity. This helps to promote respect for the integrity and authorship of creative works, fostering a culture of recognition and respect for IP. As these rights cannot be assigned or licenced by the copyright owner, vigilance must be taken to ensure that the rights are respected even where there has been an assignment or licence of copyright. Moral rights are important rights personal to the creator and should not be disregarded.

VI Conclusion

The intersection of property and IP law in the realm of building copyright underscores the intricate balance between tangible and intangible assets. Building plans are more than just technical drawings; they are creative expressions deserving of protection and respect. By recognising the dual nature of these works, both as physical structures and intellectual creations, Australian copyright law ensures that building designers can safeguard their innovations while maintaining the integrity of their vision. This legal framework not only protects the rights of building designers as creators but also promotes a culture of innovation and excellence in the built environment. As building designers continue to build and design spaces of the future, it is important that property developers, buyers and sellers understand and respect these legal intersections. To stay clear of copyright infringement, it is essential to grasp the significance of the building copyright landscape.

76 Section 195AT prescribes certain treatment of copyright works that does not constitute an infringement of an author's right to integrity.

77 *Copyright Act* (n 2) s 195AT.

Brendan Grigg and Hossein Esmaeili***

RESTRICTIVE COVENANTS AND THE *REAL PROPERTY ACT 1886* (SA): TIME FOR REFORM?

Abstract

The *Real Property Act 1886* (SA) ('*RPA*') does not recognise the restrictive covenant as an interest in land. This is despite the reality that for approximately the last 100 years lawyers and conveyancers have adopted a practice of attaching restrictive covenants to other registerable instruments that are registered pursuant to what is now s 128B of the *RPA*. The practice has been upheld in a number of decisions of the Supreme Court of South Australia and in one decision of the High Court of Australia. In other Australian jurisdictions (other than the Australian Capital Territory), the equivalent conveyancing practice prompted legislative recognition of restrictive covenants, to varying degrees, enabling their registration or notification on the certificate of title to the burdened land. This article argues for similar legislative recognition in South Australia to ensure certainty and clarity in the use of restrictive covenants. It examines the common law and equitable origins of the restrictive covenant, considers the ways Australian Torrens title systems deal with restrictive covenants, and concludes with recommendations for the reform of the law in relation to restrictive covenants in South Australia.

I Introduction

The law on restrictive covenants has been described as a 'morass of technicalities, inconsistencies and uncertainties'.[1] The position in South Australia would seem to be no exception. Restrictive covenants have their roots in contract law, principles of equity, and today — in most Australian jurisdictions — feature in

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1 Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 283. See also Sharon Christensen and W D Duncan, 'Is It Time for a National Review of the Torrens' System? The Eccentric Position of Private Restrictive Covenants' (2005) 12(2) *Australian Property Law Journal* 104, 120.

Torrens title legislation and case law.[2] Their origins lie in a desire to regulate land use by private means; however, this function can conflict with statutory land use planning schemes.

The *Real Property Act 1886* (SA) ('*RPA*') — South Australia's Torrens title legislation — has never recognised the restrictive covenant as a registrable interest in land.[3] In this regard, the South Australian Torrens title scheme is unlike its equivalents in most Australian jurisdictions.

While the *RPA* does not recognise restrictive covenants, the use in South Australia of a conveyancing practice — which has been endorsed by a number of judicial decisions to create, notify on the Register and thereby attempt to enforce restrictive covenants — suggests that they are an important feature of land transactions and property development in South Australia. This article argues that the law in relation to restrictive covenants in South Australia is unsatisfactory and that reform is needed to reduce the complexity and uncertainty in this area of property law and, in addition, to bring the South Australian Torrens title scheme closer to the Torrens scheme in other Australian jurisdictions.

First, this article considers the common law's treatment of restrictive covenants and then how, with the landmark decision of *Tulk v Moxhay* ('*Moxhay*') in 1848,[4] the courts of equity created the rules for the enforcement of restrictive covenants.

Second, this article considers the particular approach of Australia's Torrens title schemes to restrictive covenants and highlights their key features and considerations. Third, this article will examine a series of six reported decisions from the Supreme Court of South Australia and one further decision of the High Court of Australia concerning the enforceability of a restrictive covenant in South Australia.

Fourth, this article concludes that the law concerning restrictive covenants ought to be reformed in South Australia to allow their recognition, in some form, on the Register. The paper also sets out other related matters that need to be considered in light of this recommendation.

II Background

Unlike most of its Australian counterparts, the *RPA* does not contain any explicit references to restrictive covenants.[5] Nevertheless, in South Australia — at least

2 See generally: Bradbrook and MacCallum (n 1); Hossein Esmaeili, 'Restrictive Covenants and the Torrens System' in Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge University Press, 2016) 237; Christensen and Duncan (n 1).

3 See generally *Real Property Act 1886* (SA) ('*RPA*').

4 (1848) 48 ER 1143 ('*Moxhay*').

5 See, e.g., *RPA* (n 3) s 128B. This section omits any reference to restrictive covenants but provides for the registration of other interests in land such as a rent charge.

by 1928[6] — a conveyancing practice had been developed whereby a restrictive covenant was included in an encumbrance which was registered on the certificate of title land securing what was often merely a nominal rent charge.[7]

This practice is based on what is now s 128B(1) of the *RPA* which provides that

> [i]f land is to be charged with, or made security for, the payment of an annuity, rent-charge or sum of money in favour of a person, an encumbrance in the appropriate form must be executed by the registered proprietor and the person.[8]

It is the registered rent charge in the encumbrance rather than the restrictive covenant itself that creates the interest in the land.[9] This means that the status of the unregistered equitable restrictive covenant does not sit well with the fundamental Torrens principle that registered proprietors are subject only to other interests that are registered or that fall within the scope of an in personam exception to indefeasibility.[10]

These challenges are evident in the seven reported decisions examined in this article. On the one hand, the fact that there are so many decisions concerning the status of restrictive covenants in South Australia is odd given the silence of the Torrens system in South Australia. On the other hand, these cases may instead suggest that the law needs reform.

The most recent of these decisions, *Re Rayo* ('*Rayo*'),[11] follows a line of cases that accept the s 128B conveyancing practice as valid. These cases stem from the decision in *Blacks Ltd v Rix* ('*Blacks*'),[12] where the Supreme Court of South Australia enforced — against a successor in title of an original encumbrancer — certain restrictive covenants contained in a registered encumbrance created in 1928 that established a common building scheme.[13]

The decision in *Blacks* has been criticised by academic commentators,[14] and by other decisions of the South Australian Supreme Court,[15] but it has not been overruled. Indeed, as noted below, the practice was endorsed by the High Court of

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6 *Blacks Ltd v Rix* [1962] SASR 161, 162 (Napier CJ) ('*Blacks*').

7 *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382, 386 (Debelle J) ('*Burke*').

8 *RPA* (n 3) s 128B(1).

9 *Deguisa v Lynn* (2020) 268 CLR 638, 648 ('*Deguisa*').

10 Bradbrook and MacCallum (n 1) 455. See also *RPA* (n 3) ss 67, 69.

11 [2024] SASC 3 ('*Rayo*').

12 *Blacks* (n 6).

13 Ibid 164–5 (Napier CJ).

14 See, e.g., Bradbrook and MacCallum (n 1) 455–7.

15 *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227, 255 (Zelling J) ('*Clem Smith*'); *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9, 18–19 (Perry J) ('*Netherby Properties*').

Australia in 2020 with *Deguisa v Lynn* ('*Deguisa*'),[16] and by the Supreme Court of South Australia in 2023 with *Jaggumantri v Registrar-General* ('*Jaggumantri*'),[17] and then in 2024 with *Rayo*.[18] In order to understand these cases, it is important to recognise the origins of the restrictive covenant and its treatment by the common law and by equity. These issues are considered below.

III Restrictive Covenants and the Common Law

In essence, a covenant is a promise contained in a deed, enforceable even in the absence of consideration.[19] For the purposes of this article, however, the term restrictive covenant can be more loosely understood as 'an obligation affecting a landowner'.[20] This obligation — the restrictive covenant — is a contract between landowners that, when specific criteria have been met, becomes a proprietary interest in the land to which the agreement relates and which can be enforced by subsequent owners of the land, notwithstanding the fact that they were not parties to the original contract.[21]

Emerging in the 14th century,[22] restrictive covenants became particular features of urban development in the reign of George III (1760–1820).[23] At this time, as Adrian Bradbrook and Susan MacCallum explain, it became common in larger English cities for landowners to develop large areas of their land in lots for building estates, often in the 'form of an open square with building lots around it'.[24] Lots were then leased out or the fee simple then sold.[25]

In order to preserve the various attractive features that underpinned the building estate's value, purchasers or lessees were required to enter into certain covenants

16 *Deguisa* (n 9).

17 [2023] SASC 74 ('*Jaggumantri*').

18 *Rayo* (n 11).

19 Bradbrook and MacCallum (n 1) 279. The formalities of deeds are now governed in Australia by statute: *Conveyancing Act 1919* (NSW) s 38 ('*Conveyancing Act*'); *Property Law Act 1958* (Vic) ss 73, 73A, 73B ('*PLA* (Vic)'); *Property Law Act 1974* (Qld) ss 45–7; *Law of Property Act 1936* (SA) ss 41, 41AA; *Property Law Act 1969* (WA) ss 9, 10; *Conveyancing and Law of Property Act 1884* (Tas) s 63 ('*CLPA*'); *Civil Law (Property) Act 2006* (ACT) s 219; *Law of Property Act* (NT) pt 6 div 1.

20 Brendan Edgeworth, *Butt's Land Law* (LawBook, 7th ed, 2017) 598.

21 Brendan Grigg and Hossein Esmaeili, 'Protecting a View in Australia: Common Law Principles, Restrictive Covenants and Planning Law' (2023) 46(1) *University of New South Wales Law Journal* 235, 243.

22 *The Prior's Case* (1368) YB 42 Ed III; Co Litt 384a; Grigg and Esmaeili (n 21) 244.

23 Bradbrook and MacCallum (n 1) 280; Patrick Polden 'Private Estate Planning and the Public Interest' (1986) 49 *Modern Law Review* 195, 195.

24 Bradbrook and MacCallum (n 1) 280.

25 Ibid.

restricting their use of the land.[26] Privity of estate ensured that the covenants of a lease could be enforced against assignees of the original lessee, but when the original covenantor was the owner of a fee simple interest, the position was altogether different.[27]

A *At Common Law: The Burden of a Restrictive Covenant*

Historically, the doctrine of privity of contract meant that a covenant could be enforced between the original covenantor and covenantee.[28] However, when either or both of the original parties to the covenant had transferred the land to successors in title and were no longer the owners of the parcels of land to which the covenant related, privity of contract was absent and privity of estate was lacking,[29] preventing enforcement against successors in title.[30]

At common law a successor to the original covenantor is 'simply not bound'[31] to observe a covenant entered into by the original covenantor.[32] Brendan Edgeworth has described this as an 'immutable rule, to which there are almost no exceptions'.[33] This position evinces a 'firm pro-development policy' as it ensures that purchasers are not fettered by plans developed by predecessors in title, even if they have notice of them and are free to develop their land as they see fit.[34]

B *At Common Law: The Benefit of a Restrictive Covenant*

In contrast to the position with the burden of a restrictive covenant, the common law allows the benefit of covenants to run with the benefitted land if two conditions are met: (1) the covenant must touch and concern the land;[35] and (2) there must be an intention that the benefit should run with the benefitted land.[36] This concept is also described as an annexation to the land.[37]

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26 Ibid.

27 *Beswick v Beswick* [1968] AC 58 ('*Beswick*'). See also Bradbrook and MacCallum (n 1) 280.

28 *Beswick* (n 27).

29 Ibid.

30 Bradbrook and MacCallum (n 1) 280.

31 Edgeworth (n 20) 599. See *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750, 781–4 ('*Austerberry*').

32 *Austerberry* (n 31) 781–4.

33 Ibid; Edgeworth (n 20) 599.

34 Edgeworth (n 20) 600.

35 *Rogers v Hosegood* [1900] 2 Ch 388, 395 ('*Rogers*').

36 *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, 506, 511 ('*Smith and Snipes*').

37 *Rogers* (n 35) 395.

The term 'touch and concern the land' refers to the requirement that the covenant benefit the land rather than be merely a personal benefit to the covenantee.[38] In *Rogers v Hosegood*,[39] the rule was stated as follows:

> the covenant must either affect the land as regards [its] mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.[40]

The intention requirement is satisfied if it can be shown that when creating the covenant, the covenantee and covenantor intended that the benefit of the covenant should run with the covenantee's land such that it could be enforced by the covenantee's successors in title.[41]

Where these conditions are met the covenantee's successors in title may enforce the covenant against the original covenantor, but not successors in title to the original covenantor.[42] As Edgeworth suggests, this position is not inconsistent with a policy that ensures land is unfettered, because it is only the original covenantor who is bound personally by the promise they have made.[43]

IV Restrictive Covenants and Equity

The 'immutable rule' that the common law would not permit the burden of a covenant to bind successors in title to the original covenantor had the potential to frustrate private land use planning arrangements by compromising the integrity and value of developments planned out in reliance on these controls.[44] One such development was the subject of the decision in *Moxhay*.[45] This decision led to the development of the equitable rules which mean that where certain conditions are met, the burden of a restrictive covenant can bind a covenantor's successors in title.

A *In Equity: The Burden of a Restrictive Covenant*

Moxhay concerned one of the parcels of land owned by Mr Tulk which had been sold to another on terms that included a covenant which meant the purchaser would

38 Ibid.

39 Ibid.

40 Ibid.

41 *Smith and Snipes* (n 36) 506, 511.

42 *Austerberry* (n 31) 781–4.

43 Edgeworth (n 20) 600.

44 Ibid 599.

45 *Moxhay* (n 4).

> keep and maintain the said piece of ground and square garden … in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order.[46]

That land was then sold a number of times before being acquired by Mr Moxhay who, aware of the restriction, nevertheless proposed to build on the land. At common law, Mr Moxhay was not bound by the covenant. However, the Court of Chancery granted an injunction restraining Mr Moxhay from building on the land. Lord Chancellor Cottenham stated:

> If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.[47]

Subsequent authorities have narrowed the application of the doctrine to negative covenants only,[48] perhaps reflecting a view that allowing positive covenants to run would have inhibited adaptable land use in the context of rapid 19th century urbanisation.[49]

In addition to the application only to negative covenants, equity requires that: (1) the covenant must be intended to benefit the land of the covenantee rather than the covenantee personally;[50] and (2) it have been intended to run with the benefitted land rather than intended to be personal to the original covenantor alone.[51]

B *In Equity: The Benefit of a Restrictive Covenant*

In equity, the benefit of a restrictive covenant may run with the benefitted land. This is so that a covenantee's successors in title may enforce the covenant against a covenantor and the covenantor's successors in title. This is because, as discussed above, equity allows the burden of a covenant to run with the land.[52] However, as Edgeworth explains, equity requires that the covenantee must not have disposed of the benefitted land before the covenant was created,[53] and that the person seeking

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46 Ibid 1143.

47 Ibid 1144.

48 See generally: *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *Marquess of Zetland v Driver* [1939] Ch 1; *Hall v Ewin* (1887) 37 Ch D 74; *Pirie v Registrar-General* (1962) 109 CLR 619; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258; *Westpoint Corporation Pty Ltd v Registrar of Titles* [2004] WASC 189.

49 Edgeworth (n 20) 617.

50 *London County Council v Allen* [1914] 3 KB 642, 654–5, 660, 672; *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, 121–2; *Clem Smith* (n 15) 234–5.

51 *Re Contract between Fawcett and Holmes* (1889) 42 Ch D 150, 155; *Re Royal Victoria Pavillion, Ramsgate* [1961] Ch 581.

52 *Rogers* (n 35).

53 Edgeworth (n 20) 623.

to enforce the covenant must retain title to some part of the benefitted land.[54] The benefit must also either have been annexed to the covenantee's land or, if not annexed, the benefit needs to have been assigned in accordance with the rules for the assignment of a chose in action;[55] or there must be a building scheme in place.[56] The annexation requirements are similar to those required at law: (1) the covenant must touch and concern the covenantee's land;[57] and (2) the instrument creating the covenant must show an intention that the benefit is to run with the land.[58]

The building scheme requirements, which recognised a 'community of interest' that 'imports in equity the reciprocity of obligation which each purchaser contemplates when he [sic] purchases', were also developed by the courts of equity with the leading decision in *Elliston v Reacher*.[59] This meant that covenants were mutually enforceable regardless of the time a lot within the scheme was acquired.[60]

V Restrictive Covenants and the Torrens Title System

Whether it was because the South Australian parliament enacted the first Torrens title legislation only ten years after the decision in *Moxhay*, or whether it was because one of the foundational principles of the Torrens title system is indefeasibility for registered interests,[61] the early Torrens title statutes enacted in Australia omitted references to restrictive covenants. Notwithstanding this omission, the conveyancing practice of noting restrictive covenants in registered encumbrances developed in a range of Australian jurisdictions, including South Australia.[62]

This practice was eventually recognised by amendments to Torrens title legislation in New South Wales,[63] Western Australia,[64] Victoria,[65] and Tasmania.[66] These amendments enabled either the recording or the notification of a restrictive covenant on the Register. Notwithstanding their diversity in approach,[67] these schemes share common features. These features include: (1) the way the restrictive covenant

54 Edgeworth (n 20) 623. See also *Marquess of Zetland v Driver* [1939] Ch 1, 8.

55 Edgeworth (n 20) 625.

56 Bradbrook and MacCallum (n 1) 316.

57 *Rogers* (n 35).

58 *J Sainsbury Plc v Enfield LBC* [1989] 1 WLR 590, 595–7.

59 [1908] 2 Ch 374, 375 (Parker J).

60 *Re Louis and the Conveyancing Act* [1971] 1 NSWLR 164, 178 (Jacobs JA).

61 Edgeworth (n 20) 639. See also Grigg and Esmaeili (n 21) 246.

62 Grigg and Esmaeili (n 21) 246–7.

63 *Conveyancing Act* (n 19) s 88(3).

64 *Transfer of Land Act 1893* (WA) s 129A(1) ('*TLA* (WA)').

65 *Transfer of Land Act 1958* (Vic) s 88 ('*TLA* (Vic)').

66 *Land Titles Act 1980* (Tas) s 102 ('*LTA* (Tas)').

67 Grigg and Esmaeili (n 21) 248–50.

interacts with the Register and with general legal and equitable principles; and (2) the powers to remove or vary the restrictive covenant, whether it be in light of the obsolescence of the restrictive covenant or in light of conflicts between the restrictive covenant and the provisions of statutory planning schemes.

In New South Wales, s 88(3)(a) of the *Conveyancing Act 1919* (NSW) ('*Conveyancing Act*') provides that the Registrar-General has, and has always had, the power to record in the folio of the Register for the burdened land a restrictive covenant that fits within the limits of s 88(1).[68] Section 88(3)(c) provides that a restrictive covenant so recorded becomes an indefeasible interest for the purpose of s 42 of the *Real Property Act 1900* (NSW).[69] However, should the restrictive covenant fail to comply with the requirements of s 88(1) which, among other things, requires the instrument to clearly indicate the benefitted[70] and burdened[71] land, then the covenant does not bind a subsequent purchaser.[72]

In Victoria, s 88 of the *Transfer of Land Act 1958* (Vic) allows the notification of a restrictive covenant on the Register,[73] but s 88(3) provides that the recording of any such restrictive covenant does not give it any greater operation than it has under the instrument or Act that created it.[74]

This position in Western Australia is similar to the position in Victoria and New South Wales. Section 129A(1) of the *Transfer of Land Act 1893* (WA) states that a restrictive covenant 'may be created and made binding in respect of land under this Act so far as the law permits by instruments in an approved form'. Instruments containing covenants may be registered without entering a memorandum of the covenants on the certificate of title of the benefitted land.[75] Instead covenants are noted on the burdened land.[76] Bradbrook and MacCallum have noted that these provisions do not clearly explain the effect of such a notation and suggest that the limitation contained in the words 'so far as the law permits' means that equitable principles governing the running of the benefit and burden of restrictive covenants remain applicable.[77]

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68 See *Conveyancing Act* (n 19) ss 88(1)–(3).

69 See *Real Property Act 1900* (NSW) s 42 ('*RPA* (NSW)').

70 *Conveyancing Act* (n 19) s 88(1)(a).

71 Ibid s 88(1)(b).

72 *Re Martyn* (1965) 65 SR (NSW) 387, 394–6 (Walsh J).

73 *TLA* (Vic) (n 65) s 88.

74 Ibid s 88(3). See also *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [178]–[179] (Gillard J).

75 *TLA* (Vic) (n 65) s 129A(3).

76 Ibid s 129A(4).

77 Bradbrook and MacCallum (n 1) 466.

The scheme in Tasmania is 'more specific'.[78] Section 102 of the *Land Titles Act 1980* (Tas) ('*LTA* (Tas)') provides that the burden of a restrictive covenant does not run with freehold registered land unless the requirements set out in s 102(2) are met.[79] These include that notice of the covenant is recorded on the folio of the Register constituting title to the land intended to be burdened, and that the land intended to be benefitted by the covenant is identified in the instrument containing the covenant.[80]

Section 102(3) of the *LTA* (Tas) provides that a covenant which meets the requirements of s 102(2) 'may be enforced in equity',[81] notwithstanding any provision of the aforementioned *LTA* (Tas) but

> has no greater operation or effect … than it would have if the land which it is intended to burden were not registered land and the registered proprietor of the land were affected in equity by express notice of the covenant.[82]

A restrictive covenant that satisfies s 102 is therefore notified and can be enforced in equity, but it is not necessarily an indefeasible interest.[83]

In Queensland only public authorities can register a restrictive covenant.[84] In the Australian Capital Territory the Torrens title legislation is — like that in South Australia — silent about restrictive covenants. The different approaches to restrictive covenants in Australian jurisdictions suggest that they are not as clearly established as other interests in land, such as easements. Nevertheless, their recognition means that restrictive covenants are more established in other states compared to South Australia.

In contrast to the above, the scheme in the Northern Territory creates the greatest level of certainty in that it enables the registration of a 'covenant or a covenant in gross' over both the land to be benefitted and the land to be burdened.[85] Where all requirements of the *Land Title Act 2000* (NT) have been met, a registered covenant becomes a legal interest in relation to both the benefitted and the burdened land.[86]

The restrictive covenant developed as a private land use mechanism at a time when extensive legislated land use planning schemes did not exist.[87] Neither did the

78 Grigg and Esmaeili (n 21) 250.

79 See *LTA* (Tas) (n 66) s 102(2).

80 Ibid ss 102(2)(a)(iii)–(iv).

81 Ibid s 102(3).

82 Ibid.

83 Grigg and Esmaeili (n 21) 250.

84 *Land Title Act 1994* (Qld) s 97A(2).

85 *Land Title Act 2000* (NT) ss 184–5 ('*LTA* (NT)').

86 Ibid. See also Christensen and Duncan (n 1) 122.

87 Grigg and Esmaeili (n 21) 256; Bradbrook and MacCallum (n 1) 290.

potential for conflict between the two types of land use controls.[88] Today, however, in the jurisdictions where restrictive covenants can be registered, noted or recorded, the relevant legislation ensures that 'public planning instruments prevail over private planning instruments'.[89] Edgeworth has described this as a 'public law brake'.[90] For example, s 3.16(2) of the *Environmental Planning and Assessment Act 1979* (NSW) empowers planning authorities to override covenants through planning policies or via the imposition of a consent granted under that legislation.[91] The clear purpose of such a provision is to prevent the sterilisation of land due to outdated limitations imposed by restrictive covenants.[92]

These provisions are in addition to other provisions that enable restrictive covenants to be extinguished for reasons relating to general obsolescence due, for example, to the passage of time and general changes in the circumstances in the area to which the covenants relate. These provisions too are directed at preventing sterilisation of land.[93] In New South Wales, s 89(1) of the *Conveyancing Act* provides a power in the Supreme Court to order the modification or removal of a restrictive covenant where, for example, there has been: (1) a change in the user of the benefitted land; (2) a change in the character of the neighbourhood; or (3) other circumstances that mean that the restrictive covenant is obsolete or would impede reasonable use of the land without providing a practical benefit to the person entitled to it.[94] Equivalent legislative provisions in Victoria[95] and Western Australia[96] involve similar considerations. In Tasmania, the power to make an order modifying or extinguishing a restrictive covenant is vested in the Recorder of Titles, however, the exercise of the power involves similar considerations.[97]

The position in the Northern Territory on the extinguishment of restrictive covenants differs. Legislation in the Northern Territory empowers a person interested in land to apply to the Court to modify or extinguish a restrictive covenant where, for example, the restrictive covenant has become obsolete,[98] or where the continued

88 Grigg and Esmaeili (n 21) 256.

89 Ibid. See also Clifford Ireland, 'Environmental Planning in the Public Interest and Private Property Rights: The Role of s 28 of the Environmental Planning and Assessment Act 1979 (NSW)' (2010) 15(3) *Local Government Law Journal* 155, 156.

90 Edgeworth (n 20) 656.

91 See, e.g., *Planning and Environment Act 1987* (Vic) ss 6(2)(g), 60(2).

92 Grigg and Esmaeili (n 21) 256. See, e.g., *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning and Wagga Wagga City Council* (1996) 90 LGERA 341, 354 (Pearlman J).

93 Grigg and Esmaeili (n 21) 251.

94 *Conveyancing Act* (n 19) s 89(1).

95 *TLA* (Vic) (n 65) s 88. See also *Land Legislation Amendment Act 2009* (Vic) s 44.

96 *TLA* (WA) (n 64) s 129C.

97 See: *CLPA* (n 19) ss 84A, 84C(1)(a)–(e); *LTA* (Tas) (n 66) s 4.

98 *Law of Property Act 2000* (NT) s 177(2)(a) ('*LPA* (NT)').

existence of the covenants may impede reasonable use of the land.[99] Significantly, reflecting the security and certainty conferred on the registered restrictive covenant, Northern Territory legislation also provides that a covenant may be extinguished either in accordance with the terms of the 'instrument or plan of subdivision creating the covenant',[100] or upon the expiry of '20 years after the date the covenant was registered'.[101]

The time period of 20 years establishes a limit, beyond which the restrictive covenant is considered to be obsolete, and this statutory time limit provides a level of certainty for landowners of both the benefitted and burdened land for that time period.

Before considering how South Australia might adopt similar positions, the next section examines how a series of judicial decisions have dealt with restrictive covenants in South Australia.

VI Restrictive Covenants in South Australia

Despite the legislative developments in almost all Australian jurisdictions, the South Australian Parliament has not seen fit to alter the scope of South Australia's Torrens title legislation to recognise restrictive covenants.[102] It appears to be content to rely on a practice that is almost a century old:[103] incorporating restrictive covenants in encumbrances registered pursuant to ss 128 and 128B of the *RPA*. The following sections discuss seven judicial decisions from 1962 to 2024 concerning the enforcement of restrictive covenants that have been included in such encumbrances.

A Blacks *and* Clem Smith

The validity of using ss 128 and 128B of the *RPA* as an encumbrance device was considered first in the 1962 decision of *Blacks*.[104] Blacks Ltd had subdivided land and required the purchaser of each allotment to accept a registered encumbrance charging the land with a perpetual nominal annual rent charge and a number of restrictive covenants.[105] The Supreme Court of South Australia held that this arrangement created a building scheme and that the covenants contained in the registered rent charge were enforceable against the original covenantor's successors in title. Chief Justice Napier held that they had acquired their titles

99 Ibid s 177(2)(b).

100 Ibid s 174(1)(a).

101 Ibid s 174(1)(b).

102 *Deguisa* (n 9) 646–7.

103 The encumbrance considered in *Blacks* (n 6) was created in 1928. See also *Burke* (n 7).

104 *Blacks* (n 6).

105 Ibid.

> well knowing that the land had been bought on the faith of restrictive covenants, as covenants running with the land and enuring for the benefit of all purchasers under the building scheme.[106]

Bradbrook and MacCallum have cogently argued that Napier CJ's reasoning runs counter to the 'well-established principle that registered proprietors should be subject only to interests which are registered',[107] or which otherwise constitute an in personam exception to indefeasibility.[108] This was reinforced in the Supreme Court of South Australia's 1978 decision in *Clem Smith*,[109] which concerned a registered encumbrance of land in Mallala which had a nominal rent charge and included covenants prohibiting the use of the land as a motor racing circuit. Ultimately, the Court held that the restrictive covenants were not enforceable because it was not possible to discern the land that the restrictions were intended to benefit.[110] While this decision questioned the Court's prior reasoning in *Blacks*, the decision did not overrule it.

B Burke

Almost thirty years later, the enforceability of a restrictive covenant included in a registered encumbrance was the subject of the decision in *Burke v Yurilla SA Pty Ltd* ('*Burke*').[111] It is a leading authority on the judicial acceptance of the use of the registerable rent charge device to create and enforce a restrictive covenant in South Australia.

In this case, Debelle J noted the criticisms of *Blacks* but declined to overrule it, citing the longevity and established nature of the ss 128 and 128B conveyancing practice and the reliance upon it by people in arranging their affairs as key considerations for endorsing the practice.[112] Justice Debelle indicated a clear concern to avoid jeopardising those arrangements and adversely impacting land values that depended, in part, on their validity.[113]

Justice Debelle concluded that notwithstanding the criticisms of the approach in *Blacks* and the lack of an express provision concerning restrictive covenants in the *RPA*, there was 'nothing' in the operation of the legislation which rendered the covenants contained in the encumbrance unenforceable against the plaintiff.[114] The decision is, therefore, authority for the principle that

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106 Ibid 165 (Napier CJ).

107 Bradbrook and MacCallum (n 1) 455.

108 Ibid.

109 *Clem Smith* (n 15) 254–5 (Zelling J). See also at 241–2 (Bracy CJ).

110 Ibid 239–40.

111 *Burke* (n 7).

112 Ibid 394–5 (Debelle J).

113 Ibid 395.

114 Ibid 396.

> a person who deals with the registered proprietor is deemed to have notice of and will be bound by a restrictive covenant which runs with the land which is contained in a registered encumbrance noted on the original Certificate of Title.[115]

C Netherby Properties

The fundamental inconsistency between notice of a restrictive covenant contained in a registered encumbrance, as the basis for its enforcement, and the Torrens principle that a registered proprietor is not bound by unregistered interests of which they have notice[116] was a theme that emerged again in the single judge decision of Perry J in *Netherby Properties Pty Ltd v Tower Trust Ltd* ('*Netherby Properties*').[117]

This case concerned land that was part of a subdivision at Netherby. At the time of sale, the purchasers of the allotments each entered into an encumbrance in favour of the developer company.[118] That encumbrance was registered on the certificate of title to each allotment and contained a rent charge and a number of restrictive covenants that purported to prohibit a range of things including further subdivision of, and the construction of more than one house on, the allotment.[119] These covenants created a building scheme.[120] The plaintiff later bought an allotment and obtained permission from the local council to subdivide it. The plaintiff commenced proceedings seeking a declaration that the covenants were unenforceable.

Justice Perry noted that the performance of the restrictive covenants was not linked to the enforceability of the rent charge and, in addition, that the consideration for the covenants was the transfer of the land itself.[121] He considered, consistently with principles set out in *Burke,* that the encumbrance and rent charge were validly registered,[122] but that the covenants themselves were not stood alone, and were unrelated to the rent charge.[123]

Contrary to the reasoning expressed in *Burke*, Perry J considered that the inclusion of the restrictive covenants amounted merely to knowledge of them and that this was not enough to 'impair the title' the plaintiff obtained upon becoming the registered proprietor.[124] Nevertheless, Perry J was bound by the Full Court decision in *Burke*.[125] In any event, although he accepted that unregistered covenants could

115 Ibid 389.

116 Bradbrook and MacCallum (n 1) 457.

117 *Netherby Properties* (n 15).

118 Ibid 10 (Perry J).

119 Ibid 11.

120 Ibid 14.

121 Ibid 20.

122 Ibid.

123 Ibid.

124 Ibid.

125 *Burke* (n 7) 396.

be binding, Perry J held that the specific covenants in question were not enforceable because the land that was intended to benefit from them was 'not ascertainable from the covenants themselves, or readily ascertainable from the Register'.[126]

D Deguisa

It was not until the 2020 decision in *Deguisa* that the High Court of Australia considered the status of restrictive covenants in South Australia.[127] It is the most authoritative statement on the acceptability of the ss 128 and 128B device, confirming the position set out in *Burke* on the relevance of notice, and the need to identify the benefitted land. *Deguisa* concerned the enforcement of restrictive covenants in relation to land subdivided in Fulham during the 1960s. The purchasers of all (except two) subdivided allotments entered into an identical encumbrance in favour of the developers encumbering the land with the payment of an annual nominal rent charge. Each encumbrance was registered on the title to each allotment.[128] The encumbrance included restrictive covenants prohibiting the construction of anything other than a single residential dwelling and, specifically, prohibiting flats, home units or multiple dwellings.[129] The developer's conveyancer had added an annotation that the encumbrance formed part of a common building scheme, but there was no indication on the Register which allotments benefitted from the covenants.[130] The appellants were not party to the original covenants but eventually purchased one of the encumbered allotments. They obtained planning permission to subdivide their allotment and to build two townhouses, contrary to the covenant.[131] The executors of the estate of one of the developers commenced action to enforce the restrictive covenants.

The High Court held that the restrictive covenants were not enforceable. This was because the conveyancer's annotation referring to a purported common building scheme did not identify: (1) a registerable dealing; or (2) a subsisting registered encumbrance that would have enabled a search of the Register to identify the allotments that were intended to benefit from the restrictive covenant.[132]

In this regard, the outcome was similar to that in *Netherby Properties*. Unlike that decision, however, the High Court endorsed and accepted the conveyancing practice and use of s 128 of the *RPA*. The High Court noted that the rent charge in the encumbrance creates an interest in land, but a restrictive covenant 'of itself does not'[133] and that the practice

126 *Netherby Properties* (n 15) 26.

127 *Deguisa* (n 9).

128 Ibid 645–6.

129 Ibid 650–1 [30].

130 Ibid 651–2 [31]–[35].

131 Ibid 645.

132 Ibid 666–7 [84]–[85].

133 Ibid 648 [14].

> facilitates the registration of an instrument which gives notice on the certificate of title of the burden of the restrictive covenant and of the other lots in the scheme which benefit from it.[134]

The issue in this case was not whether the use of the encumbrance device to give notice of a restrictive covenant was consistent with the Torrens title scheme, but what constituted notice in the sense contemplated by s 69 of the *RPA*, which relevantly states:

> The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible …

The Court stated that specifically in the context of a building scheme

> [a] common building scheme can operate consistently with the scheme of the Act in relation to the enforceability of the benefit of a restrictive covenant only if those rights are notified on the certificate of title of the burdened land, or by express reference in a memorial on the certificate of title to other registered instruments which contain that information. Anything less is inconsistent with the natural and ordinary meaning of the text of s 69 and the purpose of the Act.[135]

Here, the land that was to be benefitted by the restrictive covenants could not be ascertained. Accordingly, the Court held that the covenants were not enforceable against the appellants.[136]

Following *Deguisa*, a further two decisions of the Supreme Court of South Australia concerned the enforceability of restrictive covenants. These are considered below.

E Jaggumantri *and* Rayo

In *Jaggumantri*[137] and *Rayo*[138] the Supreme Court of South Australia held that the restrictive covenants concerned were unenforceable because it was not possible to identify the land that was benefitted in the manner required. Both decisions illustrate the effect on a restrictive covenant of obsolescence arising where the original covenantee and developer is: (1) a corporate entity no longer in existence; or (2) no longer involved in the building scheme.[139]

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134 Ibid 647–8 [14].

135 Ibid 668 [88].

136 Ibid.

137 *Jaggumantri* (n 17).

138 *Rayo* (n 11).

139 *Corporations Act 2001* (Cth) s 601AD ('*Corporations Act*'). Section 601AD(2) states that the assets of a corporation are vested in the Australian Securities and Investments Commission ('ASIC') upon deregistration. See also *Jaggumantri* (n 17) [58]–[60].

Jaggumantri concerned one of 61 allotments created in 2005 as part of a land subdivision undertaken by a company called Mirago Pty Ltd ('Mirago').[140] The land was initially transferred to the Defence Housing Authority which agreed to an encumbrance in favour of Mirago that included a rent charge to pay 10 cents (if demanded) to the encumbrancee on 30 June each year for 3,999 years and various restrictive covenants including a prohibition on subdivision and limiting the number of dwellings to no more than one.[141]

It also required the encumbrancer not to transfer the land without first causing the transferee to agree, in another covenant in favour of the encumbrancee, to observe the encumbrance.[142] The Defence Housing Authority did not comply with that requirement when it transferred the property to Ms Jaggumantri in 2008.[143] Mirago applied for a voluntary deregistration and was deregistered in late 2014,[144] meaning that its property was vested in the Australian Securities and Investments Commission ('ASIC').[145] Subsequently Ms Jaggumantri commenced proceedings seeking to have the encumbrance discharged, joining ASIC.[146]

The Court considered that *Deguisa* was directly applicable to determining whether the restrictive covenants were enforceable against Ms Jaggumantri.[147] It might have been possible to infer there was a common building scheme in place given the plans and likely existence of identical encumbrances on all allotments in the subdivision. However, the Court indicated that there was nothing express in any of the registered instruments that enabled the identification of land that was to be benefitted. Accordingly, the restrictive covenant was unenforceable against her.

In *Rayo*, the Supreme Court considered the enforceability of an encumbrance that was registered in 1976 on several titles of land, including that which the applicants acquired in 2009,[148] and sought to have removed, by order of the Court.[149] The original parties to the encumbrance were the then-registered proprietor of the land and a now-deregistered company involved in the development of the Marion shopping centre in Adelaide's southern suburbs.[150] The encumbrance included a nominal rent charge and covenants that prohibited the use of the land for retailing

140 *Jaggumantri* (n 17) [3]–[4].

141 Ibid [8]–[9].

142 Ibid [11].

143 Ibid [16].

144 Ibid [17].

145 *Corporations Act* (n 139) s 601AD(2); *Jaggumantri* (n 17) [58]–[60].

146 *Jaggumantri* (n 17) [22].

147 Ibid [74].

148 *Rayo* (n 11) [8].

149 Ibid [1].

150 Ibid [2], [5], [33].

of goods until 1 April 1983.[151] The Court presumed that the agreement came about because of the development of the shopping centre and that, in order to protect its interest, the encumbrancee sought to prevent adjacent land from being used in competition with it for 15 years.[152]

The Court held that, while the rent charge was registered and enforceable, the covenants themselves, like those considered in *Netherby Properties*,[153] were unrelated to the registered rent charge: they were not linked with its enforceability and the consideration for the covenants was the transfer of the land.[154] In addition, the registered documents also did not permit the identification of the land intended to benefit from the covenants.[155] Therefore, it was unenforceable.

The matter was complicated by the fact that the restrictive covenant had expired almost 40 years before the matter was brought to court. Yet, it remained on the title, potentially in perpetuity,[156] as part of a validly registered encumbrance. Accordingly, the question to be resolved was 'whether the existence of a rent charge, which is undoubtedly registerable and has no end date, prevents the encumbrance from being removed, notwithstanding the expiry and unenforceability of the restrictive covenant'.[157]

The Court construed the terms of the restrictive covenant objectively,[158] having regard to surrounding circumstances and considering the purpose of the agreement: to prevent land near a newly developed shopping centre from being used in competition with it for a period of 15 years. It contained no mechanism for its renewal or extension. The purpose of the agreement was thus spent.[159]

The Court did not question the validity of the ss 128 and 128B conveyancing practice but openly stated that the rent charge was 'never more than a device to permit the registration of the document containing the primary purpose of the agreement'.[160] That purpose was, namely, the imposition of the restrictions on land use.[161] As that purpose had been 'spent',[162] the Court characterised the encumbrance as 'simply a

151 Ibid [4].

152 Ibid [4], [33].

153 *Netherby Properties* (n 15).

154 Ibid 20.

155 *Rayo* (n 11) [26].

156 Ibid [28].

157 Ibid [29].

158 Ibid [32]–[33].

159 Ibid [35].

160 Ibid.

161 Ibid.

162 Ibid.

barnacle on the register book',[163] and indicated that it 'should assist the parties to clean up the register'.[164] It made a declaration that the encumbrance was not binding on the applicants.[165]

The decisions considered above show that judicial acceptance of the use of the ss 128 and 128B encumbrance device is not the same thing as a comprehensive scheme that enables restrictive covenants to be created with certainty and meeting the requirements for identifying the benefitted and burdened land. Nor does it provide a mechanism for the proper consideration of factors that are pertinent for the modification or removal of restrictive covenants. The next Part examines what such a scheme may involve.

VII Justifications and Options for Reform in South Australia

As examined above, restrictive covenants were originally developed by landowners as contractual instruments to protect certain aspects of amenity and the built environment that were essential to the commercial and other values inherent in the way they chose to develop and build on their land. Their later enforcement in equity enabled these contractual interests to 'leap the fence'[166] and become property interests. This took place before both the creation of the Torrens title system in 19th century colonial Australia and the enactment of the comprehensive planning legislation and schemes that have governed land use planning since the early 20th century, largely in the public interest.

The tensions that exist between the flexibility of equitable principles, the security-oriented nature of registered title in the Torrens title system and complex statutory land use planning regimes seem difficult to reconcile, notwithstanding the legislative interventions in the Australian jurisdictions considered above. The South Australian cases analysed above suggest that the inability to notify, record or register a restrictive covenant on the Register has not made the position any clearer in South Australia. To the contrary, this may mean that, like the restrictive covenants in *Netherby Properties*, *Deguisa*, *Jaggumantri* and *Rayo*, many covenants are unenforceable because of an inability to identify the benefitted land.

Ultimately, the desire to protect the various qualities that underpin the commercial value of land developments — whether part of a building scheme or not — through private contractual arrangements, is likely to persist. The *RPA* ought to be amended to recognise, in some capacity, restrictive covenants in South Australia. This could take the form of registration, notification or recording on the Register. Overall, a number of factors lead to this conclusion.

163 Ibid.

164 Ibid.

165 Ibid [38].

166 Brendan Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32(2) *Monash University Law Review* 387, 395.

First, as is evident from the analysis above, all other Australian jurisdictions except the Australian Capital Territory have recognised the utility of a restrictive covenant by allowing them to be registered, notified or recorded in some way on the Register. There is no reason to suggest that restrictive covenants are not also useful in South Australia. Indeed, the South Australian case law considered earlier in this paper confirms their usefulness to developers. Moreover, the considerations that led Debelle J to refrain from overturning the judicial acceptance of the ss 128 and 128B encumbrance device in *Burke* apply with even stronger force today. Justice Debelle noted that the *RPA* had been amended 22 times since the decision in *Blacks*.[167] While this 'create[d] no presumption that Parliament has sanctioned or approved the practice',[168] his Honour considered that 'the fact that Parliament has not legislated to prohibit the practice is a relevant factor for the Court to take into account when considering whether it should interfere with a practice which is now longstanding'.[169]

Since the decision in *Burke*, the *RPA* has been amended more than 30 times.[170] None of these amendments have resulted in any prohibition of the practice. The significant amendments to the *RPA* in 2016 reconfigured the former s 128 but did not alter its content.

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167 *Burke* (n 7) 394.

168 Ibid 394–5.

169 Ibid 395.

170 *Real Property (Survey Act) Amendment Act 1992* (SA); *Real Property (Transfer of Allotments) Amendment Act 1992* (SA); *Statutes Amendment (Attorney-General's Portfolio) Act 1992* (SA); *Statutes Repeal and Amendment (Development) Act 1993* (SA); *Real Property (Miscellaneous) Amendment Act 1994* (SA); *Real Property (Variation and Extinguishment of Easements) Amendment Act 1994* (SA); *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA); *Real Property (Witnessing and Land Grants) Amendment Act 1995* (SA); *Statutes Amendment (Community Titles) Act 1996* (SA); *Electricity Corporations (Restructuring and Disposal) Act 1999* (SA); *Local Government (Implementation) Act 1999* (SA); *Forest Property Act 2000* (SA); *Statutes Amendment and Repeal (Attorney-General's Portfolio) Act 2000* (SA); *Real Property (Fees) Amendment Act 2001* (SA); *Statutes Amendment (Attorney-General's Portfolio) Act 2002* (SA); *Statute Law Revision Act 2003* (SA); *Justices of the Peace Act 2005* (SA); *Statutes Amendment (New Rules of Civil Procedure) Act 2006* (SA); *Statutes Amendment (Real Property) Act 2008* (SA); *Statutes Amendment (Public Sector Consequential Amendments) Act 2009* (SA); *Water Industry Act 2012* (SA); *Real Property (Access to Information) Amendment Act 2012* (SA); *Aboriginal Lands Trust Act 2013* (SA); *Real Property (Priority Notices and Other Measures) Amendment Act 2015* (SA); *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA); *Statutes Amendment (Budget 2016) Act 2016* (SA); *Statutes Amendment (Planning, Development and Infrastructure) Act 2017* (SA); *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA); *Statutes Amendment and Repeal (Budget Measures) Act 2018* (SA); *Statutes Amendment and Repeal (Simplify) Act 2019* (SA); *Statutes Amendment (Legalisation of Same Sex Marriage Consequential Amendments) Act 2019* (SA); *Statutes Amendment (COVID-19 Permanent Measures) Act 2021* (SA); *Statutes Amendment (Attorney-General's Portfolio and Other Justice Measures) Act 2023* (SA); *Residential Tenancies (Miscellaneous) Amendment Act 2023* (SA).

Second, any judicial concerns such as those expressed by Perry J in *Netherby Properties* about the decision in *Blacks* — a decision of a single judge of the Supreme Court of South Australia — have not been taken up in subsequent decisions, including by the High Court in *Deguisa*. Neither the Full Court of the Supreme Court[171] nor the High Court of Australia[172] have overruled the acceptance of the practice.

Third, the decisions in *Netherby Properties*, *Deguisa*, *Jaggumantri*, and *Rayo* show that many registered encumbrances may now be unenforceable because they fail to meet the necessary legal and equitable requirements; most notably, the requirement to identify the land benefitted by a restrictive covenant. This is despite the fact that the registered encumbrance device has been accepted as valid, without any legislative provisions guiding the drafting of restrictive covenants incorporated in them.

VIII Options for Reform

A *Registered, Notified or Recorded?*

Australian Torrens statutes have each adopted different approaches to restrictive covenants.[173] The Northern Territory scheme affords the most certainty of all the Australian schemes with its registerable,[174] legal and indefeasible[175] restrictive covenant, albeit for a limited timeframe of 20 years.[176] The New South Wales and Victorian schemes are less certain, as they reserve a role for general legal and equitable principles[177] in determining whether a restrictive covenant runs with the land. The position in Tasmania is similar to New South Wales and Victoria albeit more specific,[178] as the legislation specifically provides that the burden of a restrictive covenant will not run with the land unless notice of the covenant is recorded on the title and that the land intended to be benefitted by the covenant is identified in the instrument containing the covenant.[179] Where this requirement is met, the covenant may be enforced in equity.[180]

Reforms for South Australia ought to aim for clarity and certainty. In this regard, the Northern Territory scheme is the most clear and certain. As described above, the statutory maximum of 20 years duration for restrictive covenants reflects a desire to ensure that land is not sterilised from development. Any proposal for South Australia

171 *Burke* (n 7).

172 *Deguisa* (n 9).

173 Grigg and Esmaeili (n 21) 243, 247.

174 *LTA* (NT) (n 85) s 106.

175 Ibid ss 184–5, 188(1)–(2).

176 Ibid s 174(1).

177 *Conveyancing Act* (n 19) s 88(3)(b); *TLA* (Vic) (n 65) s 88(3). See also Grigg and Esmaeili (n 21) 249–50; Bradbrook and MacCallum (n 1) 466.

178 Grigg and Esmaeili (n 21) 250.

179 *LTA* (Tas) (n 66) s 102(2)(a)(iii)–(iv).

180 Ibid s 102(3).

must ensure that, at the very least, the scheme involves the notification of the restrictive covenant on the title to the burdened land and an effective mechanism for the identification of the benefitted land. In this regard, the Tasmanian scheme may be instructive. Similarly, any future oriented reform ought to consider the impact on restrictive covenants that have already been included in registered encumbrances under s 128B of the *RPA*.

B *Modification and Removal*

Regardless of the way in which a restrictive covenant is notified on the Register, any reform must include a mechanism for modification or removal from the Register that clearly addresses questions such as the obsolescence of a restrictive covenant or changes in land use of the land to which it relates. In this respect, s 89(1) of the *Conveyancing Act* could be instructive. It provides for a power to modify or extinguish a restrictive covenant where: (1) there has been a change in the user of the benefitted land such that the burden is no longer justified; (2) there has been a change in the character of the area generally; or (3) for other reasons the restriction has become obsolete or no longer provides practical benefit. The schemes in other jurisdictions contain similar powers.[181] In South Australia such a power could be vested in the Supreme Court or in the Registrar-General, like that which exists for easements.[182]

In the Northern Territory, a restrictive covenant may be extinguished in three ways. Section 177(1) of the *Law of Property Act 2000* (NT) enables a court to modify or extinguish a restrictive covenant upon application by a person who has an interest in the land. The power is similar to s 89(1) of the *Conveyancing Act* noted above. The Northern Territory scheme also allows the owner of the burdened land to apply for removal after five years of ownership of the burdened land.[183] The scheme also provides that a covenant may be extinguished either in accordance with its terms or subdivision plan, or upon expiry of 20 years from its registration.[184] This specific timeframe perhaps balances the security afforded by the legal, indefeasible nature of the restrictive covenant and the potential for the sterilisation of land.

C *Public Land Use Planning Law to Prevail*

A 'public law brake'[185] is also required to ensure that authorities exercising powers under the *Planning Development and Infrastructure Act 2016* (SA) can, in the public interest, override restrictive covenants through the development assessment process through conditions imposed on any development authorisation.[186] In addition, it

181 *PLA* (Vic) (n 19) s 84; *TLA* (WA) (n 64) s 129C; *CLPA* (n 19) s 84C.

182 *RPA* (n 3) s 90B.

183 *LTA* (NT) (n 85) s 112(7).

184 *LPA* (NT) (n 98) s 174(1).

185 Edgeworth (n 20) 656.

186 *Planning Development and Infrastructure Act 2016* (SA) s 3(1) (definition of 'development authorisation').

would be appropriate to allow for the *Planning and Design Code* — the principal planning policy instrument for South Australia[187] — to also override restrictive covenants in the event of inconsistency.

IX Conclusion

Except for those in South Australia and the Australian Capital Territory, all Australian Parliaments have recognised, in different ways, the usefulness of the restrictive covenant as a form of private land use and planning control and have provided for their recognition and, to varying degrees, their protection.

Such reforms have not taken place in South Australia — the birthplace of the Torrens title system — despite the fact that landowners and developers have found restrictive covenants to be useful in protecting amenity values that, in turn, underpin commercial land values and land developments. The conveyancing practice based on s 128B of the *RPA* challenges the principle that under the Torrens system, registered proprietors are subject only to registered interests unless an exception to indefeasibility applies. Nevertheless, a consistent line of decisions, including the 2020 High Court decision in *Deguisa*, has accepted this practice as valid. However, as this paper demonstrates, this is not the same thing as a comprehensive legislated scheme for the creation, registration, modification and removal of restrictive covenants. These matters are all dealt with in the Torrens title legislation of jurisdictions that have schemes for restrictive covenants.

This paper has argued that South Australian law ought to be amended to recognise the restrictive covenant by, at the very least, permitting the notification or recording of a restrictive covenant on the Register. This is a position that is similar to the schemes that operate in New South Wales, Victoria, Tasmania and Western Australia. It is not the same as in the Northern Territory, where the Torrens title legislation permits the registration of restrictive covenants, confers the status of legal and indefeasible interests upon them and provides for their enforceability for a period of 20 years. The Northern Territory scheme is a clearer, more secure and simpler option which could be considered. However, the South Australian Parliament ought to examine whether a time limit is appropriate and, if so, what length would ensure an appropriate balance between security and concerns about sterilisation of land.

Any such reform will also need to carefully consider the position of restrictive covenants that are part of currently registered encumbrances. In addition, whatever policy choice is adopted for the recognition of a restrictive covenant, the scheme must also include provisions for the modification and removal of restrictive covenants in the case of changes in land use, obsolescence or when there is a conflict between the restrictive covenant and public land use planning policies and schemes. The examination of the way these issues are dealt with in other Australian jurisdictions set out in this paper ought to guide these considerations.

187 See ibid pt 5, div 2.

Teresa Somes and Eileen O'Brien***

HOUSING, OLDER PEOPLE AND ABUSE IN AUSTRALIA

Abstract

Private home ownership brings advantages to older people because it provides a source of wealth and ontological security. Increasing home values and the accumulation of assets — however modest — over time has provided many older people with a comfortable 'nest-egg' in later life that serves as a buffer against the vagaries of financial insecurity in older age. However, an unfortunate downside to these outwardly fortunate circumstances is that older people may become vulnerable to various forms of elder abuse, often rooted in the acquisitiveness and expectations of those in a relationship of trust with them. Indeed, in an environment of declining housing affordability and constrained economic circumstances, the home can become a site of competing interests leaving the older person in conflict with family, which can make them vulnerable to abuse. This article will explore elder abuse perpetrated by family members who are associated with the older person's ownership of a private dwelling from two perspectives: (1) the home as a setting; and (2) the home as a target for abuse. The article also exposes the disconnect between prevention strategies and the implementation of meaningful legal responses to this issue — a challenge that will only intensify with our ageing population.

I Introduction

For many older Australians, private home ownership has been both an aspiration and an achievable goal.[1] The Australian Bureau of Statistics Survey of Income and Housing revealed a strong trend toward home ownership among older Australians with almost 82% of individuals aged 70 to 74 owning their homes.[2]

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1 Note that 'older person' refers to a person who is aged 65 or older in this article. This is the definition adopted by Lixia Qu et al, *National Elder Abuse Prevalence Study* (Final Report, Australian Institute of Family Studies, 22 July 2021) xiii.

2 Australian Bureau of Statistics, *Housing Occupancy and Costs, 2019–20* (Catalogue No 4130.0, 25 May 2022). See also 'Home Ownership and Housing Tenure', *Australian Institute of Health and Welfare* (Web Page, 12 July 2024) <https://www.aihw.gov.au/reports/australias-welfare/home-ownership-and-housing-tenure>.

The benefits of home ownership are wide-ranging.[3] As an asset, a house can offer financial security whereby accumulated wealth can be utilised to service changing needs throughout retirement. Most older people prefer to reside in their own homes for as long as possible, with their home 'inextricably linked to personal identity, social status and [the] sense of having control over one's life'.[4] Homes provide security of housing, tenure, and associated health and social benefits. This security is well documented, with numerous studies concluding that older people in their own homes have the highest levels of ontological security compared to those in longer term rentals or permanent public housing.[5] Similarly, as older people place more value on the security and constancy of their home, circumstances that threaten a person's security of tenure will adversely impact their wellbeing.[6] Moreover, art 11 of the *International Covenant on Economic, Social and Cultural Rights*[7] provides for the right to an adequate standard of living, including adequate housing. 'Housing' has been interpreted as encompassing not only shelter, but 'the right to live somewhere in security, peace, and dignity'.[8] Home as a 'place' offers security, permanence and continuity while maintaining connection with family and

3 This is not to ignore that there are also risks associated with home ownership in later life. They include costs of maintenance, mortgage stress exacerbated by diminishing income and risks of foreclosure in uncertain economic times: Alexander Hermann, Christopher Herbert and Jennifer Molinsky, *The Association Between High Mortgage Debt and Financial Well-Being in Old Age: Implications for the Financial Education Field* (Report, February 2020), cited in Christopher Herbert and Jennifer H Molinsky, 'Home Ownership Amongst Older Adults: A Source of Stability — or Stress?' (2020) 44(2) *Generations Journal* 1, 5.

4 Sue Adams, 'No Place Like Home? Housing Inequality in Later Life' in Paul Cann and Malcolm Dean (eds), *Unequal Ageing: The Untold Story of Exclusion in Old Age* (Policy Press, 2009) 77.

5 See, e.g., Rosemary Hiscock et al, 'Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18(1–2) Housing, Theory and Society 50. See also: Eileen Webb, 'Housing an Ageing Australia: The Ideal of Security of Tenure and the Undermining Effect of Elder Abuse' [2018] (18) *Macquarie Law Journal* 57; Philippa Howden-Chapman, Louise Signal and Julian Crane, 'Housing and Health in Older People: Ageing in Place' (1999) 13(13) *Social Policy Journal of New Zealand* 14; World Health Organisation, *Health Principles for Housing* (1989); Mortimer Lawton and Jacob Cohen, 'The Generality of Housing Impact on the Well-Being of Older People' (1974) 29(2) *Journal of Gerontology* 194.

6 Sheelah Connolly, 'Housing Tenure and Older People' (2012) 22(4) *Reviews in Clinical Gerontology* 286, 288.

7 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11. See also the emphasis on living environments in: World Health Organisation, *United Nations Decade of Healthy Ageing: Plan of Action 2021–2030* (Report, 14 December 2020); Norah Keating, 'A Research Framework for the United Nations Decade of Healthy Ageing (2021–2030)' (2022) 19(3) *European Journal of Ageing* 775.

8 Committee on Economic, Social and Cultural Rights, *General Comment No 4 (1991): The Right to Adequate Housing (Article 11(1) of the Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 6th sess, UN Doc E/1992/23 (13 December 1991).

community.[9] These factors are just as, if not more, important to an older person as a place reflecting one's ideas and values, or as an indicator of social status.[10]

While the advantages of home ownership are well documented, regrettably, an older person's home can also become a source of exploitation and motivation for people to commit elder abuse, particularly financial and psychological abuse. We illustrate this dilemma through an examination of the home both as a *setting for* and *target of* abuse.

The taxonomy we have used is not absolute as the categories tend to overlap. However, the classification is useful in examining the scope of abuse connected to the home. The first considers examples of when the 'setting' of the home provides the opportunity for exploitation or elder abuse. This 'situational' abuse includes abuse exacerbated by the confinement and isolation of individuals brought about during the COVID-19 pandemic. Of course, abuse arising in this context is not confined to privately owned dwellings (for instance, rental accommodation). However, we examine the potential for abuse in the home environment, in contrast to an institutional setting. Another instance where the setting of the home provides the opportunity for abuse is when invitees — family members or friends who have been welcomed to stay temporarily — subsequently refuse to leave. In some circumstances, they may claim an entitlement at law to continue to reside in the dwelling. Obduracy demonstrated by a refusal to leave and the disregard of the home owner's exercise of choice could also indicate a propensity to engage in other forms of elder abuse, be it physical, verbal, financial or psychological.

The second avenue we explore are those forms of financial abuse that target the 'house' as a financial asset. 'Inheritance impatience' is a term describing when adult children, who experience fiscal or mortgage stress, consider tapping into their anticipated inheritance as a solution to their problems. A submission to the Victorian Royal Commission into Family Violence recognised inheritance impatience in the following terms:

> Financial elder abuse may begin with the best intentions — with a child acting as their mother's financial power of attorney thereby managing her finances. This can quickly progress to a sense of entitlement, particularly when adult children have mortgages or debts … The children may justify their actions by saying: 'Mum doesn't need money now, and it's going to be mine anyway'.[11]

As a valuable asset, the family home is a prime target for such abuse. While parents are often willing to assist adult children financially, a sense of entitlement to a parent's property, or opportunistic exploitation can result in transactions being

9 Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Bloomsbury Publishing, 2007) 4.

10 Janine Wiles et al, 'The Meaning of "Aging in Place" to Older People' (2012) 52(3) *Gerontologist* 357, 360–2.

11 *Royal Commission into Family Violence* (Final Report, March 2016) vol 5, 71.

undertaken as consequence of pressure, undue influence or unconscionable conduct (or indeed fraud). Once a transaction is complete, unless the older person has the resilience to commence proceedings to recover the property, this behaviour is likely to be both financially and psychologically devastating. Under this conceptualisation, we also consider the rise in disputes involving family accommodation agreements. Although transfers of property pursuant to these agreements are not (necessarily) of themselves examples of elder financial abuse, these arrangements can be undertaken pursuant to undue influence. Even when the older person willingly consents to transfer property, the denial of restitution of any property or equivalent compensation if the arrangement fails can fall within the accepted definition of elder financial abuse. The pitfalls associated with these arrangements can, if they fail, leave the ageing parent at best in a precarious legal position, or at worst, homeless.[12]

The loss of one's home through financial abuse or a threat to the security provided by one's home, can have devastating consequences. One study focussing on the impact of the loss of one's home in later life stated that the

> [h]ome has become so integral to life itself and such an intimate part of the older adult's being that when older adults lose their home, they also lose the place closest to their heart, the place where they are at home and can maintain their identity, integrity and way of living.[13]

Yet, despite the critical importance of these considerations and the serious financial and emotional consequences for older individuals, the law often remains ill-equipped to address these challenges. Numerous inquiries — including the Australian Law Reform Commission's extensive examination of legal shortcomings in responding to elder abuse[14] — have led to arguably piecemeal solutions, even following the introduction of the *National Plan to Respond to the Abuse of Older Australians*

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12 Caitlin Fitzsimmons, 'Elderly People at Risk of Homelessness When "Granny Flat" Agreements Fail', *Sydney Morning Herald* (online, 23 February 2020) <https://www.smh.com.au/money/super-and-retirement/elderly-people-at-risk-of-homelessness-when-granny-flat-agreements-fail-20200221-p5439t.html>; Eileen Webb and Teresa Somes, 'Housing Stress and Homelessness Among Older Women: An Australian Perspective' (Paper presented at Law and Society Association, 2019); Teresa Somes, 'Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Arrangements' (2019) 12(1) *Elder Law Review* 1 ('Identifying Vulnerability'); Teresa Somes and Eileen Webb, 'What Role for Caveats in Protecting an Older Persons Interests Under a Failed Family Accommodation Arrangement?' (2021) 29(3) *Australian Property Law Journal* 352 ('Caveats'); Patricia Lane, 'Reform in Elder Law — Granny Flats' (2018) 92(6) *Australian Law Journal* 413, 413.

13 Catharina Gillsjö, Donna Schwartz-Barcott and Iréne von Post, 'Home: The Place the Older Adult Cannot Imagine Living Without' [2011] (11) *BMC Geriatrics* 1, 1.

14 Australian Law Reform Commission, *Elder Abuse — A National Legal Response* (Final Report No 131, May 2017).

(*'First National Plan'*).[15] There are ongoing consultations for the second.[16] The recent evaluation of the *First National Plan* has found that various Commonwealth, state and territory governments have engaged in actions such as

> funding service provision, including awareness-raising campaigns, education and training, advocacy, legal assistance, legislative and policy reforms, aged care reforms, including quality and safeguarding frameworks, and establishing investigative agencies.[17]

However, a closer examination of these government actions reveals that the focus has been in the areas of education and prevention, while minimal legal responses have been introduced to address the abuse once it has occurred.

Furthermore, upon review of Focus Area 2 (enhance legal frameworks and adult safeguarding responses) in the consultation draft of the *National Plan to End the Abuse and Mistreatment of Older People 2024–2034* (*'Second National Plan'*),[18] a critical gap emerges in the proposed approach to elder abuse. While the draft outlines several priority actions, with the exception of priority 2.4 (strengthening safeguarding frameworks) and partially 2.3 (considering Disability Royal Commission recommendations),[19] the proposed measures centre predominantly on education and prevention strategies. This approach, while valuable, neglects circumstances where abuse has already led to serious consequences for the older person — for example, interference with or loss of the home. Like the results in the *First National Plan*, the *Second National Plan* also arguably lacks investigation of robust mechanisms for legal intervention and access to justice in active cases of elder abuse.

As discussed elsewhere in this article, even the proposed safeguarding systems, though welcome additions, may prove only marginally effective when confronting matters that require direct legal intervention. This creates a significant gap in the protection framework, leaving victims of ongoing abuse with insufficient pathways to justice.[20]

Put simply, this gap in legal protection remains largely unaddressed despite ongoing policy development efforts. Indeed, in its submission to the *Second National Plan*,

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15 Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Report, 8 July 2019) (*'First National Plan'*).

16 Attorney-General's Department, *National Plan to End the Abuse and Mistreatment of Older People 2024–2034* (Public Consultation Draft, 12 December 2024) (*'Second National Plan'*).

17 Australian Institute of Family Studies, *Findings from the Evaluation of the National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Research Snapshot, July 2024) 2 (emphasis added).

18 *Second National Plan* (n 16) 49.

19 See *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023) vol 8.

20 Ben Livings, Eileen Webb and Haemish Middleton, *Achieving the Right(s) Balance: Towards Effective Adult Safeguarding in South Australia* (Report, 2021).

the Law Council of Australia suggested an increase in access to support for victims of abuse including: (1) increases in legal support and government compensation; and (2) a move to simplify access to compensation and counselling for victims of crime.[21] Action plans could address the impact and consequences of abuse and mistreatment of older people.[22] It was also noted that the draft *Second National Plan* should also consider providing more accessible legal remedies to assist in the removal of adult children who are persons causing financial, psychological and/or physical harm, from their older parents' family home, when they have no legal right to remain there.[23]

II Elder Abuse

'Elder abuse' is an umbrella term that encompasses a broad range of behaviours, including psychological, physical, sexual, financial, and chemical abuse, as well as neglect.[24] There is no single agreed definition of 'elder abuse', and the varied conceptualisations are informed by the different frameworks and contexts through which the phenomena is being analysed.[25] A prevalence study conducted by the Australian Institute of Family Studies defined elder abuse as

> a single or repeated act or failure to act, including threats, that results in harm or distress to an older person. These occur where there is an expectation of trust and/or where there is a power imbalance between the party responsible and the older person.[26]

The recent public dialogue and media attention given to elder abuse has brought the issue to the forefront of our social conscience, and it is regarded by the Australian public as a significant problem demanding urgent solutions.[27] While experts

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21 Law Council of Australia, Submission to the Attorney-General's Department (Cth), *National Plan to End the Abuse and Mistreatment of Older People 2024–2034* (26 March 2025) 12 [33].

22 Ibid [34]

23 Ibid [33].

24 Melanie Joosten, Freda Vrantsidis and Briony Dow, *Understanding Elder Abuse: A Scoping Study* (Report, June 2017) 6.

25 Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies, November 2018) 1–3; Briony Dow and Melanie Joosten, 'Understanding Elder Abuse: A Social Rights Perspective' (2012) 24(6) *International Psychogeriatrics* 853; Somes, 'Identifying Vulnerability' (n 12) 1–19.

26 Qu et al (n 1) 17.

27 See, e.g.: Eileen O'Brien, Catriona Stevens and Loretta Baldassar, 'About 1 in 6 Older Australians Experiences Elder Abuse. Here Are the Reasons They Don't Get Help', *The Conversation* (online, 10 November 2023) <https://theconversation.com/about-1-in-6-older-australians-experiences-elder-abuse-here-are-the-reasons-they-dont-get-help-216827>; Briohny Kennedy and Joseph Ibrahim, 'Safe at Home? We Need a New Strategy to Protect Older Adults From Violent Crime', *The Conversation*

from disciplines such as gerontology, social work and medicine have for many years recognised the phenomenon of elder abuse, 'abuse' is not a legal concept. Indeed, relative to other disciplines, the analysis of elder abuse from a legal perspective is in a nascent stage. So, when we categorise behaviour that reaches the doctrinal requirements of liability (for example, undue influence or unconscionable conduct) as elder abuse, we interpret legal doctrines through the lens of a different conceptual framework. In many ways, this perspective highlights the shortcoming of the law when applied to elder abuse scenarios. To illustrate this, the burden of proving a transaction has been unduly influenced requires the older claimant to prove the transaction was an exercise of their free will,[28] and 'so substantial, or so improvident, as not to be reasonably accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary persons act'.[29] In the context of family relationships it is often difficult — except in the most egregious factual circumstances — to prove whether the motivation for a transaction is natural love and affection, generosity, obligation, affection, familial responsibility or guilt, emotional blackmail, pressure, or fear. The burden of proving the elements of the cause of action, along with the legal processes necessary to challenge a transaction and the potential to cause upset within the family unit, deter many older people from undertaking legal action. Consequently, while we recognise certain behaviours as falling within the definition of 'elder abuse', addressing such behaviour through legal avenues for many is simply unrealistic or impossible. Under these conditions, when the transactions involve their home, the older person is at risk of losing their most valuable asset and/or their place of ontological security.

Characterising these transactions as a form of elder abuse does have advantages. 'Abuse' locates the phenomenon within the wider field of familial abuse — for instance, domestic abuse and child abuse — with theories developed in these fields assisting in identifying the appropriate scope of elder abuse for legal analysis.[30] Furthermore, attention directed at examples of elder abuse has focussed society's

(online, 15 July 2021) <https://theconversation.com/safe-at-home-we-need-a-new-strategy-to-protect-older-adults-from-violent-crime-163260>; Floralyn Teodoro, 'A "Silent Crisis" Unfolds: Older Women Allegedly Killed in Domestic Homicides', *Your Life Choices* (online, 27 January 2025) <https://www.yourlifechoices.com.au/crime/a-silent-crisis-unfolds-older-women-allegedly-killed-in-domestic-homicides/>.

28 *Thorne v Kennedy* (2017) 263 CLR 85, 119 [88] (Gordon J).

29 *Quek v Beggs* (1990) 5 BPR 11, 761, 764 (McLelland J), cited in *Courtney v Powell* [2012] NSWSC 460, [38] (Ball J). See also *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 54 (Starke J). However, even transactions that are not manifestly disadvantageous may still be voidable through undue influence if it can be shown the weaker party lacked an independent and voluntary will: *Baburin v Baburin* [1990] 2 Qd R 101.

30 See, e.g., Briony Dow et al, 'Barriers to Disclosing Elder Abuse and Taking Action in Australia' (2020) 35(4) *Journal of Family Violence* 853, 853–5. But see Australian Association of Gerontology, Submission No 23 to the Parliament of New South Wales, *Inquiry into Elder Abuse in New South Wales* (15 November 2015), who observe that 'making comparisons between elder abuse and child abuse, and drawing on responses used in child protection, is ageist and generally not appropriate': at 4.

attention, and importantly political attention, on strategies to educate people, detect abuse and minimise its effect.[31] Consequently, the topic is placed within the broader political aims of addressing abuse, such as the need for a coordinated national response to the problem.[32] Heightened media attention raises awareness and older people may be encouraged to exercise greater caution before undertaking financial transactions by, for example, obtaining legal advice beforehand.[33] In addition, aligning the topic with elder abuse can act as a deterrent to those whose aim is to take unfair advantage of an older party.

Nonetheless, the findings of the 2021 National Prevalence Report conducted by the Australian Institute of Family Studies concluded that one in six older people have been subject to elder abuse, and the main perpetrators of that abuse are adult children.[34] For financial abuse, children are the largest perpetrator group constituting 33%.[35] Sons are almost two times more likely than daughters to perpetrate abuse.[36] While the National Prevalence Report does not distinguish elder financial abuse relating specifically to the home as a specific subset,[37] by drawing on decided cases we are able to identify instances of elder abuse where the home or house is an integral part of the abusive conduct.[38]

The detection and reporting of any form of elder abuse can be problematic, however, financial abuse poses particular problems when there is difficulty distinguishing between legitimate gifting and financial abuse. Indeed, some commentators estimate that for every reported case of elder financial abuse, a significant number

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31 Australian Law Reform Commission (n 14); Australian Institute of Family Studies, *Evaluation of the National Plan to Respond to the Abuse of Older Australians* (Web Page, 2024) <https://aifs.gov.au/research_programs/elder-abuse-research/evaluation-national-plan-respond-abuse-older-australians>.

32 Wendy Lacey, 'Neglectful to the Point of Cruelty?' (2014) 36(1) *Sydney Law Review* 99, 104; Australian Law Reform Commission (n 14) 203–30.

33 Law Council of Australia, *Guide for Legal Practitioners in Relation to Elder Financial Abuse* (Report, 15 June 2023); Kelly Purser et al, 'Strengthening the Response to Elder Financial Abuse and the Proposed Enduring Power of Attorney Register: Suggested First Steps' [2023] (2) *University of New South Wales Law Journal Forum* 1.

34 Qu et al (n 1).

35 Australian Institute of Family Studies, *Elder Abuse in Australia: Financial Abuse* (Research Snapshot, August 2022) 2.

36 Qu et al (n 1) 72.

37 Ibid.

38 *McFarlane v McFarlane* [2021] VSC 197 ('*McFarlane*'); *Badman v Drake* [2008] NSWSC 1366; *Farrell v Stephenson* [2008] NSWSC 1350; *Fisher-Pollard v Fisher-Pollard* [2018] NSWSC 500 ('*Fisher-Pollard*'). See generally Eileen O'Brien and Teresa Somes, 'Property, Housing, and Aged Care' in Nicole Graham, Margaret Davies and Lee Godden (eds), *The Routledge Handbook of Property, Law and Society* (Routledge, 2022) 165.

remain unreported.[39] A recent study into risk factors associated with financial abuse reported that: (1) financial abuse is most prevalent where the victim needs daily support; and (2) that older people are most vulnerable to such abuse in their own home.[40] We know that older people are 10 times more likely to be living with a child or family member than a non-family member,[41] but if the older person is reliant on the abuser for care, they may be reluctant to draw attention to any abuse for fear of being moved into institutionalised care.[42]

Further, abuse occurring within the confines of the home can be hidden from outsiders or indeed denied by the older person for fear of creating family conflict.[43] In particular, the complexity of the relationship between a parent and child, and the feeling of parental failure associated with being a victim of abuse by one's own child can inhibit many people from reporting abusive behaviour.[44] Without reporting, the law can do little to assist in these circumstances. Even then, as mentioned above, the behaviour must be seen to fall within recognised legal principles to enable any relief to be granted.

III The Home as the Setting for Elder Abuse

A *The Impact of the COVID-19 Pandemic*

During the height of the COVID-19 pandemic and its aftermath, much was written concerning the challenges posed by the pandemic for those in aged care facilities. Studies indicated that aged care residents were forced into isolation, suffering

39 Thomas L Hafemeister, 'Financial Abuse of the Elderly in Domestic Settings' in Richard J Bonnie and Robert B Wallace (eds), *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (National Academies Press, 2003); Norman Hermant, '"Significant, Insidious" and Often Unreported, Financial Elder Abuse is Increasing, Lawyers Say', *Australian Broadcasting Corporation* (online, 5 August 2022) <https://www.abc.net.au/news/2022-08-05/lawyers-say-financial-elder-abuse-in-families significant/101300242?utm_source=sfmc&utm_medium=email&utm_campaign=abc_news_newsmail_am_sfmc&utm_term=&utm_id=1919044&sfmc_id=305497502>.

40 Tracey West, 'Risk Factors Associated with Elder Financial Abuse' (2021) *SSRN Electronic Journal* 1, 3–5.

41 Australian Bureau of Statistics, *Reflecting a Nation: Stories From the 2011 Census: Where Do Australia's Older People Live?* (Catalogue No 2071.0, 21 June 2012) cited in Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) 157 [8.56].

42 Dow et al (n 30) 854.

43 Ibid. See, e.g.: *McFarlane* (n 38); Jill Wilson et al, 'Older People and Their Assets: A Range of Roles and Issues for Social Workers' (2009) 62(2) *Australian Social Work* 155, 160.

44 Fran Ottolini and Vicki Edwards, Northern Suburbs Community Legal Centre, Submission to the Western Australian Legislative Council Select Committee into Elder Abuse, *Inquiry into Elder Abuse* (1 December 2017) 11, 18.

loneliness and poor mental health.[45] Similarly, those living in their own home — either alone or with family members — were required to restrict interpersonal contact to prevent the spread of the virus.[46] Measures imposed to protect older people from infection unfortunately increased risk factors for abuse. Duke Han and Laura Mosqueda explained that social distancing and isolation requirements were likely to increase the older person's dependency on others for essential products and services.[47] This dependency on people, who are traditionally in a position of trust, may consequently increase the potential for elder abuse.[48]

With community and interpersonal relationships restricted, extended periods of time spent in the home and the psychological stresses associated with lockdowns, the potential for elder abuse was exacerbated.[49] Additionally, given that financial stress has been recognised as a risk factor for interpersonal violence,[50] it is likely that the economic impact of the pandemic on many individuals increased the risk of financial or other forms of abuse. Indeed, family members who are often relied upon by older people for assistance are not immune from pandemic induced stress, financial hardship and competing responsibilities. For example, in many instances the pandemic created financial stresses through the loss of employment or divorce, necessitating adult children to seek assistance from older parents or even requiring them to move into the older person's home.[51] Therefore, many older people were

45 See generally: Aida Brydon et al, 'National Survey on the Impact of COVID-19 on the Mental Health of Australian Residential Aged Care Residents and Staff' (2022) 45(1) *Clinical Gerontologist* 58; Marie Beaulieu, Julien Cadieux Genesse and Kevin St-Martin, 'COVID-19 and Residential Care Facilities: Issues and Concerns Identified by the International Network Prevention of Elder Abuse (INPEA)' (2020) 22(6) *The Journal of Adult Protection* 385; Susan M Benbow et al, 'Invisible and At-Risk: Older Adults during the COVID-19 Pandemic' (2022) 34(1) *Journal of Elder Abuse and Neglect* 70.

46 Eileen O'Brien, 'Older Australians During the COVID-19 Pandemic: Experiences and Responses' in Mala Kapur Shankardass (ed), *Handbook on COVID-19 Pandemic and Older Persons: Narratives and Issues from India and Beyond* (Springer, 2023) 257.

47 Duke Han and Laura Mosqueda, 'Elder Abuse in the COVID-19 Era' (2020) 68(7) *Journal of American Geriatrics Society* 1386, 1386.

48 Ibid.

49 O'Brien (n 46) 268–70.

50 Deborah Capaldi et al, 'A Systematic Review of Risk Factors for Intimate Partner Violence' (2012) 3(2) *Partner Abuse* 231, cited in E-Shien Chang and Becca R Levy, 'High Prevalence of Elder Abuse During the COVID-19 Pandemic: Risk and Resilience Factors' (2021) 29(11) *American Journal of Geriatric Psychiatry* 1152, 1153.

51 Jemimah Clegg, 'The Adult Kids Forced Back Home in the Wake of COVID-19', *Domain* (Web Page, 28 March 2020) <https://www.domain.com.au/news/the-adult-kids-forced-back-home-in-the-wake-of-covid-19-944724/>. According to the Federal Circuit and Family Court, divorce rates are the highest in more than a decade due to pandemic related stress and conflict and related financial stress being major factors: Caitlin Fitzsimmons, 'Divorce Applications Up as Marriages Hit the Rocks', *Sydney Morning Herald* (online, 3 July 2022) <https://www.smh.com.au/national/divorce-20220628-p5axco.html>.

finding themselves in close proximity to others in often stressful, financially constrained circumstances. Moreover, because the pandemic precluded older people from leaving their home, the qualities of security and safety that their home previously offered instead became an environment where abuse could be both perpetrated and undetected.[52]

B *Close Proximity and Multigenerational Households*

Australia's housing affordability crisis, which intensified following the pandemic, has dramatically reshaped living arrangements for many families. Skyrocketing property prices and rental costs have driven a significant increase in intergenerational households, with adult children and their families increasingly moving in with ageing parents.[53] While often framed as mutually beneficial arrangements — providing care for ageing parents while addressing housing affordability challenges — these living situations can inadvertently recreate many of the problematic dynamics that emerged during pandemic lockdowns.

Furthermore, despite the lifting of COVID-19 restrictions, older people in shared households may continue to experience forms of isolation and control that mirror pandemic conditions. While theoretically free to visit doctors, attend religious services, or maintain social connections, subtle restrictions often materialise within these arrangements. Adult children may gradually assume control over transportation, financial decisions, or social schedules under the guise of protection or convenience. What begins as assistance can evolve into surveillance and limitation, particularly when property ownership or financial contributions create power imbalances within the household.[54]

The physical design of most Australian homes compounds these challenges, as few dwellings are constructed with multigenerational living in mind. Conventional homes typically lack private entrances, separate kitchen facilities, or dedicated living spaces that would allow older residents to maintain independence while sharing a property.[55] This architectural limitation often forces uncomfortably close

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52 See: Anna Gillbard and Chez Leggatt-Cook, *Elder Abuse Statistics in Queensland: Year in Review 2020–21* (Report, Uniting Care, 2021) 49; Lena Makaroun, Rachel Bachrach and Ann-Marie Rosland, 'Elder Abuse in the Time of COVID-19 — Increased Risks for Older Adults and Their Caregivers' (2020) 28(8) *American Journal of Geriatric Psychiatry* 876; Bianca Brijnath et al, 'Australian Frontline Service Response to Elder Abuse During COVID-19: Learnings, Successes, and Preparedness for Disaster' (2023) 43(6) *Journal of Applied Gerontology* 723.

53 Somes, 'Identifying Vulnerability' (n 12); Somes and Webb, 'Caveats' (n 12).

54 Australian Law Reform Commission (n 14) 268–70 [8.5]–[8.12].

55 Jane Knowler and Eileen O'Brien, '"Grandly Designing" Cohousing for Older People in Australia: Overcoming the Challenges', in Christie M Gardiner and Eileen O'Brien Webb (eds), *The Age-Friendly Lens* (Routledge, 2023) 136.

living arrangements that erode privacy and autonomy, creating friction that can escalate into more serious forms of elder abuse.[56]

Financial entanglements present additional complications, particularly when property ownership becomes blurred. Adult children who contribute to mortgage payments or renovations may develop a sense of entitlement to the property, creating pressure on ageing parents to adjust wills or transfer ownership. These tensions can intensify when grandchildren are involved, as emotional leverage (for instance, 'You'll never see your grandchildren if you don't cooperate') becomes a powerful tool for manipulation.[57]

The normalisation of these living arrangements in response to the housing crisis has also reduced external scrutiny. Unlike living arrangements in the pandemic, when health authorities were actively concerned about isolated older individuals,[58] these new household formations are viewed primarily through an economic lens rather than as potential sites of elder vulnerability.[59] Health professionals, social services, and legal advisors are less likely to question these arrangements or identify warning signs of exploitation.[60]

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56 There is a growing and substantial body of research examining the intersection between elder abuse and various aspects of the built environment. This expanding literature documents how physical spaces, architectural design, and environmental factors can either facilitate or help prevent mistreatment of older adults. See, e.g.: Noe Garin et al, 'Built Environment and Elderly Population Health: a Comprehensive Literature Review' (2014) 10(1) *Clinical Practice and Epidemiology in Mental Health* 103; Nana Asiamah et al, 'Abuse and Neglect of Community-Dwelling Older Adults: Index Generation, an Assessment of Intensity, and Implications for Ageing in Place' (2022) 12(2) *Advances in Gerontology* 176; Mehmet Öçal and Özge Kutlu, 'Two Sides of the Coin in Ageing in Place: Neighbourhood Safety and Elder Abuse' in Nestor Asiamah et al (eds), *Sustainable Neighbourhoods for Ageing in Place: An Interdisciplinary Voice Against Global Crises* (Springer, 2023) 71.

57 Elder Abuse Action Australia, 'Grandparent Alienation — Why We Need to Start Recognising It as Elder Abuse', *Compass* (online, 7 October 2021) <https://www.compass.info/news/article/grandparent-alienation-why-we-need-to-start-recognising-it-as-elder-abuse/>; Kaspiew, Carson and Rhoades (n 25) 15.

58 O'Brien (n 46) 257, 268–70.

59 Multigenerational living is often promoted as an affordable alternative to traditional arrangements. However, the focus is on the economic benefits and an often romanticised concept of family living that neglects potential complications: Henrique Vicente and Liliana Sousa, 'The Multigenerational Family and the Elderly: A Mutual or Parasitical Symbiotic Relationship?' in Lillian Sousa (ed), *Families in Later Life: Emerging Themes and Challenges* (Nova Science Publishers, 2009) 27; Adéla Souralová and Martina Žáková, 'My Home, My Castle: Meanings of Home Ownership in Multi-Generational Housing' (2020) 37(8) *Housing Studies* 1446.

60 Lidia Engel and Cathrine Mihalopoulos, 'The Loneliness Epidemic: A Holistic View of Its Health and Economic Implications in Older Age' (2024) 221(6) *Medical Journal of Australia* 290; Australian Human Rights Commission, *Collateral Damage: What the Untold Stories From the COVID-19 Pandemic Expose about Human Rights in Australia* (Report, March 2025) 48–50.

C *Financial and Inheritance Issues*

During the pandemic, several state and territory governments passed legislation allowing electronic signing and witnessing of documents. For the older population, these measures ensured that despite isolating they were still able to: (1) execute wills; (2) create enduring guardianship documents; and (3) create or revoke enduring powers of attorney ('EPA').[61] This was a prudent step, with the National Elder Abuse Prevalence study noting that having legal documents in place, such as a will, an EPA or an advanced care document, were effective tools to prevent and respond to elder abuse.[62] These measures have been made permanent in relation to estate planning documents in several jurisdictions including New South Wales and South Australia.[63] Having access to these legal safeguards is an important step to prevent elder abuse. However, this initiative can be a two-edged sword; some commentators have expressed concern that the absence of a face-to-face meeting could in fact exacerbate the risk of abuse, particularly in circumstances where the older person is living with their abuser.[64]

Therefore, while electronic witnessing offers advantages for older and perhaps less mobile clients, legal practitioners must recognise its significant challenges. These include the heightened possibility of elder abuse through undue influence or coercion, particularly when the practitioner cannot observe the full environment surrounding the client. Practitioners may also face increased difficulty in accurately confirming mental capacity without in-person assessment, which may require additional verification steps. The digital divide would seem to present another substantial barrier, as many older individuals and those in regional or remote communities may lack adequate access to audio-visual link technology, potentially excluding vulnerable populations from necessary legal protections. Additionally, it would be prudent for practitioners to implement robust verification of identity protocols in the absence of physical document examination. Finally, the remote nature of these interactions necessitates more comprehensive documentation of client communications than traditional face-to-face meetings, creating an additional administrative burden that ensures transparency and accountability

61 See, e.g.: *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW); *Electronic Transactions Act 2000* (NSW) pt 2B, as amended by *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW); *COVID-19 Emergency Response (Section 17) Regulations 2020* (SA).

62 Qu et al (n 1) 98.

63 *Electronic Transactions Act 2000* (NSW) pt 2B; *COVID-19 Emergency Response 2020* (SA) s 17. See also: *Oaths Regulations 2021* (SA); related Codes of Practice created under the *Oaths Act 1936* (SA) s 33(1)(b); *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) sch 1; Law Society of New South Wales, *Implications of the Electronic Witnessing Provisions* (Report, December 2021) 3.

64 See, e.g.: Kay Patterson, *Financial Elder Abuse and the Importance of Enduring Documents by The Hon Dr Kay Patterson AO* (Report, 29 April 2024) 4; Law Council of Australia (n 33).

in the witnessing process.[65] While this added requirement may indeed turn the witnessing solicitor's attention to the potential for abuse, it may not be an adequate safeguard against ongoing pressure imposed by someone who both resides with the ageing client, and whom the ageing client relies upon.[66]

D *Family and Domestic Violence*

Another instance of abuse within the home is domestic and family violence. This can involve a domestic partner but can also involve adult family members such as adult children. There is a considerable body of evidence establishing that domestic violence affects a significant number of older people, particularly women, and can result in adverse consequential impacts upon housing circumstances.[67] Indeed, this can lead to injury and even death.[68] It is assumed that statistical rates are low because of a reluctance to report the incidents rather than the non-occurrence of abuse.[69]Also, because of the cultural and social stigma of family violence remaining prevalent among older women, they tend to stay with family or friends rather than seeking the assistance of specialist homelessness services.[70]

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65 For example, in a position paper published in 2020, Justice Connect proposed that solicitors who witness documents remotely should add a clause to enduring powers of attorney and guardianship documents certifying that they are satisfied that the client has given instructions freely and voluntarily: Justice Connect, *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) — Changes to Witnessing Requirements for Enduring Powers of Attorney and Enduring Guardianship Appointments* (Position Paper, April 2020) 3–4.

66 Law Society of New South Wales (n 63) 3; Kelly Purser, Tina Cockburn and Bridget J Crawford, 'Wills Formalities Beyond COVID-19: An Australian–United States Perspective' [2020] (5) *University of New South Wales Law Journal Forum* 1.

67 In an Australian context, the Australian Institute of Health and Welfare noted in February 2025 that 39% of older women cited 'domestic and family violence' as the main reason they were seeking assistance: 'Family, Domestic and Sexual Violence', *Australian Institute of Health and Welfare* (Web Page, 28 February 2025) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/housing>.

68 For example, the concern over rising instances of matricide in Australia: Catherine Barrett et al, *The [un]Silencing of Older Women: A Life Stages Approach for the National Plan to End Violence Against Women and Their Children* (Report, 2024). Note the comments in the submission by the Law Council of Australia which observed that 'an analysis by The Guardian of government data has found that, in the 10 years to 2023, nearly 200 women over the age of 55 were allegedly killed in family violence related homicides in circumstances where sons, as well as intimate partners, have been perpetrators': Law Council of Australia (n 21) 12 [34].

69 Silvia Fraga Dominguez, Jennifer Storey and Emily Glorney, 'Help Seeking Behavior in Victims of Elder Abuse: A Systematic Review' (2021) 22(3) *Trauma, Violence and Abuse* 446.

70 SafeLives, *Safe Later Lives: Older People and Domestic Abuse* (Report, October 2016); Council to Homeless Persons, 'Framing the Issue — Older Women Experiencing or at Risk of Homelessness', *Council to Homeless Persons* (Web Page, 18 June

Older people experiencing family or domestic violence in rental situations face unique vulnerabilities, especially when the lease is in their name. The older person encounters the twin challenges of age and gender discrimination.[71] This is especially the case with older women who may have devoted decades to traditional caregiving roles with limited workforce participation, resulting in financial insecurity and housing vulnerability that severely restricts their options when facing abuse.[72]

When an older person holding a lease needs to escape family or domestic violence, their options vary dramatically depending on which Australian jurisdiction they reside in. Western Australia and New South Wales offer the most accessible approach through declaration-based systems that allow women to terminate leases without engaging police or courts.[73] These tenant-friendly systems permit termination through declarations signed by qualified professionals such as medical practitioners, nurses, social workers, or family violence support workers.[74] With notice periods typically between 7–14 days, confidentiality requirements for landlords and protection from financial penalties beyond standard lease break provisions, this approach acknowledges the reluctance of older women to engage with formal systems when the perpetrator is a family member.[75]

In contrast, several jurisdictions impose medium-barrier court/tribunal order systems requiring formal documentation like family violence restraining orders, tribunal hearings, or court-ordered perpetrator exclusion.[76] These processes, while providing legal clarity, create significant obstacles for older women who may be intimidated by formal proceedings, lack financial resources for legal representation, or fear retaliation during hearing waiting periods. Most concerning are jurisdictions with limited or no provisions, where women must break leases and

2024) <https://chp.org.au/parity/framing-the-issue-older-women-experiencing-or-at-risk-of-homelessness/>.

71 Guiomar Merodio et al, 'The Impact of Gendered Ageism and Related Intersectional Inequalities on the Health and Well-being of Older Women' (2024) 12(2) *Research on Ageing and Social Policy* 146. Note that a lack of opportunities for employment also factor into older women's prospects for affordable housing: Colin Duncan and Wendy Loretto, 'Never the Right Age? Gender and Age-Based Discrimination in Employment' (2004) 11(1) *Gender, Work and Organization* 95.

72 Eileen Webb et al, *Impact of Tenancy Laws on Women and Children Escaping Violence: Final Report for Department of Social Services* (Report, March 2021) 57–8; Lyn Craig and Catherine Hastings, 'Intersectionality of Gender and Age ('gender*age'): A Critical Realist Approach to Explaining Older Women's Increased Homelessness' (2024) 23(4) *Journal of Critical Realism* 361.

73 Webb et al (n 72) 14.

74 Ibid 145, 171; Eileen O'Brien, 'New Laws in Western Australia Will Help Victims of Family Violence End Their Tenancies', *The Conversation* (online, 10 May 2019) <https://theconversation.com/new-laws-in-western-australia-will-help-victims-of-family-violence-end-their-tenancies-116800>.

75 Webb et al (n 72) 12.

76 See, e.g., O'Brien (n 74). See also Webb et al (n 72) 88.

accept financial penalties, navigate complex tribunal processes without specialised domestic violence provisions, and remain legally responsible for property damage caused by their abusers.[77]

However, terminating a lease due to domestic violence is only the first step in a challenging journey for older women seeking safety. While legal provisions for lease termination provide immediate relief, they do not address the critical question of where these women can go. Moreover, the severe shortage of affordable housing creates a significant barrier for older victims on fixed incomes. Public housing waiting lists often stretch into years, making this option unavailable during immediate crises.[78] Meanwhile, the private rental market presents formidable challenges with high rents, competitive application processes favouring stable employment histories, and substantial upfront costs.[79] This creates a troubling paradox; where an older woman may have the legal right to leave an abusive situation, but without viable housing alternatives, exercising this right could lead to precarious living arrangements or even homelessness. For many, this uncertainty becomes another factor keeping them trapped in dangerous living situations.[80]

E *Family Members as (Unwelcome) Guests*

A further example of behaviour that constitutes abuse against older people in their home is when individuals — often family members — move in as temporary 'guests', but then refuse to leave.[81] The relationship between the 'unwelcome lodger' and elder abuse is an under-researched phenomenon.[82] This is so, despite recent statistics gathered by Uniting Care in Queensland revealing that the most common

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77 Webb et al (n 72) 57, 64–73.

78 Josh Nicholas, 'As 190,000 Households Wait for Social Housing, Application Numbers are Only Increasing', *The Guardian* (online, 17 April 2024) <https://www.theguardian.com/news/ng-interactive/2024/apr/18/as-190000-households-wait-for-social-housing-application-numbers-are-only-increasing>.

79 National Older Women's Housing and Homelessness Working Group, *Retiring into Poverty: A National Plan for Change: Increasing Housing Security for Older Women* (Report, 23 August 2018) 9.

80 'What Are the Real Costs of Australia's Housing Crisis for Women?', *Australian Housing and Urban Research Institute* (Research Brief, 7 March 2024) <https://www.ahuri.edu.au/analysis/brief/what-are-real-costs-australias-housing-crisis-women>.

81 This issue has been noted by the Law Council of Australia, suggesting that the *Second National Plan* should provide more accessible legal remedies that facilitate the removal of adult children who are causing financial, psychological, and/or physical harm by remaining in their ageing parents' family home: Law Council of Australia (n 21) 12 [33].

82 However, see Richard McCullagh, 'Property and Elder Law: Beware the Lonesome Lodger: Dealing with Guests Who Outstay Their Welcome' [2019] (61) *Law Society Journal* 88.

form of elder financial abuse is non-contribution.[83] Non-contribution occurs where the perpetrator lives with the victim and does not contribute towards expenses such as electricity or groceries.[84] An example of the dilemma is demonstrated by the following question, which was posted on an online forum for the aged in the United Kingdom:

> My grandma lost her husband around 3 years ago. Even before he died my aunt and her daughter made themselves at home and have been sleeping upstairs. 3 years on they are still in the house, they don't pay bills and they actually have their own house. My grandma is 90 and she would like them to leave. They ask to 'lend' money (usually around £100 every couple of weeks), the aunt's daughter has drug issues and is very angry/aggressive. How do we help my grandma to get the unwanted guests out of her house? She has asked them to leave but they have refused, and they keep coming back.[85]

The circumstances giving rise to a perpetrator residing in a victim's property can vary. They may have originally been welcomed into the house due to financial insecurity, divorce, housing stress, circumstances related to the COVID-19 pandemic, or even to initially assist the older person. Alternatively, the pretext for moving in may stem from the assumption that as a former 'family home', adult children maintain an entitlement to move back in, regardless of the wishes of the parent owner. Regardless of the motivations for their presence, their refusal to leave presents the home owner with significant challenges.

Despite there being legal avenues to pursue, the older home owner is initially faced with the challenge of confronting the occupant with a demand to leave. If the occupant is a family member, the home owner may be reluctant to commence legal action for fear of fracturing relationships, out of concern for the family member, or being intimidated or frightened.[86] Financial dependence, unemployment, substance abuse, and mental illness can lead to complex family dynamics and expose the

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83 Gillbard and Leggatt-Cook (n 52) 5. See also Anna Gillbard, *Elder Abuse Statistics in Queensland: Year in Review 2023–24* (Report, 2024) 19. Although statistics indicate a downward trend in cohabitation, the issue remains.

84 Gillbard and Leggatt-Cook (n 52) 5.

85 'Uninvited Family Members Won't Leave 90 Year Old Grandma's House. How Do We Help My Grandma to Get Them Out of Her House?', *Aging Care* (Forum Post, May 2018) <https://www.agingcare.com/questions/uninvited-family-members-wont-leave-90-year-old-grandmas-house-how-do-we-help-my-grandma-to-get-them-439345.htm>.

86 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 165–6 [5.35]; Jan R Greenberg, Martha McKibben and Jane A Raymond, 'Dependent Adult Children and Elder Abuse' (1990) 2(1–2) *Journal of Elder Abuse and Neglect* 73, 80–1.

ageing home owner not only to financial abuse, but also verbal, physical, and psychological abuse.[87]

If the older home owner is empowered to seek a legal solution, their first challenge is characterising the legal status of the arrangement. As is common amongst families, there is rarely any agreement concerning the nature and duration of the occupancy. It is possible that the arrangement may fall under the *Residential Tenancies Act 2010* (NSW), the *Residential Tenancies Act 1995* (SA), or other state and territory equivalent legislation. For example, the *Residential Tenancies Act 2010* (NSW) covers any arrangement, written or oral, 'under which one person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence', whether exclusively or not.[88] Providing 'value' for the right to stay does not need to equate to market rent, and some form of monetary contribution to the outgoings could be sufficient.[89] Unless the period of tenancy has come to an end, the home owner will need to argue there is a breach of the Act in order to terminate the tenancy. If the facts permit, a right to occupation of the property may be argued on the basis of estoppel.[90]

The doctrine of proprietary estoppel can fundamentally alter property rights in family situations. When a person makes a clear promise to another that they can reside in a home indefinitely, this verbal assurance can create binding obligations in certain circumstances.[91] The doctrine becomes particularly relevant in a family situation when the adult child subsequently takes substantial actions in reliance on this promise — perhaps surrendering their own housing arrangements, declining career opportunities in other locations, or investing significant personal funds into improving or maintaining the property. These decisions, made in good faith based on the parent's assurances, may constitute detrimental reliance; meaning the adult child has positioned themselves in a worse situation than they would have been otherwise. The courts recognise that if these elements are established — a clear promise, reasonable reliance, and resulting detriment — it would be fundamentally unjust to permit the parent to renege on their word. Consequently, even without formal written agreements or property transfers, an adult child may successfully

87 Greenberg, McKibben and Raymond (n 86) 84–5; Karen A Roberto, Pamela B Teaster and Joy O Duke 'Older Women Who Experience Mistreatment: Circumstances and Outcomes' (2004) 16(1) *Journal of Women and Aging* 3, 7–8.

88 *Residential Tenancies Act 2010* (NSW) s 13. See also *Residential Tenancies Act 1995* (SA) s 3.

89 *Case v Frimont* [2021] NSWCA 30, [24]–[28] (Leeming JA).

90 For the elements of proprietary estoppel see: *Kramer v Stone* (2024) 421 ALR 106, 115–16 [36]–[40]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 159–67.

91 See *Sullivan v Sullivan* [2006] NSWCA 312, [38] (Handley JA) involving a husband and wife allowing the husband's sister to reside in a property for life.

establish legal rights to remain in the property through proprietary estoppel.[92] This effectively prevents eviction, despite the absence of traditional tenancy protections or ownership documentation.

IV The Home as the Target of Elder Abuse

In an environment of declining housing affordability and constrained economic circumstances, the older person's home can become a site of competing interests and conflict amongst family members.[93] Alongside these tensions, the phenomena of inheritance impatience and entitlement, coupled with the parental financial 'obligation' felt by many parents in favour of their children, can often give rise to an environment where undue pressure, abuse and exploitation can occur.[94] This Part will examine three circumstances where the older person's house may be the target of financial elder abuse. These include situations where: (1) the parent has agreed to use their property as security or guarantee for a family member's loan; (2) transactions involving the older person's property have been procured by either undue influence or unconscionable conduct; and (3) the loss of property through failed family accommodation agreements.

A *Mortgages or Guarantees for the Benefit of Other Family Members*

Older people are particularly susceptible to being persuaded to act as guarantors for their adult children who are in need of financial assistance. In some circumstances, the agreement may be made pursuant to undue influence or unconscionable conduct,[95] but there are other reasons why it may occur. Parents can act out of a sense of love and affection, responsibility, guilt, or emotional pressure.[96] In acting as guarantor, loans are secured against the older person's home. This exposes them to a significant risk that the borrower will default, and could result in the loss of the older person's home. Unfortunately, many older people enter into such transactions

92 See, e.g., *Milling v Hardie* [2014] NSWCA 163. The Court granted Milling's daughter and her husband the right to occupy the property for the life of the defendant home owner. This decision was based on the daughter having spent money on the property with the expectation that she would receive an interest in it: at [71] (Macfarlan JA).

93 Wilson et al (n 43) 156.

94 While there has been considerable analysis of the balance of power and influence in intimate family relationships, the law has been slow to recognise the relationship between parent and child as one where the parent is at a disadvantage, owing to their sense of obligation towards their children. And, while there is no legal obligation on a parent towards an adult child, our law has embedded within it a strong confirmation of the moral and financial obligations flowing 'downwards'; for instance, testator's family maintenance, and the presumption of advancement.

95 See *Coldunell Ltd v Gallon* [1986] 1 QB 1184.

96 In some circumstances, emotional pressure may amount to undue influence. However, subtle forms of emotional pressure may not be sufficient to satisfy the doctrinal threshold of undue influence.

without being fully aware of the nature of the transaction and the extent of the consequences of the lender defaulting.[97] Courts have also recognised the vulnerability of parents who are acting as guarantor for their adult children. In *Watt v State Bank of NSW Ltd*, Higgins CJ and Crispin J observed that

> the real vulnerability of parents usually stems not from a failure to comprehend the nature of the transactions in which they have been asked to participate or from insufficient information concerning their implications. It stems from their love of their children. Their desire to help and protect them, to advance their interests, to maintain a close relationship, to avoid causing disappointment, hurt or distress, to maintain the relationship may all make it difficult to say 'no'.[98]

In a similar case involving parents acting as guarantors, Crispin J again alluded to the vulnerability experienced by parents arising from the sense of obligation parents feel towards their children.[99] His Honour described how the parents proceeded with a transaction 'because of their affection for their children, a perception that a refusal might be damaging to the relationship with them, and/or a conviction that they deserve the chance to make good'.[100] Again, so long as the lender is not a party to the relevant conduct, the older person will be bound by the mortgage or guarantee over their property.[101]

Of course, in some cases, the older person may not be consulted at all and becomes the victim of fraud. In the recent decision in *Issa v Owens*,[102] Mrs Issa was the registered proprietor of two properties; one located in Queensland and another in Victoria. While managing her assets, her son Mr Karbotli, who had taken control of the family, encountered severe financial difficulties. Mr Karbotli resorted to fraud by forging his mother's signature on loan documents, creating fraudulent mortgages without her knowledge or consent. To further this deception, Mr Karbotli enlisted his solicitor, Mr Picken, who falsely certified witnessing Mrs Issa's signature on both the mortgage and personal guarantee documents. Mr Picken compounded this fraud by completing a combined appointment and identification certificate, in which he

97 See, e.g., *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*').

98 *Watt v State Bank of NSW Ltd* [2003] ACTCA 7, [22] (Higgins CJ and Crispin P) ('*Watt*'). See also: *Permanent Mortgages Pty Ltd v Vandenbergh* (2010) 41 WAR 353; Juliet Lucy Cummins, 'Relationship Debt and the Aged: Welfare vs Commerce in the Law of Guarantees' (2002) 27(2) *Alternative Law Journal* 63. The lengths to which a parent will go in order to look after an adult child can be seen in a decision from the High Court in the UK. Here, an older blind man endured physical and emotional abuse from his son but felt obliged to look after him. The Court found that 'the essence of [the parent's] vulnerability is, in fact, his entirely dysfunctional relationship with his son': *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [34] (Hayden J).

99 *Janesland Holdings Pty Ltd v Simon* [2000] ANZ ConvR 112, [120] (Crispin J).

100 Ibid.

101 *Amadio* (n 97) 459 (Gibbs CJ).

102 [2023] QSC 4.

falsely claimed to have conducted a face-to-face verification of Mrs Issa's identity, when no such meeting occurred. The situation escalated when Mr Karbotli eventually defaulted on the fraudulently obtained loans. As a consequence, the mortgagee took possession of Mrs Issa's Queensland property and promptly arranged for its sale at auction.[103] Mrs Issa only discovered the existence of the mortgage shortly before the scheduled auction.[104] Mrs Issa sought legal advice, lodged a caveat and notified the police and Registrar of Titles. The property was subsequently sold at auction to the Morecrofts, who were unaware of the fraud. Mrs Issa reluctantly removed her caveat for $40,000 while 'reserving all rights', allowing settlement to proceed. The Registrar of Titles confirmed that the mortgage was fraudulent after settlement. When the Morecrofts attempted to register their transfer, they were blocked by the Registrar of Titles' caveat.[105]

In a dispute between Mrs Issa and the Morecrofts as to who had the best right to the property, the Court determined that the mortgagees had failed to comply with identity verification requirements under the *Land Title Act 1994* (Qld), meaning they had not obtained indefeasible title.[106] As a result, the Court cancelled both the mortgage and transfer registrations, allowing Mrs Issa to retain her property. The State of Queensland was ordered to compensate the innocent Morecrofts $2.7 million under the *Land Title Act 1994* (Qld), representing the market value of the property.[107]

B *Transactions Made Pursuant to Undue Influence and Unconscionable Conduct*

As mentioned above, an older person's decision to secure an adult child's debt by using their home as security may be motivated by natural love and affection. However, it may also be procured by undue influence or unconscionable conduct. Transfers of an older person's home, whether for value or not, can be set aside pursuant to these equitable doctrines.[108] For the transferor to prove undue influence, they must prove that the transferee exerted such ascendancy and influence over a weaker person's decision-making, that the weaker person who relied upon them cannot be taken to have exercised their own free will.[109] While there is no presumption that a parent is subject to the undue influence of an adult child, it has been observed that a presumption of undue influence could arise where 'the alleged victim is an ageing parent [who] is living alone and is no longer in good health [and] that the child alleged to have influence is one who, in large part, is responsible for

103 Ibid [1]–[11] (Crowley J).

104 Ibid [15]–[19].

105 Ibid.

106 Ibid [120]–[126].

107 Ibid [399]. The decision in relation to compensation was upheld in *Queensland v Morecroft* [2024] QCA 11.

108 Or a contract for sale or transfer.

109 *Thorne v Kennedy* (n 28) 101–2 [34] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

his care'.[110] Presumably, influence could more readily be assumed if the parties were under one roof.

Unconscionable conduct is a closely related doctrine and is often pleaded alongside undue influence on the same facts. For a transaction to be set aside due to unconscionable conduct, the court must be satisfied that: (1) the transferor suffered from a 'special disadvantage'; (2) the transferee was aware of that disadvantage; and (3) the transferee took unconscientious advantage of the disadvantage.[111]

Case law in this area reveals numerous examples involving older adults in which undue influence or unconscionable conduct is alleged.[112] These cases demonstrate that older people may be placed in a vulnerable position when they become dependent on others, and that the relationship of dependency has a very real risk of being misused. In *McFarlane v McFarlane*,[113] an older woman transferred her house, her only valuable asset, to her son for consideration of 'natural love and affection'.[114] In an application made on her behalf by the Victorian State Trustee to have the transfer set aside on the grounds of both undue influence and unconscionable conduct, it was revealed that her son consistently subjected her to verbal, psychological, and at times physical abuse. While he lived in her house, she was dependent on him for transport, and he controlled her food and medication. Nonetheless, the older plaintiff was reluctant to deny his request that the house be transferred, as she was both frightened of him, and felt guilty that his father had abandoned him at a young age.[115]

The risk is particularly acute in instances where the plaintiff suffers some degree of cognitive impairment. For instance, in *Farrell v Stephenson*,[116] an ageing widow was left property worth $1.5 million. In the absence of independent legal advice, she transferred all her property to the defendants for consideration of one dollar. This transfer was ostensibly to enable a larger house to be purchased for the widow, and to allow the two defendants to ultimately reside together. At the time of the transfer, she was suffering from the early stages of Alzheimer's dementia, was easily manipulated and suggestible and had reduced capacity to manage her own affairs

110 *Hogg v Hogg* [2007] EWHC 2240 (Ch), [43] (Lindsay J), cited in Brian Sloan, 'Due Rewards or Undue Influence? — Property Transfers Benefitting Informal Carers' [2011] (19) *Restitution Law Review* 37, 42. See also *McFarlane* (n 38).

111 *Amadio* (n 97) 474 (Deane J). See also: *Blomley v Ryan* (1956) 99 CLR 362; *Louth v Diprose* (1992) 175 CLR 362; *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301; *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; *Thorne v Kennedy* (n 28).

112 See, e.g.: *Jansen v Jansen* [2007] NSWSC 1344; *Darmanin v Cowan* [2010] NSWSC 1118; *Meiners v Gunn* [2020] WASC 18.

113 *McFarlane* (n 38).

114 Ibid [1] (Richards J).

115 Ibid [45]. See also: *Wardle v Wardle* [2021] NSWSC 1529; *Wilce v Wilce* [2022] QSC 94.

116 *Farrell v Stephenson* (n 38).

and protect her own interests.[117] When the matter was heard, the plaintiff was residing in an aged care facility and was in danger of defaulting on her fees. Chief Judge Young in Equity referred to this as a 'classic elder law case'.[118] The money was actually used by the defendants to undertake property speculation, which was disastrously unsuccessful. Just over $106,000 was left from the sale of the 'developed' property and held in a solicitor's trust account. The Court declared that the initial transfers from the widow to the defendants were voidable by reason of equitable fraud, and therefore the money traced from these transactions to the trust account belonged to the widow in equity.[119] In *Badman v Drake*, Young CJ in Eq took the opportunity to warn practitioners of the need to exercise caution when acting in a transaction involving an older 'at risk' person. His Honour noted it was 'impermissible for any solicitor to take the view that because monies are going to flow [to their] client, they can close their eyes to fraud that may be being perpetrated on the vulnerable person'.[120]

C *The Failed Family Accommodation Arrangement and the Impact on the Experience of Home*

Family accommodation agreements arise when an older person makes a financial contribution to a family member, relative or friend in exchange for accommodation for life.[121] The financial contribution may contribute towards the construction of a granny flat, a home extension, or the older person moving into a newly constructed home with family. The key criterion is that there is a monetary advantage provided to the adult child in return for accommodation provided in a caring environment.[122] Most often, these arrangements are entered into voluntarily and provide each party with mutual benefits. However, in some circumstances, the arrangement may be made pursuant to undue influence or unconscionable conduct. These doctrines have been successfully argued to have transfers that were made pursuant to a family accommodation agreement set aside.[123] Adult children experiencing difficulties in entering the housing market because of rising house prices or high levels of mortgage debt may encourage or pressure parents to 'step in' and assist. The accommodation arrangement is one method in which parents transfer money or property to their children whilst believing they are securing accommodation and benefits for themselves. Nonetheless, if successful, the arrangement can be a considerable source of ontological security.[124] The goals provided by the arrangement — to be

117 Ibid [48] (Young CJ in Eq).

118 Ibid [61].

119 Ibid [68]–[69].

120 *Badman v Drake* (n 38) [56], [84] (Young CJ in Eq).

121 See: Somes, 'Identifying Vulnerability' (n 12) 1–3; Seniors Rights Victoria, *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse* (Guide, 18 September 2024) 33.

122 Somes, 'Identifying Vulnerability' (n 12) 2; Australian Law Reform Commission (n 14) 203 [6.1].

123 *Fisher-Pollard* (n 38) [551]–[552].

124 Aviva Freilich et al, *Security of Tenure for the Ageing Population in Western Australia* (Report, Council on the Ageing Western Australia, 2014) ch 1.

safe, looked after and to remain close to family — reflect many characteristics of home that are given greater priority in older age. If, however, the arrangement fails and the older person is required to leave the home, then the resulting tenuous legal and financial position they are placed in threatens these very goals. In addition, when an older person must relocate voluntarily or involuntarily, support formerly provided by friends or family within a community is likely to be affected and must be provided in some other way.[125]

At the outset, it is important to acknowledge that a failed accommodation arrangement is not always a result of the older person being 'kicked out' of their home, nor is the conduct of the adult child necessarily a form of fraud or elder abuse. On occasion, the ageing parent may voluntarily leave for circumstances such as the need for specialised care that requires a change in accommodation.[126] Yet in many cases, the dispute between the parties results in the parent being told to vacate the very property that was their home; the place where they anticipated they would live and be cared for.[127] In these situations, the denial of the reimbursement of some or all of the older party's financial contribution would likely be regarded as financial elder abuse.[128]

Once there is a denial by the adult child of any restitution of the older person's contribution towards the adult child's property, the older person's legal position is precarious, and claiming an interest in the property is extremely problematic. The transactions in which the older person has contributed to the adult child are usually entered into without a written contract and without consideration of contingencies such as the breakdown of the agreement, the need for the adult child to sell the property (for financial reasons or as the result of a divorce), or the older person's health deteriorating to an extent that residential aged care is necessary.[129] While legal avenues are available to the older party, navigating the existing law is fraught, due to its inaccessibility and complexity. Moreover, the law applies certain presumptions that create significant barriers for a parent to overcome in the event of a dispute. For instance, the presumption of advancement presumes any transfer of property made from a parent to a child is a gift, with the onus resting on the parent to rebut the presumption.[130] Therefore, the older party must possess the emotional and financial resources to commence proceedings, and then be willing to invest time in litigating a dispute against a member of their own family, or a close

125 Webb (n 5) 60.

126 See, e.g., *Richardson v Lindsay* [2019] NSWCA 148, [4]–[13].

127 Margaret Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 (Spring) *Reform* 29, 31. Hall states that '[a]necdotal and case law evidence indicates that most care agreements fail because of relationship breakdowns'.

128 Australian Law Reform Commission (n 14) 203 [6.1].

129 See, e.g.: Seniors Rights Victoria (n 121) [33]–[34]; Somes, 'Identifying Vulnerability' (n 12) 11–12; Somes and Webb, 'Caveats' (n 12) 354–5.

130 *Nelson v Nelson* (1995) 184 CLR 538, 547 (Deane and Gummow JJ); *Flourentzou v Spink* [2019] NSWCA 315, [17], [20] (Barrett AJA); *Anderson v McPherson (No 2)* (2012) 8 ASTLR 321, 342 [140]–[141] (Edelman J).

acquaintance.[131] Such a process is lengthy and expensive, as matters can only be brought in supreme courts and in some jurisdictions, district courts.[132]

The loss of home often involves an unanticipated and unplanned change in an older person's living conditions and may result in an inability to re-establish themself. This can have a detrimental effect on the health and wellbeing of an older person.[133] In some instances, the request to leave has left the older person homeless or reliant on public housing.[134] Indeed, the Australian Institute of Criminology noted that in the context of the effect of fraud and financial crime, the impact on the older person can be profound:

> Not only can a comfortable lifestyle collapse, but they may not have the time or the opportunity for financial recovery. A blow to financial security is often a permanent and life-threatening setback, characterised by fear, lack of trust, and is often the onset of acute and chronic anxiety. Loss of assets may ruin a person's otherwise well-planned retirement … it has also been found that the personal, emotional and psychological consequences of fraud for older persons are much more profound than for younger persons.[135]

V Legal Gaps in Elder Housing Protection: Beyond Prevention

For older Australians, housing security constitutes more than basic shelter — it provides ontological security, personal identity, and individual autonomy.[136] When abuse threatens this fundamental pillar of well-being, affected seniors have little choice but to turn to the legal system. This Part critically examines the legal responses available to an older person when the home serves as both a setting for and a target of elder abuse. Unfortunately, this critical intersection of elder abuse and housing security has remained largely unaddressed in legal and policy reforms. The current legal framework remains, in our view, woefully inadequate to address

131 Teresa Somes and Eileen Webb, 'What Role for Real Property in Combatting Financial Elder Abuse through Assets for Care Arrangements?' [2016] (22) *Canterbury Law Review* 120, 127.

132 Somes, 'Identifying Vulnerability' (n 12) 34–5. See also Teresa Somes, 'Cutting the Gordian Knot of Failed Family Accommodation Agreements: Identifying Vulnerability to Improve Access to Justice for Older People' (PhD Thesis, University of South Australia, 2023) ('Cutting the Gordian Knot').

133 Lorna Fox O'Mahoney, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 157.

134 See *Spink v Flourentzou* [2019] NSWSC 256, [177] (Robb J).

135 Australian Institute of Criminology, Submission No 40 to Parliament of Australia, *Inquiry into Older People and the Law* (20 September 2006) 1, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, the Parliament of Australia, *Older People and the Law* (Report, September 2007) 12 [2.4].

136 See, e.g.: Adams (n 4) 77; Hiscock et al (n 5).

these complex and often time-sensitive situations, leaving a troubling protection gap for one of society's most vulnerable populations.

A *The Prevention–Response Disconnect*

Australia's approach to elder abuse has evolved significantly since the establishment of the *First National Plan*,[137] yet fundamental questions remain about the adequacy of legal protections for older Australians. As policymakers grapple with an ageing population and increasing reports of elder abuse, the balance between preventive measures and remedial legal frameworks should be considered. The development of the *Second National Plan* represents an important milestone in this ongoing effort, but its emphasis on prevention over legal remedies raises important questions about its comprehensiveness and effectiveness.

The recent consultation draft of the *Second National Plan* — while commendable for its emphasis on prevention and early intervention — fails to remedy significant legal gaps that leave vulnerable older Australians exposed when preventive measures prove insufficient. The *Second National Plan* emphasises '[e]nhance[d] legal frameworks and adult safeguarding responses', but predominantly focusses on early identification and prevention rather than strengthening remedial legal pathways.[138] While prevention is vital, a comprehensive approach must also include robust legal remedies for cases where prevention fails. This creates a dangerous gap in protection, particularly regarding housing — arguably an older person's most significant asset and source of security.

While early intervention strategies are valuable, they cannot address all instances of elder abuse, particularly those involving complex family dynamics or sophisticated financial exploitation. A truly effective national response must therefore balance prevention with remediation, ensuring robust and accessible legal pathways exist when prevention fails.

B *Critical Legal Shortcomings Requiring Reform*

The burden of proving undue influence places older people in the difficult position of demonstrating that transactions with family members were improvident and not motivated by natural affection. This standard ignores the complex emotional dynamics within families where love, obligation, guilt, and manipulation often intertwine. Legal frameworks should recognise these nuances through adjusted evidentiary standards for vulnerable older adults; for example, a presumption of undue influence in transactions involving older parents and adult children. Similar considerations arise in relation to establishing unconscionable conduct.[139]

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137 *Second National Plan* (n 16).

138 Ibid 49.

139 See *McFarlane* (n 38) [6] (Richards J). The Court found both undue influence and unconscionable conduct where a son orchestrated the transfer of his mother's home to himself for inadequate consideration. While this case resulted in a favourable outcome,

The presumption of advancement fundamentally disadvantages older parents in property disputes by assuming that transfers to children are gifts.[140] This outdated principle fails to reflect contemporary realities where ageing parents transfer property under complex arrangements in the expectation of care or accommodation for life. Reform should reverse this presumption for vulnerable older adults or create specific exceptions for family accommodation agreements.[141]

Jurisdictional barriers often force older victims to navigate supreme court litigation — a process that is prohibitively expensive, emotionally draining, and often practically inaccessible.[142] The incorporation of these issues into specialised tribunals with simplified procedures and lower costs could dramatically improve access to justice in elder housing disputes.[143]

The ambiguous status of informal living arrangements leaves older home owners vulnerable when family members refuse to leave their property. Current tenancy laws provide inadequate guidance on these complex scenarios that lie at the intersection of family and property law. Clearer legal frameworks specifically addressing family cohabitation would help to fill this gap.

Insufficient protections for older guarantors fail to recognise the unique vulnerabilities and familial pressures that may lead to older people securing loans against their homes. Parental love creates a distinctive vulnerability that current banking regulations inadequately address.[144] Mandatory independent legal advice and strengthened lender responsibility provisions could better protect these vulnerable guarantors. Consumer protection laws have made some inroads, but older people remain vulnerable to exploitation.[145]

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it is significant that success was achieved through the substantial legal resources and expertise of the Victorian Public Trustee. This raises important questions about access to justice — it remains highly questionable whether Mrs McFarlane, acting independently without institutional support, would have possessed the financial means, legal knowledge, or emotional fortitude to successfully pursue such complex litigation against her own son.

140 Lane (n 12) 415; Krasa Bozinovska, 'Rethinking the Presumption of Advancement in Contemporary Australia' [2019] (62) *Law Society Journal* 78; Australian Research Network on Law and Ageing, Submission to the Select Committee into Elder Abuse, *Inquiry into Elder Abuse* (2018) 17; Somes and Webb (n 131) 125.

141 Australian Research Network on Law and Ageing (n 140) 17; Somes and Webb (n 131) 125.

142 Sarah Ellison et al, *Access to Justice and Legal Needs* (Report Vol 1, Law and Justice Foundation of New South Wales, December 2004) 365.

143 See generally Somes, 'Cutting the Gordian Knot' (n 132).

144 *Watt* (n 98) [22].

145 For example, the responsible lending provisions in the *National Consumer Credit Protection Act 2009* (Cth) ch 3 and the unjust transaction provisions of the *National Consumer Credit Protection Act 2009* (Cth) sch 1 ('*National Credit Code*') cl 76(2) generally, and particularly cl 76(2)(f). See also Australian Banking Association, *Banking Code of Practice* (Code of Practice, 12 December 2019) pt 7.

Electronic witnessing vulnerabilities create significant risks when older persons execute important legal documents while potentially under surveillance or influence from cohabitating abusers.[146] Enhanced verification protocols specific to vulnerable older adults would help address these digital-age risks.

Inconsistent tenancy protections across jurisdictions create a postcode lottery for older people experiencing family violence. Some states offer accessible declaration-based systems, while others require intimidating court proceedings.[147] Harmonisation of these protections would ensure all older Australians receive equal protection to leave residential leases without penalty in circumstances of family and domestic violence, regardless of location.

Emotional and financial barriers to legal action against family members represent perhaps the most significant obstacle to justice. Many older victims refuse to pursue legal remedies against their children, despite clear exploitation.[148] Specialised legal assistance programs, emotionally sensitive mediation services, and supportive court processes could help address these barriers.

Reluctance to pursue criminal remedies means that even in clear cases of exploitation, the criminal law's deterrent and protective functions remain largely theoretical.[149] While respecting victims' wishes is important, prosecution policy should recognise the public interest in addressing these crimes, establishing precedents that protect future potential victims.

C *Lack of Genuine Legal Pathways and Access to Justice*

South Australia and New South Wales have implemented safeguarding legislation with ostensibly robust powers to protect vulnerable older people.[150] However, these legal frameworks have proven largely ineffective in addressing housing insecurity — perhaps the most devastating form of elder abuse.[151]

The implementation of these safeguarding regimes reveals a critical disconnect between legislative intent and practical outcomes. For example, while the South Australian legislation grants considerable powers on paper, operational realities paint

146 Law Council of Australia (n 33) 8–9; Law Society of New South Wales (n 63) 11–13; Purser, Cockburn and Crawford (n 66) 13.

147 For example, New South Wales and Western Australia provide an avenue for obtaining a declaration from a medical practitioner or social worker who is familiar with the case to trigger termination of the lease. Other states still require the person experiencing domestic violence to navigate the court system. See also Webb et al (n 72) ch 3.

148 Somes, 'Identifying Vulnerability' (n 12) 30–1.

149 Seniors Rights Victoria, *Elder Abuse and Criminal Law* (Discussion Paper, May 2018) 7–10.

150 *Ageing and Adult Safeguarding Act 1995* (SA); *Ageing and Disability Commissioner Act 2019* (NSW).

151 See generally Livings, Webb and Middleton (n 20).

a different picture.[152] The overwhelming emphasis on autonomy and consent — while philosophically sound — has created a system that typically intervenes only in cases of immediate danger, leaving those experiencing more insidious forms of housing exploitation without adequate protection.[153]

Law enforcement agencies demonstrate marked reluctance to involve themselves in what they perceive as 'family matters', despite clear elements of exploitation or fraud. Meaningful intervention typically occurs only when larger institutions with established legal departments — such as a public trustee or aged care facilities pursuing unpaid fees — advocate for action.[154] Individual older people rarely receive comparable support.[155]

Meanwhile, traditional legal safety nets remain inadequate. Legal aid services and community legal centres operate under crushing resource constraints, with elder law expertise particularly scarce.[156] This creates a perfect storm, where vulnerable older people face housing insecurity with limited accessible legal pathways to remedy.

This gap in protection is particularly devastating given that housing insecurity represents perhaps the most profound form of elder abuse.[157] The psychological impact of feeling unsafe in one's home — or worse, losing it entirely — creates profound trauma and insecurity at a stage of life when stability is most crucial. Yet despite this gravity, current legal frameworks provide few effective accessible remedies,[158] particularly in the context of Australia's housing affordability crisis, where alternative accommodation options are severely limited.

The result is a protection system that exists more in theory than practice — a paper tiger that provides little meaningful protection for older Australians facing housing exploitation and insecurity. Without significant reform to both legislative frameworks and implementation resources, this critical protection gap will continue

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152 See generally *Ageing and Adult Safeguarding Act 1995* (SA).

153 Ibid.

154 Seniors Rights Victoria (n 149) 7. For example, in *McFarlane* (n 38), the older person's circumstances would not have been revealed if the aged care facility had not acted in relation to unpaid fees.

155 Note the recent suggestion by the Law Council of Australia for an increase in access to support for victims of abuse, including increases in legal support and government compensation: Law Council of Australia (n 21) 12 [33].

156 'Seniors Rights Victoria Asks for Urgent Investment into Australian Community Legal Centres', *Seniors Rights Victoria* (Web Page, 18 March 2024) <https://seniorsrights.org.au/news/seniors-rights-victoria-asks-for-urgent-investment-into-australian-community-legal-centres/>; O'Brien, Stevens and Baldassar (n 27). Some jurisdictions have introduced an elder law focus within legal aid services, for example, in Western Australia: Legal Aid Western Australia, *Elder Rights WA Strategy 2023–2025* (Report, 2023). See also Dow et al (n 30) 859–60.

157 See generally Livings, Webb and Middleton (n 20).

158 Somes, 'Cutting the Gordian Knot' (n 132) ch 8.

to leave countless older Australians vulnerable to one of the most devastating forms of elder abuse.

VI Conclusion

It is a sad irony that the place where an older person should feel the most secure has become both a setting and target for abuse. Unfortunately, in precarious economic times and with housing affordability declining, this vexing issue is likely to accelerate. For many older Australians, private home ownership has been both an aspiration and an achievement, providing financial security and ontological well-being. However, this article has illustrated how the home can paradoxically become both a setting for, and a target of, elder abuse. When the home becomes a setting for abuse — through isolation, unwelcome lodgers, or multigenerational living arrangements — the very place meant to provide security instead becomes a site of vulnerability. Similarly, when the home becomes a target for exploitation through inheritance impatience, fraudulent mortgages, or failed family accommodation agreements, older people risk losing not just their most valuable asset, but their sense of identity and security.

The legal frameworks currently available to address these forms of elder abuse are frequently inadequate, particularly when the dynamics of family relationships blur the line between generosity and exploitation. Equitable doctrines such as undue influence and unconscionable conduct provide some recourse, but the burden of proof, the emotional cost of litigation against family members, and the presumption of advancement create significant barriers to justice. Even when legal avenues are theoretically available, many older people remain reluctant to pursue them, fearing family conflict or the social stigma associated with acknowledging abuse by their own child.

As housing affordability continues to decline and financial pressures intensify, the vulnerability of older home owners is likely to increase. The emotional and psychological consequences of losing one's home through abuse are profound — particularly for older people who have limited opportunities to recover financially and rebuild their lives. Without coordinated responses that include better legal protections, increased awareness, and support services specifically designed for elder abuse related to housing, many older Australians will continue to face the devastating prospect of having their most secure place become their greatest source of insecurity.

*P T Babie**

JUDICIAL FEDERALISM AND *SUB SILENTIO* AMENDMENT OF THE *REAL PROPERTY ACT 1886* (SA)

WHAT IT IS AND WHY IT MATTERS, OR, HOW I LEARNED TO STOP WORRYING AND LOVE THE *UNIFORM TORRENS TITLE ACT*[1]

ABSTRACT

This article examines the overriding legislative exception to indefeasibility. In other work, I examine ss 6, 10, and 11 — three intriguing provisions found in the *Real Property Act 1886* (SA) ('*RPA*'). In this article, I argue that while those provisions represent the Parliament's attempt to entrench Torrens system indefeasibility of title by imposing 'manner and form' requirements on future alterations to the *RPA*, judicial consideration, at least of s 6, means that the attempt has, to a great extent, failed. The important part of the story, though, is the role that courts play in sorting out what these entrenching or 'manner and form' provisions might mean. In working that out, one must also account for the fact that the courts, in interpreting those provisions, are themselves amending that legislation *sub silentio*. Often overlooked, judicial interpretation operates in plain sight. And when it engages in the interpretation or construction of a statute for the purposes of clarifying its operation and application, a court amends, and possibly even repeals, parts of that legislation.

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1 Adapting the title of the classic political satire 'Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb' (Stanley Kubrick (dir), Columbia Pictures (UK), 1964).

I Introduction

It is accepted by some, in both the American[2] and the Australian[3] federal systems, that judicial interpretation of legislation is a form of amendment of the legislation being so interpreted.[4] We might call this judicial activity a form of *sub silentio* amendment: amendment or repeal that occurs 'under silence; without notice being taken; without being expressly mentioned'.[5] Even if it is not full-blooded amendment of the type which a legislature effects, judicial interpretation nonetheless affects the operation of the statute in question. None of this is necessarily problematic; indeed, it is fully understood to be an accepted dimension of the relationship that exists between the legislative and judicial branches of government and the ongoing dialogical development of the common and statute law in a constitutional system of government.[6] That is, of course, until the concept of federalism enters as a variable in the development of both the common and statute law by way of interpretation (*sub silentio* amendment).[7] For then, it is possible that two judicial spheres — one belonging to the national or federal level of government, and others belonging to local, regional, or state/provincial levels of government — may seek to pronounce on the same matter. How do the courts of a federal system handle that issue?

In a previous article, I explored the power of Australian state parliaments to amend Torrens title legislation.[8] Provisions like s 6 of the *Real Property Act 1886* (SA) ('*RPA*') attempt to constrain that power; yet there are a number of complications that emerge as to how a parliament may confer paramountcy upon or 'entrench' that legislation through the imposition of 'manner and form' requirements. We at least

2 John F Manning, 'Inside Congress's Mind' (2015) 115(7) *Columbia Law Review* 1911.

3 Jeffrey Goldsworthy, 'Is Legislative Supremacy Under Threat? Statutory Interpretation, Legislative Intention, and Common Law Principles' (2016) 28 *Upholding the Australian Constitution* 36.

4 William J Aceves, 'Shadow Amendments' (2023) 60(1) *Harvard Journal on Legislation* 27.

5 Bryan A Garner (ed), *Black's Law Dictionary* (12th ed, 2024), 1656 '*sub silentio*'.

6 This has traditionally been associated with constitutional interpretation. See: Peter W Hogg and Allison A Bushell, 'The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)' (1997) 35(1) *Osgoode Hall Law Journal* 75; Peter W Hogg, Allison A Bushell Thornton and Wade K Wright, 'Charter Dialogue Revisited: Or "Much Ado About Metaphors"' (2007) 45(1) *Osgoode Hall Law Journal* 1. But it also applies to the development of common and statute law: Adam Pomerenke, 'Statute and Common Law' (Current Legal Issues Seminar Series, 17 August 2017); Jeremy Webber, 'Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)' (2003) 9(1) *Australian Journal of Human Rights* 135.

7 On the interaction of the common law and statute in a federal system generally, and Australia's specifically, see William Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 1–37, 71–113.

8 P T Babie, 'Entrenching Indefeasible Title Pursuant to the *Real Property Act 1886* (SA)' (2025) 32(2) *Australian Property Law Journal* 42.

know this much: within the structure of Australian federalism, whether the South Australian Parliament complies with s 6 or not, it has the express and exclusive constitutional power to enact, alter, and even to repeal the *RPA* and the indefeasibility it confers, and so it acts legitimately in exercising that power.[9]

Reaching that conclusion, however, involves judicial analysis.[10] And the intriguing part of the story is the role of the courts themselves in sorting out what these entrenching or 'manner and form' provisions might mean. In working that out, one must also account for the fact that courts, in interpreting those provisions, *sub silentio* amend that legislation. When it engages in the interpretation or construction of a statute for the purposes of clarifying its operation and application, a court amends, and possibly even repeals parts of that legislation. Often overlooked as a form of amendment, it takes place in plain sight.

Statutory construction is perhaps the most common function of judicial review. It is, in fact, an essential task. Statutes routinely contain language that is ambiguous and subject to multiple interpretations. As Marshall CJ observed, '[s]uch is the character of human language'.[11] Times also change, and statutory language may develop new meanings requiring clarification. What we might call 'shadow amendments' are, therefore, an inevitable outcome of statutory construction. They represent judicial interpretations that can broaden or narrow a statute's reach. These interpretations 'take on a canonical role' and are then construed by courts as if they appeared in the original text.[12]

This 'shadow' or, as I call it here, *sub silentio* judicial amendment, found in every area of law,[13] is, of course, a legitimate and justifiable judicial function. As William J Aceves writes:

> *A priori*, shadow amendments are not problematic. Indeed, they are a necessary feature of judicial review. As Holmes J recognised, 'judges do and must legislate'.

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9 Pursuant to s 107 of the *Constitution of Australia*. The state power to legislate with respect to land was acquired progressively, first, by the colony of New South Wales and, subsequently, by the other colonies as they were carved out of that first colony, and by the states which were the successors to those colonies at federation: Andrew G Lang, *Crown Land in New South Wales: The Principles and Practice Relating to the Disposal of and Dealings with Crown Land Pursuant to the Crown Lands Consolidation Act, 1913, Western Lands Act, 1968, Returned Soldiers Settlement Act 1916, War Service Land Settlement Act, 1914, Closer Settlement Acts & Related Legislation* (Butterworths, 1973) 15 [201]; Paul Babie, 'Rome in the Antipodes: *Emphyteusis* and the Australian Perpetual Lease' in Joe Sampson and Stelios Tofaris (eds), *Essays in Law and History for David Ibbetson: Querella* (Hart Publishing, 2024) 205–15, 206–7.

10 *South-Eastern Drainage Board (South Australia) v Savings Bank of South Australia* (1939) 62 CLR 603.

11 *McCulloch v Maryland*, 17 US 316, 414 (1819).

12 Aceves (n 4) 30 (citations omitted).

13 Ibid.

> In the realm of statutory construction, interpretation is legislation and, therefore, interpretation *is* law.[14]

These amendments become problematic, in Aceves' view, 'when they ignore the plain meaning of a statute or reject legislative intent'.[15] Another problem can emerge, though, as a consequence of federalism. And a strange twist of the Australian model of federalism exacerbates that problem.

The Australian federal model places one court, the High Court of Australia, in the paradoxical position of being the final arbiter of what a Torrens system in any one of the states may be, notwithstanding the fact that each state alone has the power to enact its own unique legislation. No less than a former Chief Justice of that Court has said this: 'since the establishment of the High Court as Australia's final appellate court, the common law, as declared by it, stands as one common law for the whole of Australia.'[16] By arrogating to itself the power to act as the final court of the common law, expounding the 'common law of Australia',[17] the High Court, in pronouncing on one piece of Torrens legislation — South Australia's, for instance — establishes a standard intended to apply to all Torrens legislation, notwithstanding the differences in the common law of property and the operation of Torrens systems among the individual states.

This article explores federal judicial *sub silentio* amendment of the *RPA* by the High Court. It contains four parts. Part II outlines the answers provided by the classical model of federalism in the United States, characterised by a restrained or limited form of what has come to be called judicial federalism. Part III argues that the Australian model of federalism employs what I call *aggressive* judicial federalism. Part IV argues further that aggressive judicial federalism is problematic, for reasons demonstrated by the High Court's 2020 decision in *Deguisa v Lynn*,[18] a seemingly innocuous case about the notification of restrictive covenants within the *RPA*. Part V concludes.

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14 Ibid 32 (emphasis in original), quoting *Southern Pacific Company v Jensen*, 244 US 205, 221 (1917).

15 Aceves (n 4) 32.

16 Robert French, 'Bending Words: The Fine Art of Interpretation' (Guest Lecture Series, University of Western Australia, Faculty of Law 20 March 2014), citing *Lipohar v The Queen* (1999) 200 CLR 485, 500; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 ('*Lange*').

17 Leslie Zines, 'The Vision and the Reality' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 3, 11.

18 (2020) 268 CLR 638 ('*Deguisa* (HCA)').

II Classical Federalism

The Americans invented the modern federal system of government. The classical model[19] upon which the American experiment rests, as Kennedy J wrote, represents an attempt to

> split the atom of sovereignty. … citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[20]

Federalism establishes two fundamental poles of governmental power. First, its separation, into three branches, the executive, legislative, and judicial, and, second, its division, between a general, national, central, or federal sphere, and local, regional, or state spheres. Within each of the latter two spheres of power, the national and the regional, power is separated between the three branches of governmental power.[21] What that has been taken to mean, on the classical American model, is that there will be no bleeding of power as between the two levels or spheres. Thus, the law, as developed by legislatures and courts, operates in water- or air-tight compartments,[22] the federal and the state, with no cross-boundary involvement.[23] Albeit in the Canadian context, Lord Atkin, in the Privy Council, famously wrote: 'While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure'.[24]

What this means in practice is that law over which the legislature or the courts have authority in one sphere is immune from interference from the legislature or courts

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19 I am grateful to my friend and colleague, Professor Arvind P Bhanu, of Amity University School of Law, Delhi, India, for a very helpful conversation which clarified my thinking on the concept of the classical model of federalism in the United States and India.

20 *US Term Limits, Inc v Thornton*, 514 US 779, 838 (Kennedy J) (1995). See also Cynthia L Cates, 'Splitting the Atom of Sovereignty: Term Limits, Inc's Conflicting Views of Popular Autonomy in a Federal Republic' (1996) 26(3) *Publius: The Journal of Federalism* 127.

21 Judith Resnik, 'What's Federalism For?' in Jack M Balkin and Reva B Siegal (eds), *The Constitution in 2020* (Oxford University Press, 2009) 269, 270.

22 See *A-G (Canada) v A-G (Ontario)* [1937] AC 326, 354 (Lord Atkin) ('*Canada v Ontario*'). See also Scott Bennett, 'The Politics of the Australian Federal System' (Research Brief, 1 December 2006).

23 The Supreme Court of the United States has been very clear on this: *Swift v Tyson*, 41 US (16 Pet) 1 (1842); *Erie Railroad Co v Tompkins*, 304 US 64 (1938). See also: Zachary B Pohlman, 'Stare Decisis and the Supreme Court(s): What States Can Learn from *Gamble*' (2020) 95(4) *Notre Dame Law Review* 1731; Thomas W Merrill, 'The Common Law Powers of Federal Courts' (1985) 52(1) *University of Chicago Law Review* 1.

24 *Canada v Ontario* (n 22) 684.

of the other. There may be instances of cooperation between governments to take account of interdependent realities,[25] and there may be examples of what has come to be known as 'judicial federalism' in the judicial sphere — areas of cooperation between the federal and state court systems.[26] But judicial cooperation is limited either to matters that clearly involve federal matters as found in the *Constitution*,[27] or to matters which clearly transcend state borders and only relate to the common law in matters that seem beyond the power of individual states to manage.[28] Thus, in matters relating to the common law — by which I mean both legislation and its interpretation by the courts, and that law which is still entirely judge-made[29] — the classical American model ensures the general policy of immunity of the federal and state spheres, resulting in 51 systems of common law, one that is federal, and 50 others for each of the states. And this is particularly so in the case of property law.[30]

Sitting atop each of the 51 systems of common law, then, is a final court of appeal for that system — the Supreme Court of the United States for the federal, and the final state court for each of the states.[31] For over 180 years, the position has been clear:[32] other than in federal matters — in the interests of providing a clear, consistent response to constitutional questions[33] — neither judicial sphere would presume to interfere with the common law or statutory interpretation of another sphere, whether it be federal in relation to one of the states, or one state with respect to another state or the federal system.[34] That classical model largely holds in Australia with the notable exception of one very significant court: Australia's final federal court, the High Court.

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25 Resnik (n 21) 271–2.

26 Ibid 276–7.

27 Sandra Day O'Connor, 'Our Judicial Federalism' (1984) 35(1) *Case Western Reserve Law Review* 1.

28 Resnik (n 21) 276–7; Tracy Hester, 'Climate Tort Federalism' (2018) 13(1) *Florida International University Law Review* 79.

29 See Pomerenke (n 6).

30 Abraham Bell and Gideon Parchomovsky, 'Of Property and Federalism' (2005) 115(1) *Yale Law Journal* 72.

31 Anthony J Bellia, 'State Courts and the Making of Federal Common Law' (2005) 153(3) *University of Pennsylvania Law Review* 825; Alton B Parker, 'The Common Law Jurisdiction of the United States Courts' (1907) 17(1) *Yale Law Journal* 1; John T Parry, 'Some Realism About Choice-of-Law Statutes and the Common Law: The Oregon Example' (2023) 27(1) *Lewis and Clark Law Review* 197. See also: Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97(1) *Harvard Law Review* 4, especially 40–4; Robert Cover, 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1981) 22(4) *William and Mary Law Review* 639.

32 For recent examples, see, e.g.: *Ford Motor Co v Montana Eighth Judicial District Court*, 592 US 351 (2021); *Snay v Burr*, 167 Ohio St 3d 123 (2021).

33 The classic federal apology for a national supreme court comes from Alexander Hamilton, '*Federalist* No 22', in Edward Bourne (ed), *The Federalist: A Commentary on the Constitution of the United States* (1947) 148.

34 *Swift v Tyson*, 41 US (16 Pet) 1 (1842); *Erie Railroad Co v Tompkins*, 304 US 64 (1938). See also Resnik (n 21) 270.

III Aggressive Judicial Federalism

The High Court of Australia takes judicial federalism far beyond the limited form of that concept found in the United States. We might call its understanding of its federal role as *aggressive* judicial federalism. Using this model of federalism, the High Court takes the position that it expounds not a federal common law limited to those matters in which the Commonwealth holds an express grant of power pursuant to the *Constitution*, but the Australian common law.

How this came to be is not clear; what is clear is that whatever happened, it happened quickly. Leslie Zines writes that within three years of the High Court coming into operation, its 'effect … on [s]tate court judgments was devastating.'[35] Perhaps the 'poorer quality' of state court judgments resulted in the 'scholarly standards applied by the High Court' giving rise to the High Court's expansive view of this power.[36] Still, it would be another six decades before the High Court justices saw their task not only as a national court of appeal, but of expounding a 'national common law'.[37] The reason the High Court justices waited lies not in their shrinking before the enormity of the task, but the fact that during that time the Privy Council remained the final court of appeal for Australia.[38] Thus, as Sir Owen Dixon wrote, the 'common law was one system which should receive uniform interpretation and application "not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law rules".'[39] This meant that the High Court followed not only Privy Council decisions, but also House of Lords and even English Court of Appeal precedent.[40] From 1963, however, the High Court shifted its position, and stopped following the House of Lords,[41] and between 1975 and 1986 all Commonwealth and state appeals to the Privy Council ceased.[42]

35 Zines (n 17) 11.

36 Ibid.

37 Ibid.

38 *Constitution of Australia* s 74. That avenue, of course, no longer exists: *Privy Council (Limitation of Appeals) Act 1968* (Cth) ('*Privy Council Limitation Act*'); *Privy Council (Appeals from the High Court) Act 1975* (Cth) ('*Privy Council HCA Act*'); *Kirmani v Captain Cook Cruises Pty Ltd [No. 2]; Ex parte A-G (Qld)* (1985) 159 CLR 461.

39 Zines (n 17) 11, citing Sir Owen Dixon, 'Jesting Pilate' in Severin Howard Zichy Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965), 198–9.

40 Ibid 11.

41 *Parker v The Queen* (1963) 111 CLR 610; *Skelton v Collins* (1966) 115 CLR 94; *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221; *Geelong Harbour Trust Commissioners v Gibbs Bright and Co* (1974) 129 CLR 576; *Viro v The Queen* (1978) 141 CLR 88; *Privy Council HCA Act* (n 38).

42 *Privy Council HCA Act* (n 38); *Privy Council Limitation Act* (n 38); *Australia Act 1986* (Cth); *Australia Act 1986* (UK). See Sonali Walpola, 'After the Australia Acts' (2021) 21(1) *Oxford University Commonwealth Law Journal* 31.

The power for the High Court to step into the shoes of the Privy Council with respect to the common law is found in s 73 of the *Australian Constitution*, which allows appeals to the High Court in any matter in which an appeal would have existed from a State Supreme Court to the Privy Council. Thus, as appeals to the Privy Council in matters of the common law were possible from such courts, so, too, were they possible to the High Court once Privy Council appeals ceased. As John Quick and Robert R Garran put it, the words of s 73 'make the High Court not merely a federal court of appeal, but a national court of appeal of general and unlimited jurisdiction'.[43] As such, the High Court finds itself atop the judicial pyramid of Australia, settling matters which, in the American classical federal model, would be left to final state appellate courts.

And the High Court, far from being timid about the use of this power, at least from 1996, emphatically expounds the common law of a national system, the common law of Australia.[44] In *Lange v Australian Broadcasting Corporation*, the Court wrote that 'there is one common law in Australia which is declared by this Court as the final court of appeal',[45] and in *Kable v Director of Public Prosecutions*, 'there is a common law of Australia as opposed to a common law of the states'.[46] Zines concludes that this means that 'the creation of the High Court as a general court of appeal has produced a body of law that does not belong to either of the usual federal categories of "Commonwealth" and "State" and is simply "Australian" or "national".'[47]

Of these developments, Zines concludes that 'the vision of the founders, and of Australian judges until the latter half of the twentieth century, of uniformity of common law would be impossible today even if it were regarded as desirable'.[48] Putting to one side its desirability, and accepting its existence, the question is whether it is useful, especially in relation to the Torrens system. And it matters because, in interpreting Torrens legislation for any jurisdiction and then purporting to make that a 'national' standard, the Court subtly amends the legislation of every Torrens jurisdiction. A national conclusion seems problematic for it forces every system into one box, notwithstanding subtle differences in the legislation itself and the practice that has grown up around it in that jurisdiction. The local court is better placed to understand those nuances and that practice, and to develop the law accordingly. At the very least, this matters enough that we ought to pay attention to it.

The High Court undoubtedly has the power to hear appeals of common law matters and statutory interpretation of state legislation pursuant to s 73 of the *Australian*

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43 John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, rev ed, 2015) 893, s 305.

44 *Lange* (n 16) 563; *Kable v DPP (NSW)* (1996) 189 CLR 51, 113 ('*Kable*').

45 *Lange* (n 16) 563.

46 *Kable* (n 44) 113.

47 Zines (n 17) 12.

48 Ibid 13.

Constitution. That does not, however, impose an obligation on that Court to do so. Indeed, the Court could have taken the same view of its position with respect to the states that the Privy Council took of its relationship to Australia: that the local courts know local conditions better than the central courts, and so ought to have the final word on the common law that operates and of statutory interpretation of legislation enacted there.[49] As an early commentator on the treatment of state courts by the High Court whimsically suggested:

> A standard sentence [should be placed] at the end of State judgments as follows:
>
> We are unanimously of the opinion that judgment ought to be entered for (say) the plaintiff, but to save the trouble and expense to parties of an appeal to the High Court we order judgment to be entered for the defendant.[50]

The High Court held then, and holds now, the power to hear such appeals. But there is no requirement or obligation that it exercise that power so as to expound, substantively, the common law of Australia. Nor is there an obligation to interpret legislation for one state in a way that affects the meaning of that legislation either for that state, or for other states the legislation of which is not under review. It might just as easily have used that power to state that the common law of the states ought to be developed by their own courts, according to local conditions, as did the Privy Council with respect to Australia itself. That may seem unusual to those schooled on Australia's aggressive judicial federalism, but it is entirely appropriate to those who know federalism in its classical form.

Any number of cases could be used to demonstrate the pitfalls of aggressive judicial federalism applied to Torrens legislation, and why we should pay attention to the harm it might do. The next part uses just one of those matters — one that has drawn a great deal of attention in South Australia: the *Deguisa v Lynn* saga.[51]

IV Why It Matters

While one Australian parliament may not cross the federal Rubicon by legislating for another state, or the Commonwealth, likewise, do so in relation to a power reserved to the states — including the power to enact Torrens legislation — the High Court, through its application of aggressive judicial federalism, can, with impunity. Thus, by interpreting one Torrens statute according to principles drawing upon all of

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49 See generally *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

50 Zines (n 17) 11, citing a correspondent in *The Morning Post*.

51 In-text references to *Deguisa v Lynn* or *Deguisa* refer generally to the litigation saga spanning four cases: *Lynn v Deguisa* [2017] SADC 78 ('*Deguisa (No 1)* (SADC)'); *Lynn v Deguisa (No 2)* [2018] SADC 84 ('*Deguisa (No 2)* (SADC)'); *Deguisa v Lynn* [2019] SASCFC 107 ('*Deguisa* (FCSC)'); *Deguisa* (HCA) (n 18). Where a particular court's approach is discussed, this will be made evident in-text using the short name of the case assigned in this footnote.

them, the High Court does through judicial interpretation what a parliament cannot, namely, legislate for another state or, indeed, legislate in a way not permitted by that state itself, as indicated by the existence of entrenching or manner and form requirements. Therefore, in an attempt to standardise the common law for Australia, the High Court entrenches law with respect to the Torrens system in ways that drafters of provisions like s 6 of the *RPA* undoubtedly would have found reprehensible, but were powerless to prevent.

Deguisa represents such an attempt to standardise the common law and statutory interpretation of Torrens legislation across all states in Australia. It is hardly classical federalism at work. Quite the contrary. It involved the protection of restrictive covenants and their notation on the Register pursuant to the *RPA*. The litigation called into play ss 69 and 128B (which, at the time of the litigation was s 128)[52] of the *RPA*:

> **69 — Title of registered proprietor indefeasible**
>
> The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible.
>
> **128B — Encumbrance of land**
>
> (1) If land is to be charged with, or made security for, the payment of an annuity, rent-charge or sum of money in favour of a person, an encumbrance in the appropriate form must be executed by the registered proprietor and the person.
>
> (2) This section only applies to land intended to be charged or made security under this Act by the registration of an encumbrance.

Deguisa obtained planning approval to subdivide land held in fee simple to build two townhouses. The land had once been part of a large parcel of land which was subdivided and sold in the 1960s pursuant to what Lynn claimed was a common building scheme. In its schedule of dealings, the certificate of title for the relevant lot referred to a memorandum of encumbrance purporting to be a restrictive covenant. This covenant was lodged for registration and recorded on a previously cancelled certificate of title when the lot was first sold in 1965. Among other things, the memorandum of encumbrance prohibited the erection of any building or buildings other than 'a dwellinghouse', and also prohibited the erection of 'multiple dwellings'. Neither the memorandum of encumbrance nor Deguisa's certificate of title identified the other lots intended to be benefited by the restrictive covenant in the memorandum of encumbrance. Lynn claimed that building two townhouses on Deguisa's lot infringed the restrictive covenants. The litigation history of the case carries significance.

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52 In 2016, the *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA), s 43, substituted s 128B for the original, and substantially similar, s 128.

A *District Court*

In the District Court, Judge Tilmouth accepted that a common building scheme constitutes a recognised means of creating a restrictive covenant and that such covenants are enforceable only in equity.[53] The primary issues were: (1) whether restrictive covenants were notified on the Register; and (2) whether a person dealing in land was required to make searches beyond the Register in order to ascertain restrictive covenants that may bind successors in title to the parties who created them.

In respect of the first issue, Judge Tilmouth cited extensive South Australian precedent[54] and secondary literature[55] to affirm the long-standing South Australian practice for the notation of a restrictive covenant as an encumbrance registrable as a rent charge pursuant to ss 128 and 128B of the *RPA*.[56] Judge Timouth noted that '[t]his court should not now overrule [earlier precedent], even if it was satisfied that the decision was wrong'.[57] Citing Debelle J in *Burke v Yurilla SA Pty Ltd* ('*Burke*'), Judge Tilmouth found that 'the practice has not only stood for at least 50 years, but has been acted upon, if not with the approval, at least without apparent disapproval by the Registrar-General'.[58]

This animated the second issue. Again, having reviewed the South Australian authorities,[59] Judge Tilmouth concluded that

> [t]he fact of the matter is that before purchase, the defendants were clearly on notice of the existence of an encumbrance over their land. Any reasonable and simple search in the Lands Title[s] Office reveals the existence of nearby subdivisions at the very least, even if more had to be done in order to precisely identify the benefitted properties. As noted earlier, the terms of the encumbrance itself are typical of the language used where subdivision is involved and therefore suggestive in itself, of little else than subdivision.

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53 *Deguisa (No 1)* (SADC) (n 51) [21]–[34], [43]–[65].

54 *Deguisa (No 2)* (SADC) (n 51) [8].

55 G A Jessup, *Forms and Practice of the Lands Titles Office of South Australia* (Lands Titles Office of South Australia, 1st ed, 1940) ('*Forms and Practice of Land Titles Office (1940)*'); G A Jessup, *Lands Titles Office Forms and Practice* (Law Book, 4th ed, 1963) ('*Forms and Practice of Land Titles Office (1963)*'); Don Mackintosh and R J White, Thomson Reuters, *Jessup's Lands Titles Office: Forms and Practice SA* (at Service 10 August 2024).

56 *Deguisa (No 1)* (SADC) (n 51) [21]–[34]; *Deguisa (No 2)* (SADC) (n 51) [6], citing *R J Elder Smith & Company Limited* [1936] SASR 209; *Blacks Ltd v Rix* [1962] SASR 161 ('*Blacks*'); *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227 ('*Clem*'); *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 ('*Burke*').

57 *Deguisa (No 1)* (SADC) (n 51) [33], quoting *Burke* (n 56) 396 (Debelle J) (which itself cited extensively from *Blacks* (n 56)).

58 *Deguisa (No 1)* (SADC) (n 51) [32], quoting *Burke* (n 56) 394.

59 *Deguisa (No 1)* (SADC) (n 51) [63]–[65], citing *Clem* (n 56); *Burke* (n 56); *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 ('*Netherby*').

> The position is, as it was held to be in *Burke v Yurilla SA Pty Ltd*, that a person dealing with a registered proprietor is deemed to have notice and will be bound by a restrictive covenant contained in a registered encumbrance endorsed on the Certificate of Title. This is so even when, as here, 'the endorsement conveys little more information than the fact that the encumbrance exists': *Burke v Yurilla*. In that event the defendants were in a position to 'identify the land which is entitled to the benefit of the covenant either from the encumbrance or from other related documents which can be discovered on a search of the Land Titles Office. Moreover as Debelle J emphasised:
>
> > … the paucity of information disclosed by the endorsement will make it necessary in any event to search the Register to ascertain the precise terms and effect of the encumbrance.[60]
>
> Moreover, it is impossible to suppose that a reasonably prudent conveyancer searching the Title on behalf of the defendants as prospective purchasers, would not make further inquiry to ascertain the exact nature of the encumbrance.[61]

Judge Tilmouth held in favour of Lynn; Deguisa appealed to the Full Court of the Supreme Court.

B *Full Court of the Supreme Court*

The Full Court of the Supreme Court agreed with Judge Tilmouth and dismissed the appeal. Justice Peek (with whom Hughes J agreed), wrote the majority judgment; Kourakis CJ dissented.

1 *Justice Peek*

Having reviewed the same South Australian authorities,[62] Peek J agreed with Judge Tilmouth that[63]

> [a] building scheme restrictive covenant[] will be protected under the Torrens System provided that it…is not merely a "covenant in gross" and that the land entitled to the benefit of the covenant must be capable of identification *in some way* from the registered document containing the covenant *or, at least, from other related documents which can be discovered by a search in the Land[s] Titles Office*.[64]

Based upon the authorities, Peek J concludes that the governing principle is

> [w]hat is "notified" to a prospective purchaser by the vendor's certificate of title is everything that would have come to his or her knowledge if a prudent conveyancer

60 *Burke* (n 56) 391 (Debelle J).

61 *Deguisa (No 1)* (SADC) (n 51) [65] (internal citations and footnotes omitted).

62 *Blacks* (n 56); *Clem* (n 56); *Burke* (n 56).

63 *Deguisa* (FCSC) (n 51).

64 Ibid [219] (emphasis in original) (citations omitted).

> had made such searches as ought reasonably to have been made by him or her as a result of what appears on that certificate of title.[65]

Justice Peek continues: 'if one inquires, "What searches of the Register ought reasonably be made by a prospective purchaser?" the applicable principle becomes'

> [a] prospective purchaser is required to make such searches of the Register as ought reasonably be made by a prudent conveyancer having regard to both what appears on the vendor's certificate of title and what comes to his or her knowledge during the course of such reasonable searches.[66]

And finally:

> in addressing the facts of a particular case (such as the present) one will inevitably ask the further and ultimate question: 'Precisely what searches of the Register ought reasonably have been made by the party here?' The process of answering that ultimate question to some extent corresponds to the undeniable tension between the opposing considerations of the traditional approach of the equitable jurisdiction and the ideals of the Torrens System.
>
> Clearly, the answer to any question concerning 'reasonableness of conduct' will very much be informed by matters of detail varying with the particular case. One important thing to bear in mind is that [it is] reasonable searches in the plural; and it is the fact that what searches are reasonably required to be performed will often depend on what, if anything, is found at the outset.[67]

Justice Peek endorsed the process used in South Australia for discovering a building scheme restrictive covenant from a search of the Register as one 'well known to conveyancers.'[68] Taking account of the facts in *Deguisa*, Peek J stated that

> appellants [are] required to inspect the encumbrance referred to on their CT and, on such inspection, [are] put on notice as to the likely existence of the common building scheme by the express memorial on the Memorandum of Encumbrance … referring to 'a common building scheme' together with the form of the encumbrance and the covenants.[69]

That is, in such circumstances, the prudent conveyancer is 'therefore obliged to undertake further reasonable searches of the Register.'[70]

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65 Ibid [29], citing *Burke* (n 56) 390–1 (citations omitted).

66 *Deguisa* (FCSC) (n 51) [253].

67 Ibid [254]–[255] (emphasis in original) (citations omitted).

68 Ibid [257].

69 Ibid [275].

70 Ibid.

For Peek J, the South Australian law with respect to both noting restrictive covenants and the practice for ascertaining its terms was clear.

2 *Chief Justice Kourakis*

Chief Justice Kourakis would have allowed the appeal, holding that under the *RPA*, a restrictive covenant exists only in equity and, as such, 'the interest…can only bind a purchaser for value who has, not only notice, but notice of a kind which is consistent with the indefeasibility of title conferred by the *RPA*.'[71] For that purpose, the Chief Justice approved *Burke*,[72] confirming that

> the device which has been adopted [pursuant to ss 128 and 128B] has been to register an encumbrance which included [a] restrictive [covenant]. [Such an] encumbrance charged the land with a nominal annual rent charge and then went on to include the restrictive covenants.[73]

But, Kourakis CJ continued, 'even if a restrictive covenant is mentioned in an encumbrance, the covenant itself is not a registered instrument'.[74] From this it followed that

> the only form of notice sufficient to bind a subsequent purchaser to a restrictive covenant entered into by a predecessor in title is notice arising from a registered dealing with the land. … The controversy on this appeal is whether notice of the land to which the benefit of the covenant accrues is confined to what is expressly identified on the face of the Certificate of Title of the encumbered land, or a registered instrument noted in it, or whether the benefited properties may be ascertained inferentially from a search of other Certificates of Title and the registered instrument memorialised on them.[75]

On the facts in *Deguisa*, 'the appellants [were] not bound by the restrictive covenant included in the encumbrance, because neither the memorial of the encumbrance, nor the registered instrument itself, identifies the land benefited by it.'[76] In other words, the Chief Justice approved the ss 128 and 128B practice, but disagreed as to the extent of the necessary searches which an interested party must make to ascertain the land benefited by a covenant so noted in the Register.

Thus, while dissenting from the disposition of the appeal, Kourakis CJ nonetheless joined the other three South Australian judicial officers who considered this case in accepting the long-established practice of registering restrictive covenants pursuant

71 Ibid [18].

72 *Burke* (n 56) 386 (Debelle J).

73 *Deguisa* (FCSC) (n 51) [19].

74 Ibid [21].

75 Ibid [24].

76 Ibid [3].

to ss 128 and 128B. The Chief Justice only departed from the others on the question of the breadth of searches necessary in order to ascertain the land benefitted by such a covenant. His Honour's view merely included additional reasonable searches of related documents which can be discovered on a search of the Register. The Chief Justice, in other words, and not unreasonably, placed greater emphasis on the mirror of the Register — that a full and accurate picture of the state of title should be ascertainable from the certificate of title alone. Meanwhile, the majority (again, not unreasonably) placed greater emphasis on the enforceability of the covenant. Deguisa appealed, this time to the High Court. In so doing, it is worth noting that the Full Court might have added the rider I quoted earlier: 'We are … of the opinion that judgment ought to be entered for (say) the plaintiff, but to save the trouble and expense to parties of an appeal to the High Court we order judgment to be entered for the defendant'.[77]

C *High Court of Australia*

The High Court unanimously allowed the appeal.[78] The Court agreed, uncontroversially, with all four South Australian judicial officers that

> advantage has been taken of s 128 of the [*RPA*], which provides for the execution in the appropriate form of an encumbrance where 'land is intended to be charged with, or made security for, the payment of … [a] sum of money, in favour of any person'. The courts have upheld the practice of annexing the restrictive covenant of a common building scheme to an encumbrance which secures the payment of a sum of money. This practice facilitates the registration of an instrument which gives notice on the certificate of title of the burden of the restrictive covenant and of the other lots in the scheme which benefit from it. It must be understood that the rent charge in an encumbrance creates an interest in land, but a restrictive covenant of itself does not.[79]

Thus, as in the South Australian courts, the principal issue was whether the appellants were notified of and bound by the restrictive covenants.[80] The Court held in the negative, because

> [t]he text of s 69 of the [*RPA*], the statutory context in which it is to be construed, and the authoritative judicial exposition of the purpose of the Act, combine to support the conclusion that a person dealing with a registered proprietor of land is not to be regarded as having been notified of an encumbrance or qualification upon the title of the registered proprietor that cannot be ascertained from a search of the certificate of title or from a registered instrument referred to in a memorial entered in the Register Book by the Registrar-General.[81]

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77 Zines (n 17) 11, citing a correspondent in *The Morning Post*.

78 *Deguisa* (HCA) (n 18).

79 Ibid 647 [14], citing *Blacks* (n 56) 163–4; *Burke* (n 56) 389–90; *Netherby* (n 59) 21–2 [71]–[72].

80 *Deguisa* (HCA) (n 18) 646 [8].

81 Ibid 646 [9], 647–8 [14]–[17].

The Court wrote that, 'as will be seen, the path to the resolution of the principal issue in the present case is significantly illuminated by the approach in [*Westfield Management Ltd v Perpetual Trustee Co Ltd* ('*Westfield*')].'[82] In analysing *Westfield*, the Court also referred to *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*[83] and to *Hutchinson v Lemon*.[84] True enough, these were all Torrens cases, but the first two arose on appeals from New South Wales, dealing with the New South Wales Torrens legislation,[85] and the last was a Queensland trial decision, decided on the basis of the relevant Queensland legislation.[86] The Court concluded:

> The approach of Peek J in the present case is inconsistent with the reasons of this Court in *Westfield*. Those reasons support the proposition that unless reference to an interest is endorsed on the certificate of title or incorporated by reference in a registered instrument notified on the certificate of title, the interest has not been notified on the certificate of title.[87]

And, applying *Westfield* to the *RPA*:

> A person who seeks to deal with the registered proprietor in reliance on the [s]tate's guarantee of the title of the registered proprietor disclosed by the certificate of title in the Register Book (or its electronic equivalent) is not to be put on inquiry as to anything beyond that which is so notified. A common building scheme can operate consistently with the scheme of the Act in relation to the enforceability of the benefit of a restrictive covenant only if those rights are notified on the certificate of title of the burdened land, or by express reference in a memorial on the certificate of title to other registered instruments which contain that information. Anything less is inconsistent with the natural and ordinary meaning of the text of s 69 and the purpose of the Act.[88]

The Court's conclusions may be helpful. They may even be consistent with Torrens policy concerning a system of title by registration. But whether those conclusions are helpful in understanding the *RPA* or even consistent with Torrens policy is not the point. The review of the litigation history of *Deguisa* reveals that all four of the South Australian judicial officers agreed as to the ss 128 and 128B practice for notification, and they did so in the light of local conditions and long-accepted practice — practice which, while not without its critics, had existed in South

82 Ibid 645 [4], citing *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 ('*Westfield*'). See also analysis of *Westfield* in *Deguisa* (HCA) (n 18) 661–3, [66]–[72].

83 (1971) 124 CLR 73.

84 [1983] 1 Qd R 369 (Connolly J).

85 *Real Property Act 1900* (NSW); *Conveyancing Act 1919* (NSW).

86 *Real Property Act 1861–1980* (Qld).

87 *Deguisa* (HCA) (n 18) 663 [71].

88 Ibid 668 [88].

Australia for at least 77 years.[89] And three of those judicial officers agreed as to the nature of the searches necessitated when an interested party faces the notification of a restrictive covenant according to that accepted ss 128 and 128B practice. The High Court disagreed; twice, it refuted the majority in the Full Court:

> The approach of Peek J in the present case is inconsistent with the reasons of this Court in *Westfield*. Those reasons support the proposition that unless reference to an interest is endorsed on the certificate of title or incorporated by reference in a registered instrument notified on the certificate of title, the interest has not been notified on the certificate of title.[90]

> In addition, it cannot be that, as seems to have been accepted by Peek J in acting upon the expert evidence to which he referred, the operation of s 69 of the Act depends upon whether the surname of the original vendor in a common building scheme is unusual. If generalised searches beyond that of the current certificate of title of a property were required, it would be difficult to draw a line as to when "prudent" searching might cease. This is the sort of complexity and uncertainty that the Act sought to eradicate. More importantly, the scheme of the Act would be reduced to incoherence if the operation of s 69 of the Act were to vary with the surname of the owner of land referred to in a certificate of title that is no longer a folio of the Register Book.[91]

But Peek J was not applying *Westfield* — indeed, he only referred to the case as being consistent with the South Australian authorities.[92] Chief Justice Kourakis, with whom the High Court agreed, did not even cite the case. And, most importantly, the Full Court was not interpreting New South Wales legislation (because, of course, it could not); instead, the Full Court was concerned with the *RPA* and the relevant South Australian authorities, which it thoroughly reviewed, and which were also decided in the light of South Australian conditions and long-accepted practice. Furthermore, even if Peek J were concerned with the New South Wales system (which properly he could not be) that legislation itself contained, in 2017, provision for the registration of restrictive covenants which would have swiftly dealt with the dispute in *Deguisa*.[93] The *RPA* had and has no equivalent to that New South Wales provision — that alone would be sufficient grounds for not applying the principles in *Westfield* to the facts of *Deguisa*.

And therein lies the problem with *sub silentio* amendment when utilised in conjunction with the High Court's aggressive judicial federalism: while the South

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89 Brian Hunter, 'Equity and the Torrens System' (1964) 2(2) *Adelaide Law Review* 208; Jessup, *Forms and Practice of Land Titles Office (1940)* (n 55); Jessup, *Forms and Practice of Land Titles Office (1963)* (n 55); Mackintosh and White (n 55). The practice can be traced at least, then, to 1940, and those references suggest it was already known then; it can therefore be assumed to be older than 77 years.

90 *Deguisa* (HCA) (n 18), 662–3 [71].

91 Ibid 667 [85].

92 *Deguisa* (FCSC) (n 51) [194], [206]–[209] (Peek J, Hughes J concurring).

93 *Conveyancing Act 1919* (NSW) s 88(3).

Australian courts, in accepting the long-standing practice, had certainly *sub silentio* amended the *RPA*, those courts did so in the light of local conditions, which they were better placed to understand than the High Court. The South Australian judges did so in the light of South Australian authorities and not interpretations of the Torrens legislation of other jurisdictions. The problem, then, is one created by the application of aggressive judicial federalism. The High Court amended the *RPA* by using non-South Australian legislation, to some degree uninformed about local South Australian conditions, and in a way that applies to every other Torrens jurisdiction in Australia. The point is not that *sub silentio* amendment is unjustifiable — it clearly is not, quite the contrary, it is absolutely necessary. The point is the identity of the court doing that amending within a federal system. The High Court, in exercising aggressive judicial federalism, is not amending in the light of local conditions and as a matter of the specific legislation from which a controversy arises. And that is why *sub silentio* amendment matters, and why we must be aware of it when it is exercised in conjunction with aggressive judicial federalism.

V Conclusion

In 1859, Sir Robert Torrens wrote to the Governor of the Colony of South Australia that 'the two most important measures of our colonial history have been … Constitutional Government and Reform of the Law of Real Property'.[94] This proved prescient in a way Torrens probably failed to foresee: that Torrens title and constitutional government would become bound up in the federal principle in a way that would potentially undermine the integrity of the Torrens system of which he was so proud. Judicial *sub silentio* amendment, when exercised in concert with aggressive judicial federalism bears the potential to violate the *RPA* in ways that its drafters sought to deny to the very Parliament that had enacted it.

My solution to this problem might surprise you. Rather than perpetuating the fragmentation inaugurated with the federal experiment in 1901, the answer is greater centralisation. Aggressive judicial federalism has, as we have seen, already attempted to standardise the meaning of Torrens title throughout Australia, notwithstanding the difficulties that creates for individual Torrens systems in each of the states and territories. Overcoming those difficulties demands standardisation on the legislative side, too. And that means looking to the potential of an Australian *Uniform Torrens Title Act*.[95] There is little doubt that achieving that objective may prove

94 Letter of R R Torrens to His Excellency Sir Richard Graves MacDonnell , Governor-in-Chief of Her Majesty's Province of South Australia in Robert R Torrens and Henry Gawler, *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties Dealing, Illustrated by Copies of the Books and Forms in Use in the Lands Titles Office, to which is added, the South Australian Real Property Act as Amended in the Sessions of 1858, with a Copious Index* (Register and Observer General Printing Offices, 1859) iv.

95 Peter Butt, 'A Uniform Torrens Title Code?' (1991) 65(6) *Australian Law Journal* 348; Law Council of Australia, *Uniformity of Property Laws & Procedures: Model Guidelines for a Harmonious System of Torrens Title* (Policy Guidelines, 23 June 2007).

almost impossible.[96] But rather than continue to allow the High Court to attempt to rationalise the differences through piecemeal interpretation of individual state and territory Torrens statutes as and when cases arise, legislative standardisation would allow the Court to continue to exercise aggressive judicial federalism and to expound the common law for the whole of Australia, but to do so while interpreting *one* statute for the whole of Australia.

My proposed solution would not obviate *sub silentio* judicial amendment, but it would militate against anomalous amendments as a result of attempts at standardising an approach to Torrens when using eight differing statutes. I might summarise my solution this way: R R Torrens or: how I learned to stop worrying and love the *Uniform Torrens Title Act*.

96 Tina Hunter, 'Uniform Torrens Title Legislation: Is There a Will and a Way?' (2010) 18(3) *Australian Property Law Journal* 201; Butt (n 95).

*John V Orth**

WHERE TORRENS FAILED

Abstract

The early days of the Torrens system in the United States looked promising. Its spread through the country was rapid — by the early 20th century, it had been adopted in almost half of America's states. Today, however, Torrens is all but obsolete in America. This article examines what went wrong. For one thing, a workable, if cumbersome, system of title assurance — relying on recorded deeds, warranties of title, and title insurance — already existed. For title holders, the process of petitioning for Torrens registration was unfamiliar, often expensive and protracted, and invited risk from adverse claimants. Pragmatic factors such as market preferences for title insurance, lawyerly skepticism born of unfamiliarity and potential loss of business, and a characteristic American distrust of government all helped to seal its fate. Ultimately, Torrens, for all its advantages, failed to displace established systems of title assurance.

I How it Started…

The benefits of Torrens registration are obvious. As a consequence of registration, the owner gets an indefeasible title subject only to such encumbrances as appear on the certificate of registration.[1] Once in the Torrens system, title can be conveyed only by filing with the registrar an instrument of transfer executed by the seller and the certificate of title. The claims of an adverse possessor cannot prevail against a registered title. So obvious are its benefits that Torrens spread rapidly from its South Australian origin in 1858 throughout the Commonwealth.[2] By the late 19th century, it reached the United States; over the following decades, almost half the American states adopted Torrens statutes.[3] But by the mid-twentieth century, it was

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1 For a summary of the origins and operation of the Torrens system, see generally Horst K Lucke, 'Ulrich Hubbe and the Torrens System' (2009) 30(2) *Adelaide Law Review* 215.

2 On Torrens' export to Canada and for references to studies of its spread elsewhere, see Greg Taylor, *Law of the Land: The Advent of the Torrens System in Canada* (University of Toronto Press, 2008).

3 Frederick B McCall, 'The Torrens System: After Thirty-Five Years' (1931) 10(4) *North Carolina Law Review* 329, 329–30.

apparent that Torrens was not catching on. State legislatures began repealing Torrens acts and closing registry offices, while some holders of Torrens titles voluntarily withdrew from the system.[4] By now, it is apparent that in America, Torrens failed.

The strange career of Torrens in America began in 1895, when the State of Illinois authorised its use in Cook County (the Chicago area).[5] As with any major legal innovation in America, there were at first constitutional questions. Determination of title to land is an exclusively judicial function under the (American) concept of separation of powers.[6] Consequently, Illinois' Torrens statute was rejected by the State Supreme Court as an attempt to confer judicial power on the registrar, an executive branch officer.[7] After the Illinois legislature rewrote the legislation, the Court acquiesced in its validity.[8] Next, Ohio's Torrens Act of 1896[9] was held unconstitutional, one reason being inadequate notice requirements.[10] Not until the State Constitution was amended in 1912 and a new Torrens Act adopted the following year was the system finally accepted in Ohio.[11] Massachusetts adopted its *Land Registration Act* in 1898,[12] which survived a constitutional challenge based on the guarantee of due process.[13]

Its constitutionality finally settled, Torrens legislation spread from state to state.[14] In 1916 the National Conference of Commissioners on Uniform State Laws — now known as the Uniform Law Commission — proposed a *Uniform Land Registration Act*.[15] So familiar was the system to the general public at that time that the

4 John L McCormack, 'Torrens and Recording: Land Title Assurance in the Computer Age' (1992) 18(1) *William Mitchell Law Review* 61, 73.

5 *An Act Concerning Land Titles*, 1895 Ill Laws 107.

6 *People v Chase*, 46 NE 454, 458 (Ill, 1896).

7 Ibid 459.

8 See *An Act Concerning Land Titles*, 1897 Ill Laws 139, upheld in: *People ex rel Deneen v Simon*, 52 NE 910 (Ill, 1898); *Eliason v Wilborn*, 281 US 457 (1930).

9 Act of 27 April 1896, Ohio Laws 220.

10 *State v Guibert*, 47 NE 551 (Ohio, 1897).

11 *Ohio Constitution* art II § 40; Act of 6 May 1913, Ohio Laws 914.

12 *Land Registration Act*, ch 562, 1898 Mass Acts 682.

13 *Tyler v Judges of Court of Registration*, 55 NE 812 (Mass, 1900).

14 California (1897), Oregon (1901), Minnesota (1901), Colorado (1903), Territory of Hawaii (1903), Washington (1907), New York (1908), North Carolina (1913), Mississippi (1914), Nebraska (1915), South Carolina (1916), Virginia (1916), Georgia (1917), North Dakota (1917), South Dakota (1917), Tennessee (1917), and Utah (1917). For citations, see: McCall (n 3) 329–30; Jean Kadooka Mardfin, 'Two Land Recording Systems' (Research Report No 7, Hawaii Legislative Reference Bureau, 1987).

15 The Commission proposes laws to be adopted without change by all states in order to create national uniformity. Few are adopted in all states; of those that are adopted, many include local modifications. See *Uniform Land Registration Act 1916*, adopted at the 26th Annual Meeting of the National Conference of Commissioners (Chicago, Illinois, 23–29 August 1916) 191, 9 ULA 217.

progressive novelist and Nobel laureate Sinclair Lewis could casually refer to it in his 1922 best-seller *Babbitt*: George Babbitt, a Midwestern real estate agent, attending a state meeting of realtors, reported 'with startled awe … that he had been appointed a member of The Committee on Torrens Titles'.[16]

But soon thereafter it was apparent that the spread of Torrens had stalled in the United States; adoptions ceased and in 1934 the *Uniform Act* was withdrawn as 'obsolete'.[17] A survey of the American experience with Torrens over the first 35 years concluded that — with exceptions in limited geographical areas or in special circumstances — few titles had been registered; in several jurisdictions the law 'appears to have been still-born'.[18] In 1933, Utah, one of the few states to have adopted the *Uniform Land Registration Act*, repealed it.[19] Over the following decades, almost half of the adopting states abandoned the system,[20] and in 1952 the multi-volume *American Law of Property* magisterially observed that '[t]he subject of registration of title is of too limited application to justify an extended review of the cases'.[21]

In 1991, Illinois, which had been the American pioneer, repealed its Torrens Act and closed the registry as of 1997;[22] New York prohibited new registrations at the same time.[23] In the 21st century, the move away from Torrens has accelerated. It appears that today only a few states still have the system, and some of them do not allow new registrations. Even in the states where it retains some vitality, the system is not widely used. In 2023, Torrens was abolished in Washington State and arrangements were made to move registered titles out of the system.[24] And in 2024, Massachusetts, which had been an early and enthusiastic adopter, passed a statute facilitating voluntary withdrawal from the Torrens system.[25]

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16 Sinclair Lewis, *Babbitt* (The Floating Press, 1922) ch 13.

17 See National Conference of Commissioners on Uniform State Laws, *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the 44th Annual Conference* (1934) 253–4. The Committee found that the *Uniform Act* had been adopted by only three states: Virginia, Utah, and Georgia (with modifications).

18 McCall (n 3) 343.

19 Revised Statutes of Utah, 1933 (Inland Print Co, 1933).

20 See McCormack (n 4) 73.

21 Rufford G Patton, 'Registration of Title' in James Casner (ed) *American Law of Property* (Little, Brown and Company, 1952) § 17.37, 637 n *.

22 *Torrens Repeal Law*, 765 Illinois Comp Stat § 40 (1992).

23 See William Stoebuck and Dale A Whitman, *The Law of Property* (West Academic, 3rd ed, 2000) 924.

24 *An Act Relating to Registration of Land Titles*, ch 66, 2022 Wash Sess Laws 440 (effective 1 July 2023). This, presumably, ends the protection against adverse possession, which could raise a constitutional question.

25 *An Act Relative to the Affordable Homes Act*, ch 150, 2024 Mass Acts. Withdrawing from the Torrens system and recording in the traditional system would create an apparent break in the chain of title, which could cause complications for later title searches.

II Why it Failed…

When Torrens was made available in America, owners of real property already had an established form of title assurance. Prior to the purchase of real estate, an attorney would normally have examined relevant deeds in the state's recording system.[26] Most conveyances were by warranty deed including covenants for title, providing a cause of action for damages against the grantor if title was not as warranted. Title insurance, first offered in 1876, was becoming available to grantees in many states, offering further protection of their investment.[27] After delivery of the deed, it was almost invariably recorded, giving some grantees protection of possession against holders of unrecorded instruments.[28] In addition, the operation of the doctrine of adverse possession provided the possibility of acquiring an original title, not one derived from prior grantors. In the 20th century, marketable title acts limited the necessary scope of the title search, providing further assurance.[29] Recently, computerisation of land records has made searches much easier.[30]

To secure the benefits of the Torrens system, a landowner had to petition to register the title.[31] Generally, the petition had to include a metes-and-bounds description of the land, a statement of how the land had been acquired, and the names and addresses of all interested parties, including adjacent landowners. Interested parties would be served with actual notice; others received notice by publication. An official examiner of titles would hold a hearing and report to the relevant court on the state of the title. If the examiner approved the title and no adverse claims were presented, the court would confirm the petitioner's title and enter a decree for its registration. Once registered, the title is free of all claims not noted on the certificate — usually with exceptions only for fraud or forgery. Any action challenging a registered title is barred unless filed within a relatively short period after registration. An assurance fund is normally available to indemnify any person who lost an interest in the land through fraud or negligence in the registry.

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26 Recording of deeds, also in America sometimes referred to as 'registration', documents only that a transaction took place; it does not prove title to land.

27 See Edward H Cushman, 'Torrens Titles and Title Insurance' (1937) 85(6) *University of Pennsylvania Law Review and American Law Register* 589, 607.

28 Recording statutes vary from state to state, but all invalidate prior unrecorded documents as against good faith purchasers who record first.

29 See Lewis M Simes, *The Improvement of Conveyancing by Legislation: A Treatise with Model Acts* (University of Michigan Law School, 1960) 6–16.

30 See, e.g., Patrick K Hetrick and James B McLaughlin, *Webster's Real Estate Law in North Carolina* (Michie, 6th ed, 2016) § 21.01, 21–3: '[a] paradigm shift in title examination has taken place and continues to evolve and improve because of the advent of user-friendly computer web pages and easily searchable data bases'.

31 For a general overview of the procedure for registering a title in a United States jurisdiction, see, e.g., John V Orth, 'Torrens Title in North Carolina: Maybe a Hundred Years is Long Enough' (2017) 39 *Campbell Law Review* 271, 277–9.

Registration meant the surrender of familiar safeguards in return for the benefits of Torrens registration, but petitioning for registration exposed the petitioning landowner to risk. As one property scholar observed in 1931:

> The owner of property, the title to which is in a state of quiescence and is reasonably well-established according to the public records, hesitates to extend a call to the world at large and to his neighbors (the adjoining owners) in particular to come forward and present any objections they may have to his ownership of the land.[32]

A prudent landowner might reasonably pause before petitioning for registration.

Only in certain cases was the risk worth taking. After the Great Fire of 1871, land titles in Chicago were in urgent need of clarification.[33] In Boston and Cape Cod, colonial records were in a state of confusion.[34] In North Carolina, timber companies holding large tracts of forest-covered swamp lands took the opportunity to establish definite boundary lines in difficult terrain; registration had the added benefit of eliminating the risk of loss to adverse possessors, difficult to prevent without periodic searches of the property.[35]

Supporters of Torrens have attributed its failure in America to sinister forces.[36] The title insurance industry, developing at about the same time as Torrens became available, had an obvious interest in maintaining the traditional system with its associated uncertainties concerning titles. One scholar has claimed that title insurers engaged in 'systematic sabotage of the American Torrens System'.[37]

Recent developments in the financial markets have incidentally favoured title insurance over registration. Mortgage-backed securities — pools of mortgages usually of varying maturities and quality — became popular with investors. Because the vast majority of titles in America are not registered, most mortgagees require title insurance, even of registered titles, in order to be able to more easily sell loans into the securities market. Furthermore, a federal tax lien is valid without indication on the certificate of title in the state registry.[38]

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32 McCall (n 3) 345.

33 Ibid 340.

34 Blair C Shick and Irving H Plotkin, *Torrens in the United States: A Legal and Economic History and Analysis of American Land Registration Systems* (Lexington Books, 1978) 54.

35 McCall (n 3) 337.

36 See, e.g., Martin Lobel, 'Two Perspectives on the Real Estate Title System: A Proposal for a Title Registration System for Realty' (1977) 11 *University of Richmond Law Review* 501.

37 Barry Goldner, 'The Torrens System of Title Registration: A New Proposal for Effective Implementation' (1982) 29(3) *UCLA Law Review* 661, 670.

38 *United States v Rasmuson*, 253 F 2d 944, 946 (8th Cir, 1958).

Lawyers were often unenthusiastic about Torrens. Traditional conveyancing and the associated need for title searching provided a regular source of income for many practitioners.[39] But even disinterested legal advisers might well caution against the risks of unsettling titles by petitioning for registration in ordinary situations. Further, in some states, the process of registration was time-consuming and expensive; subdividing large tracts for development was particularly complicated. In 1989 there was reported to be a two-year delay in the issuance of Torrens certificates in Cook County; a few years earlier an employee in the Chicago office had been convicted of taking payments to expedite registration.[40] Reviewing the situation, a scholar concluded that Torrens failed in Chicago because of 'incompetent, unsatisfactory administration'.[41] In addition, most lawyers today are simply unfamiliar with Torrens; it is generally not taught in American law schools.[42] In a bizarre inversion of history, one experienced property lawyer even described the Torrens system as 'archaic'.[43]

Finally, Torrens encountered the characteristic American distrust of government. On its inception in North Carolina in the early 19th century, it was reported that some landowners suspected that Torrens was 'a means whereby rich men could seize the lands of the poor'[44] — a perception that has not yet disappeared.[45] The recording system, which relies on private attorneys to inspect the record and report on the state of the title, is widely believed to be preferable to the Torrens system, which relies on public employees to make decisions about title.[46]

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39 See, e.g., *Empire Mfg Co v Spruill*, 86 SE 522, 522–3 (NC, 1915) (stating that the Torrens Law 'has not been looked on with favor by some [lawyers] who believe that the act will deprive them of fees for the investigation and making of abstracts of titles').

40 *United States v Gannon*, 684 F 2d 433 (7th Cir, 1981).

41 McCormack (n 4) 113.

42 An anecdote shared with the author by a former student illustrates that state officers, even in a state with a still vital Torrens system, are unfamiliar with it. It was reported that a state road had been built on registered land without notice of the condemnation appearing on the certificate of title. When a driver on the road was charged with driving while impaired, the charges were dismissed because the road was not technically a public highway!

43 Adam L Bailey, Letter to Editor (May/June 2016) 30(3) *Probate and Property* 1, 3.

44 McCall (n 3) 342–3.

45 See Orth (n 31) 282–6 (describing: *Adams Creek Associates v Davis*, 652 SE 2d 677 (NC Ct App, 2007): an appeal was dismissed, discretionary review denied; *Adams Creek Associates v Davis*, 662 SE 2d 901, 901–2 (NC, 2008); *Adams Creek Associates v Davis*, 746 SE 2d 1 (NC Ct App, 2013): a discretionary review was denied; *Adams Creek Associates v Davis*, 748 SE 2d 322, 322–3 (NC, 2013)).

46 The dispensing power in the law of will execution, another legal innovation from South Australia, has also had relatively few adoptions in America because of the disinterest of the legal profession and the distrust of officialdom. See John V Orth, 'Of Titles and Testaments: Reflections of an American Reader of the Adelaide Law Review' (2019) 40(1) *Adelaide Law Review* 155, 158–62, 164.

III Conclusion

It appears that the ultimate reason for the failure of Torrens in America is that it was offered as an alternative to an existing system that was workable, if cumbersome. While evolutionary theory prepares us to expect the survival of the fittest, Torrens — despite its obvious benefits — failed to drive out its competitors in this particular legal niche. In the struggle for existence, the only test of fitness is survival.

*Ben France-Hudson**

MR FRAZER VERSUS MR WALKER: WHO WOULD WIN NOW?

Abstract

Frazer v Walker may have established the primacy of immediate indefeasibility of title, but it is hard not to feel sorry for Mr Frazer, who because of his wife's 'irregularities' lost ownership of his farm to Mr Walker. The occasionally harsh operation of immediate indefeasibility has sat uneasily with many ever since. Recently, New Zealand has legislated for a judicial discretion to alter the land transfer register in cases of manifest injustice with the desire to provide a route for people in Mr Frazer's position to get their property back, unencumbered. This article considers what might have happened for Mr Frazer had these provisions existed at the time he brought his case. There are considerable ambiguities in the statutory drafting, and it is unclear how the statutory guidelines informing the exercise of the discretion will be applied. It seems very unlikely, however, that the courts would have exercised the discretion to remove the forged mortgage. There is a strong argument that Mr Walker is not within the jurisdiction of the court's discretion. Ultimately, the courts appear likely to take a conservative approach that upholds immediate indefeasibility wherever possible. Mr Walker is still likely to win his argument with Mr Frazer. However, this is likely to be very expensive for Mr Walker and our sympathies in relation to the case may become more balanced as a result. Whether this increased uncertainty is worth it remains to be seen, but it will make the policy choices underpinning our land transfer system even more explicit.

I Introduction

It is hard not to feel sorry for Mr Frazer. Busy working on his farm, he apparently did not know that his wife had arranged to borrow money from the Radomskis. He did not know that she had forged his signature on a subsequently registered mortgage. He did not know that she had failed to pay any of this loan back. He also did not know that Mr Walker had purchased the farm through a mortgagee sale from the Radomskis. It was not until a bailiff arrived at the farm with a warrant for

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possession that Mr Frazer had any inkling of a problem.[1] At this stage it is unlikely that he thought he would eventually lose his farm completely.

It is facts like these that make teaching indefeasibility of title hard. For most students, not yet inured to the bright line choices made by property law, the result in *Frazer v Walker*[2] feels unfair and, because of this, it is confusing. However, once aware of the fact that neither the Radomskis nor Mr Walker had any knowledge of Mrs Frazer's irregularities,[3] and had each acted in good faith, better students will begin to see the outlines of a policy choice and the reasons for it. Ultimately, they will come to understand that in *Frazer v Walker*, the Privy Council opted for 'transactional certainty' over 'individual justice'.[4] However, this choice might not ever sit comfortably with them, and it is unsurprising that the debates over whether indefeasibility should be 'immediate' or 'deferred' have continued,[5] notwithstanding that *Frazer v Walker* has apparently determined the issue.[6]

New Zealand has recently attempted to soften the sting of immediate indefeasibility, not by opting for deferred indefeasibility, but by legislating for a judicial discretion to alter the land transfer register in cases of manifest injustice.[7] This was driven by a desire to provide a route for people in Mr Frazer's position to get their property back, unencumbered. It is unclear, however, whether the legislation will operate in the way intended or help people in the same circumstances as Mr Frazer.[8] This is the result of considerable ambiguities in the statutory drafting. It is also unclear how the statutory guidelines informing the exercise of the discretion will be applied.

This article considers what might have happened for Mr Frazer had these provisions existed at the time he brought his case. It seems very unlikely that the courts would have exercised the discretion to remove the Radomskis' mortgage. There is a strong argument that Mr Walker is not within the jurisdiction of the court's discretion. Whether the court would have favoured Mr Frazer over Mr Walker is also uncertain.

Ultimately, it is likely that judges will take a conservative approach that upholds immediate indefeasibility wherever possible. Mr Walker is still likely to win his

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1 Rod Thomas, 'Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act' [2011] (4) *New Zealand Law Review* 715, 741 ('Reduced Torrens Protection').

2 [1967] 1 AC 569 ('*Frazer v Walker*').

3 Ibid 578.

4 Jayden Houghton, 'Immediate Indefeasibility with Transactional Uncertainty' [2018] (28) *New Zealand Universities Law Review* 261, 264; New Zealand Law Commission, *Review of the Land Transfer Act 1952* (Issues Paper No 10, October 2008) 39 [2.74] ('*Review of the Land Transfer Act 1952*').

5 *Review of the Land Transfer Act 1952* (n 4) ch 2.

6 *Frazer v Walker* (n 2) was adopted in Australia in *Breskvar v Wall* (1971) 126 CLR 376.

7 *Land Transfer Act 2017* (NZ) s 55(1) ('*Land Transfer Act*').

8 See, e.g., New Zealand Law Commission, *A New Land Transfer Act 1952* (Report No 116, June 2010) 14 [2.11] ('*A New Land Transfer Act 1952*').

argument with Mr Frazer. However, this is likely to be very expensive for Mr Walker and our sympathies in relation to the case may become more balanced as a result. Whether this increased uncertainty is worth it remains to be seen. It will, however, make the policy choices underpinning our land transfer system even more explicit. Perhaps students will now gain a deeper understanding of the tensions at the heart of property law and our ongoing attempts to reconcile them, or, of course, perhaps not.

II Alteration of the Register in Cases of Manifest Injustice

Led by New Zealand's Law Commission, there was an extensive process of law reform leading up to the enactment of the *Land Transfer Act 2017* (NZ) ('*Land Transfer Act*'). This Act replaced the *Land Transfer Act 1952* (NZ), under which *Frazer v Walker* was decided. Both Acts were continuations of Torrens legislation that has been present in New Zealand since 1870.[9] Of the many issues considered during this process, the role of indefeasibility of title under any new legislation was a key question.[10]

The Law Commission considered that, although indefeasibility of title in an absolute sense is something of a misnomer, it is central to the aims of the Torrens system and ought to be retained in some form. It explored several options for change.[11] In particular, it considered whether indefeasibility should remain 'immediate'[12] or change to 'deferred'.[13] Retaining the status quo on indefeasibility was seen as unattractive as there was a perception by some that it could be unfair for the previous registered owner,[14] who may have lost out to fraud.[15] Conversely, a shift to deferred indefeasibility was seen as unappealing. The concept has been applied inconsistently in different jurisdictions and suffers from complexity and a corresponding lack of clarity.[16]

Instead, the Law Commission recommended a compromise: immediate indefeasibility would be retained, but with limited judicial discretion to direct that the register be altered in favour of a previous owner where it would be manifestly unjust not to

9 *Land Transfer Act 1870* (NZ).

10 *A New Land Transfer Act 1952* (n 8) ch 2.

11 *Review of the Land Transfer Act 1952* (n 4) ch 2.

12 This gives a purchaser title immediately on registration, regardless of whether the transfer may have been void, or voidable, at common law and equity: see *A New Land Transfer Act 1952* (n 8) 11–13 [2.4]–[2.8].

13 Ibid 11–12 [2.4]. This allows the original owner to defeat the registered title of a subsequent purchaser or mortgagee through a forged or invalid instrument (at least until the property is subsequently transferred to a third party).

14 The terminology has also changed under the *Land Transfer Act* (n 7). Rather than registered 'proprietors', the Act now speaks of registered 'owners' (of the fee simple or of a mortgage or easement etc).

15 *A New Land Transfer Act* (n 8) 12 [2.6].

16 Ibid 13 [2.9].

rectify the situation.[17] The intention was to provide for improved security in favour of previously registered owners, 'who had no intention to transfer or mortgage their property, and to improve fairness where a transfer would be void or voidable but for the operation of the Act'.[18] The hope was also that it would reduce lengthy litigation in cases of fraud and avoid the temptation to push the boundaries of the in personam exception.[19]

Ultimately, this recommendation was adopted and set out in ss 54 and 55 of the *Land Transfer Act*. Section 54 states:

> **54 Application to court for order for alteration of register**
>
> (1) This section and sections 55 to 57 apply to a person (**person A**) who —
>
> (a) has been deprived of an estate or interest in land by the registration under a void or voidable instrument of another person (**person B**) as the owner of the estate or interest in the land; or
>
> (b) being the owner of an estate or interest in land, suffers loss or damage by the registration under a void or voidable instrument of another person (person B) as the owner of an estate or interest in the land.
>
> (2) **Person A** may apply to the court for an order under section 55.

Section 55 empowers the court to make an order cancelling the registration of person B only if it is satisfied that it would be manifestly unjust for person B to remain the registered owner of the estate or interest.[20] Manifest injustice is not defined, however, s 55 notes that 'the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice'.[21] The section also provides that no order can be made if compensation or damages would 'properly address' the injustice.[22]

Section 55 also provides a list of 11 non-exclusive guidelines the court may consider in making its decision.[23] Examples of factors to be taken into account include: (1) the circumstances of the acquisition by person B of the estate or interest; (2) the length

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17 Ibid 15.

18 Ibid 15 [2.14].

19 Ibid.

20 *Land Transfer Act* (n 7) s 55(1).

21 Ibid s 55(2).

22 Ibid s 55(3). It has been suggested that this section, viewed objectively, suggests that a court should explore every possibility before it gives the estate or interest back to person A. This might also support the analysis in this article. See Elizabeth Toomey, 'Knocking at the Compensation Door: What Might a Deprived Owner Expect Under the *Land Transfer Act 2017*' in David Grinlinton and Rod Thomas (eds), *Land Registration and Title Security in the Digital Age: New Horizons for Torrens* (Routledge, 2020) 142 ('Knocking at the Compensation Door').

23 *Land Transfer Act* (n 7) ss 55(4)(a)–(k).

of time person A and person B have owned or occupied the land; and (3) the conduct of person A and person B in relation to the acquisition of the estate or interest.

Section 56 is also relevant as it significantly limits the class of people who might be caught by the provisions. It states that the 'court must not make an order under section 55 if person B has transferred the estate or interest to a third person, that third person acting in good faith'.[24] Finally, any application must be made within six months of when person A ought to have, or did, become aware of the acquisition of the estate or interest by person B.[25]

Importantly, the provisions can only apply where person B has acted in good faith. The fraudster themselves cannot take advantage of the sections.[26] If the fraudster has become registered, then their title is automatically void under the 'fraud exception' to indefeasibility.[27] However, where person B has acted in good faith, they may be deprived of their registered interest in favour of person A by order of the court. For example, where a fraudster manages to transfer the fee simple title of person A into the name of an innocent person B, the court appears to have the power to alter the register and transfer the fee simple back into the name of person A. Likewise, if a fraudster manages to register a fraudulent mortgage against the title, person A could apply to have an otherwise innocent mortgagee (person B) removed from the title. In both circumstances, person B can now bring proceedings against the Crown for compensation.[28]

On the face of it, Mr Frazer might now have significantly more confidence that he would get the farm back from Mr Walker. Mr Frazer may well be able to convince a court that it would be manifestly unjust for Mr Walker to remain as the new registered owner of the property. Had the Radomskis still owned the mortgage over the property perhaps they could be removed too. However, as with all matters of statutory interpretation, the answer requires a close assessment of the wording of the legislation itself. The consequences of the fact that Mr Walker took title as a result of the Radomskis exercising their power of sale also need to be considered. This means that it is necessary to consider whether the Radomski mortgage would have been removed before considering the position of Mr Walker.

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24 Ibid s 56.

25 Ibid s 54(3).

26 Ibid s 56; Toomey, 'Knocking at the Compensation Door' (n 22) 142.

27 For the New Zealand position in relation to indefeasibility and fraud, see *Land Transfer Act* (n 7) ss 6, 51. Technically, the current fraudulently registered owner would hold the property on constructive trust for the true owner (person A) with orders accordingly. See *Waller v Davies* [2005] 3 NZLR 814 (HC).

28 *Land Transfer Act* (n 7) s 59. For a discussion of how compensation might work in these circumstances, see Toomey, 'Knocking at the Compensation Door' (n 22).

III The Radomskis

It appears that s 54(b) of the *Land Transfer Act* would cast the Radomskis in the role of 'person B'. Mr Frazer is likely to have suffered 'loss or damage' by the registration of the forged, and therefore 'void or voidable',[29] mortgage owned by the Radomskis. The question then becomes: would the court exercise its discretion to remove the mortgage from the register? Elizabeth Toomey argues that in exercising its jurisdiction the courts should — and are likely to — take a very conservative approach and set a very high threshold for any successful manifest injustice claim.[30]

In considering the guidelines provided in s 55(4), Toomey notes s 55(4)(e), which directs the court's attention to the 'nature of the estate or interest, for example, whether it is an estate in fee simple or a mortgage'.[31] Drawing on *Frazer v Walker* and *Nathan v Dollars and Sense Financing Ltd*,[32] she suggests that in interpreting the section it is critical that the courts do not end up creating inconsistencies or rankings between mortgagees and fee simple owners.[33] Indefeasibility applies equally to both species of interest in land and that to

> declare the interest of a registered mortgagee defeasible merely because the mortgage documents were void, through no fault of the mortgagee, would 'destroy the benefit of immediate indefeasibility and would be inconsistent with the Torren system'.[34]

It follows that the fact that the Radomskis owned a mortgage, and Mr Frazer previously owned the fee simple, should both be irrelevant factors, notwithstanding the statutory language. To find otherwise would create a two-tier system of registered interests and devalue the security afforded by a mortgage. This cannot have been the framer's intent.

Section 55(4)(j) provides that the court may consider 'the conduct of person A and person B in relation to the acquisition of the estate or interest'.[35] Toomey suggests that the preserved ability to defeat immediate indefeasibility by a claim in personam[36] under the *Land Transfer Act* must inform how this section is interpreted and the level of conduct necessary to reverse immediate indefeasibility. If person B has

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29 *Land Transfer Act* (n 7) s 54(1)(b). Precisely what makes an instrument 'void or voidable' has not yet been considered. However, it seems clear from first principles that a mortgage entered using a forged signature would meet the requirements. See Thomas (n 1) 729–40.

30 Elizabeth Toomey, 'Reverberations in the Torrens System: A New Land Transfer Act in New Zealand' (2019) 11(2) *Journal of Property Planning and Environmental Law* 87, 96 ('Reverberations in the Torrens System').

31 Ibid 96–7.

32 [2008] NZSC 20 ('*Nathan*').

33 Toomey, 'Reverberations in the Torrens System' (n 30) 97.

34 Ibid 87, citing *Nathan* (n 32) [138].

35 *Land Transfer Act* (n 7) s 55(4)(j).

36 Ibid s 51(5); Toomey, 'Reverberations in the Torrens System' (n 30) 99.

not acted in a way that would support a claim in personam, they also should not be taken to have behaved in a way that would support a finding of manifest injustice.

In particular, as an in personam claim requires unconscionability on the part of the registered owner,[37] in the absence of unconscionability, it might be very difficult to establish that person B's behaviour has resulted in manifest injustice.[38] Examining an Australian case involving a forged mortgage, *Vassos v State Bank of South Australia* ('*Vassos*'), Toomey notes that no unconscionability was found in circumstances where there had been 'no misrepresentation by the bank, no misuse of power, no improper attempt by the bank to rely on its legal right, and no knowledge of wrongdoing by the other party'.[39] Moreover, even if the bank could have undertaken enquiries and discovered the forgery, that did not, on its own, make the conduct unconscionable.[40] The Court made it clear that more than the mere fact of forgery is needed to establish a claim of unconscionability and with it a claim in personam.[41]

In a similar vein, s 55(2) makes it clear that something more than forgery or other dishonest conduct is needed to constitute manifest injustice.[42] It follows that it is very unlikely that the bank in *Vassos* would have met the test for manifest injustice. Applying this to the Radomskis results in a similar outcome. As Wilberforce LJ made clear they 'acted throughout in good faith and without any knowledge of the irregularity on the part of Mrs Frazer'.[43] If the bank in *Vassos* would be safe, it seems the Radomskis would be too. This would accord with the intention of the legislation which was to set a 'very high' threshold which would see the manifest injustice provisions apply 'only for exceptional cases'.[44]

This also raises a question about how the courts will apply the guidelines in s 55(4). There is a possibility that they may take inspiration from, or indeed return to, the common law approach to competing equitable interests.[45] The first step might be to

37 Toomey, 'Reverberations in the Torrens System' (n 30) 98, citing *Regal Castings v Lightbody* [2008] NZSC 177, [78].

38 Toomey, 'Reverberations in the Torrens System' (n 30) 98.

39 Ibid, citing *Vassos v State Bank of South Australia* [1993] 2 VR 336.

40 Toomey, 'Reverberations in the Torrens System' (n 30) 98.

41 Ibid.

42 *Land Transfer Act* (n 7) s 55(2). For the purpose of sub-s (1), the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice.

43 *Frazer v Walker* (n 2) 578.

44 Government Administration Committee, Parliament of New Zealand, *Land Transfer Bill* (Report No 118–2, 2016) 4 ('*Land Transfer Bill*').

45 See Neil Campbell and Rod Thomas, 'The New Fraud Test and Manifest Injustice' in David Grinlinton and Rod Thomas (eds), *Land Registration and Title Security in the Digital Age: New Horizons for Torrens* (Routledge, 2020) ('The New Fraud Test and Manifest Injustice'). Campbell and Thomas suggest that consideration of the law of competing equities will be required in any discussion of s 54(1)(b) in order to deal with the issue of whether an interest is 'void' or 'voidable', but for, the *Land Transfer Act* (n 7).

ask whether person B has behaved in a way that would indicate manifest injustice has been caused to person A by person B's conduct. If yes, then there is no need for a further inquiry. If no, it might be necessary to continue to consider the position of person A and assess whether the result to them amounts to manifest injustice, notwithstanding the lack of any disqualifying behaviour on the part of person B. In this context it would be necessary to balance any discussion of person B with those guidelines that look to the position of person A.[46]

Certainly, the fact that Mr Frazer and Mrs Frazer had purchased the land some four years before the mortgagee sale would be a relevant factor (although perhaps this is too short a period for a farm, as a piece of commercial property, to garner great sentimental value).[47] However, some pointed questions would also have to be asked of Mr Frazer as to precisely why he was unaware of the mortgage and subsequent mortgagee sale (perhaps he never checked the mail?).[48] Likewise, the fact that Mr Frazer was in 'actual occupation' of the land,[49] the nature of the improvements made to the land by him,[50] the use to which he had put the land[51] and any 'special characteristics' the land may have to him,[52] could all be relevant. Indeed, it is these factors that make one sorry for Mr Frazer and wonder if the outcome in *Frazer v Walker* could have been different.

However, all other things being equal and given the Radomskis acted in good faith throughout, if the threshold for manifest injustice is to be 'very high',[53] and given forgery without something more is not manifest injustice, Mr Frazer's connection to the land may, and perhaps should, not be enough to amount to manifest injustice. It would be a very stark policy choice for a court. Mr Frazer's connection to the land versus the Radomskis' otherwise immediately indefeasible mortgage. Perhaps the fact that Mr Frazer may well be entitled to compensation (with which he could discharge the mortgage) might also be persuasive.[54]

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46 *Land Transfer Act* (n 7) s 55(4). For example, the 'identity of the person in actual occupation of the land' (s 55(4)(d)), 'the length of time person A and person B have owned or occupied the land' (s 55(4)(f)) and 'the nature of any improvements made to the land by either person A or person B' (s 55(4)(i)).

47 The Frazers purchased the land in 1957, with the mortgagee sale to Mr Walker occurring in 1962. See Thomas (n 1) 739–40.

48 This is relevant to the interpretation of *Land Transfer Act* (n 7) s 55(4)(j): 'the conduct of person A and person B in relation to the acquisition of the estate or interest'.

49 Ibid s 55(4)(d).

50 Ibid s 55(4)(g).

51 Ibid s 55(4)(h).

52 Ibid s 55(4)(i).

53 *Land Transfer Bill* (n 44) 4.

54 *Land Transfer Act* (n 7) s 55(3). See also Toomey, 'Knocking at the Compensation Door' (n 22).

It is also important to note that there is an argument that if the Radomskis are person B then Mr Walker could, or perhaps should, be viewed as a third party and protected from any claim by Mr Fraser:

> **56 Court must not make order if estate or interest transferred to third person**
>
> The court must not make an order under section 55 if person B has transferred the estate or interest to a third person, that third person acting in good faith.

However, this is complicated by the fact that '*the* estate or interest' here might be read as only referring to the mortgage held by the Radomskis.[55] As Mr Walker did not take a transfer of the mortgage, he cannot be a third party. As a result, it is possible that rather than being safe as a bona fide purchaser under the mortgagee's power of sale, Mr Walker could be person B for the purpose of s 54(1)(a) of the *Land Transfer Act* and at risk of a claim from Mr Frazer.[56]

IV Mr Walker

By the time the bailiff knocked on Mr Frazer's door, the Radomski mortgage had been discharged. As a result, the person against whom Mr Frazer would have been most likely to bring a claim for manifest injustice would be Mr Walker. Mr Frazer would argue that he had 'been deprived of an estate or interest in land by the registration under a void or voidable instrument of [Mr Walker] as the owner of the estate' in the land.[57]

However, it is not clear that the Act provides jurisdiction to give relief following a mortgagee sale, where the mortgage has been procured by fraud.[58] The strongest argument is that Mr Walker would be caught as the transfer was enabled by a power of sale contained in a forged (and therefore voidable) mortgage.[59] The notion that this might be enough to bring Mr Walker within jurisdiction to be granted relief was first floated during the law reform process, where the Law Commission's draft Bill used the words deprivation '*through* the registration under a voidable instrument'.[60] This contrasted with the language in what is now s 54(1)(b) which used the words '*by* the registration under a void or voidable instrument'.[61] Rod Thomas suggested

55 *Land Transfer Act* (n 7) s 55(1) (emphasis added).

56 Ibid s 54(1)(a).

57 Ibid.

58 Katherine Sanders, 'Land Law' [2012] (3) *New Zealand Law Review* 545, 567, citing Thomas (n 1) 741–2.

59 Thomas (n 1) 744.

60 *A New Land Transfer Act 1952* (n 8) 216 (emphasis added).

61 *Land Transfer Act* (n 7) s 54(1)(b) (emphasis added).

that use of the word 'by' indicated a more conservative test and that there is a distinction between a registration effected *through* a void or voidable instrument (for example a registration effected *through* the use of a power of sale contained in a forged mortgage) and getting registered *by* a void or voidable instrument.[62] Mr Walker was not registered *by* the forged *mortgage* document, as he would have been if he had become registered as the result of (i.e. *by*) a forged *transfer* document.

This reasoning is compelling and given s 55(1)(a) as enacted uses the word 'by' it may well be that a conservative approach is justified.[63] It would strain a strict interpretation of the statutory language to say that Mr Walker was registered as owner of the land *by* a voidable instrument. He was not registered *by* the forged mortgage, rather he would have been registered by 'a transfer instrument executed by a mortgagee for the purpose of exercising a power of sale under a mortgage'.[64]

Moreover, if 'through' has a potentially longer reach, it follows that 'by' requires the void or voidable instrument to be the instrument of registration. This would allow for a more holistic view where there are a series of transactions, potentially ensuring that the effect of ss 54 and 55 are limited to those transactions that arise as a direct result of the fraudster's actions and not as a later and indirect consequence of them. This would limit the reach of the discretion and accord with the intention to keep immediate indefeasibility as the fundamental rule.

Further supporting an interpretation that would exclude Mr Walker from jurisdiction under s 54(1)(a) is the fact that at the time the Radomskis exercised their power of sale, the mortgage was indefeasible.[65] It could only become defeasible at the time a court made an order under s 55 altering the register.[66] Therefore, even if Mr Walker's interest was registered as a result of the power of sale of the mortgage being exercised, it could not be said that he acquired the property under a void or voidable mortgage. The mortgage itself was neither void nor voidable until such time as the Court made an order, which in *Frazer v Walker* was after the sale was undertaken and Mr Walker had been registered as the new owner.[67] Indeed, this was the very point that was settled in *Frazer v Walker* and reiterated in related cases.[68] Declaring a registered mortgage defeasible because of fraudulent documents would destroy the benefit of immediate indefeasibility.[69]

It has been suggested that the words 'void or voidable' can only have meaning in this context if the Torrens system is ignored completely because the purpose of

62 Thomas (n 1) 727–9.

63 *Land Transfer Act* (n 7) s 55(1)(a).

64 Ibid s 103(1).

65 *Frazer v Walker* (n 2) 586.

66 *Land Transfer Act* (n 7) s 55(1).

67 *Frazer v Walker* (n 2) 584.

68 See, e.g.: *Nathan* (n 32); *Regal Castings v Lightbody* [2008] NZSC 177.

69 Toomey, 'Reverberations in the Torrens System' (n 30) 97, citing *Nathan* (n 32) [138].

indefeasibility is to cure such defects.[70] To a certain extent this must be correct and it certainly seems to have been the intention that in most cases the legislation should be read as saying an instrument would be 'void or voidable *but for the Land Transfer Act*'.[71]

However, while this logic makes sense where 'person B' is registered as a result of a forged transfer instrument, it would be a serious challenge to the principle of immediate indefeasibility if it also applied to those who acquire an estate in the land through the exercise of a power of sale in a forged (but at that moment indefeasible) mortgage.

If, as suggested above, the courts would not remove the Radomskis' mortgage on the basis of manifest injustice, then the mortgage would always remain indefeasible. Remember the purpose of the provisions is to create a system of 'immediate indefeasibility with limited judication discretion'[72] which allows for *alteration* of the register *after* the requirements of ss 54 and 55 have been met *and* an order has been made.[73] 'Immediate indefeasibility remains the normal rule',[74] and as a result Mr Walker would have taken under a mortgage that was valid and indefeasible.

It is also difficult to see why Mr Walker should end up in a different position from a third party who received a transfer of the Radomski mortgage in good faith. That person would be safe by virtue of s 56. As noted by Jayden Houghton, if a bona fide owner of a registered mortgage (such as the Radomskis) transferred that mortgage to a new mortgagee, the new mortgagee would be protected by s 56.[75] Mr Walker should not be in a different position merely because he took ownership of the fee simple, rather than a transfer of the mortgage.

There is an argument that Mr Frazer would be in a better position if the interest transferred remained a mortgage because he could: (1) apply for compensation;[76] (2) use that to discharge the mortgage; and (3) retain his fee simple unencumbered. However, if third parties are not to be caught by the section there seems no distinction (beyond the benefit to Mr Frazer) between the transferee of the mortgage itself, or the transferee of the fee simple as a result of the operation of the same mortgage. If Mr Frazer's rights are to be balanced against Mr Walker's, it should be because of a clear statement that Mr Walker is within jurisdiction and not as the result of what appears to be poor statutory drafting. Section 56 would be better to read 'the court must not make an order … if person B has transferred *an* estate or interest *referred*

70 Campbell and Thomas (n 45) 120.

71 *A New Land Transfer Act 1952* (n 8) 15 [2.14] (emphasis added).

72 Ibid 14 [2.11]

73 The court is empowered to 'make an order cancelling the registration of person B': *Land Transfer Act* (n 7) s 55(1).

74 *A New Land Transfer Act 1952* (n 8) 14 [2.11].

75 Houghton (n 4) 277.

76 *Land Transfer Act* (n 7) s 58(2).

to in s 54 to a third person, that third person acting in good faith'. If this was the case, Mr Walker would certainly be safe.

In any event, it would be perverse if the courts were to undertake an inquiry in relation to Mr Walker that was separate from consideration of the position of the Radomskis. This suggests that if s 54(1)(a) of the *Land Transfer Act* is to apply in cases involving a mortgagee's power of sale, there will need to be a twofold enquiry: (1) to assess whether the mortgagee's interest could have been removed from the register for manifest injustice; and (2) to see whether it is manifestly unjust for the new registered owner to remain on the title. If the first inquiry results in a 'no', then the second must always be a 'no', because the mortgage would have always been indefeasible. If the first is a 'yes', there is still the problem that when the power of sale was exercised indefeasibility applied and it was, at that time, a valid exercise of the power of sale. Moreover, it would be necessary to conduct a completely new assessment of the guidelines to determine whether manifest injustice was still present given the different characteristics and behaviour of the new bona fide registered owner. This would become extremely convoluted and expensive for all involved.

Coupled with the question of whether Mr Walker is, or should be, a bona fide third party, this suggests that there is a lot of strength in an argument that s 54(1)(a) should not apply in the case of a new registered owner who has obtained title by way of a mortgagee sale.[77] Indeed, this situation appears to be outside what the Law Commission seemed primarily concerned with:

> In cases of void transfer instruments (particularly fraudulent transfers), immediate indefeasibility is not always fair on previously registered owners (especially those in occupation) who, as innocent victims of fraud for example, did not wish or intend to transfer their property.[78]

Mr Walker did not take title because of a void transfer instrument, but rather by the exercise of a mortgagee's power of sale. Moreover, and remembering that 'the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice',[79] and that Mr Walker was acting with no knowledge and in good faith, it seems unlikely that the courts would find manifest injustice in any event. Unless, of course, feeling sorry for Mr Frazer is sufficient to persuade a court to unpick the principle of immediate indefeasibility.

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77 Thomas (n 1) 742.

78 *A New Land Transfer Act 1952* (n 8) 12 [2.6].

79 *Land Transfer Act* (n 7) s 55(2).

V Judicial Reception

It is still early days for these provisions with only a few cases having considered them.[80] Somewhat oddly, the only case in which the provisions have been used to correct the register involved an error by the Registrar-General of Land, who had mistakenly registered a consolidation order which had the effect of registering new people as owners of the land.[81] For reasons that are unclear,[82] rather than using the Registrar's powers of correction conferred by the Act,[83] an application was instead made under ss 54 and 55. The Court had no problem concluding that while the consolidation order itself was not void, its registration was 'void or voidable' because it was a mistake.[84] This meant that it was capable of rectification by the Court.[85] The Court also quickly concluded, largely because of: (1) the applicant's decades-long connection with the land; and (2) the fact that the incorrectly registered owners did not oppose the application, that it would have been manifestly unjust not to correct the register.[86] The result in this case is unobjectionable, although the use of ss 54 and 55 in this context seems an uneasy fit. However, it does not give us much insight into how the sections will be interpreted in future.

In *Mau Whenua Inc v Shelly Bay Investments*,[87] there is a strong indication that the courts are likely to take the conservative line predicted by Toomey. The case involved an application that a caveat not lapse in the context of an allegation that a breach of trust by the trustee owners had resulted in the transfer of land to a new registered owner.[88] One of the caveator's arguments was that ss 54 to 57 of the *Land Transfer Act* were intended 'to provide a fairer and more flexible approach to

80 See also *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* (2023) 24 NZCPR 885, where the High Court noted any application under ss 54 and 55 would have been well out of time. In any event, there was no injustice in circumstances where the registered owner had taken title with knowledge of a conservation covenant. They had taken a chance that the covenant would either let them do what they wished, or could be changed to allow for this. It was not now unfair that they had discovered they could not. The Court of Appeal did not remark on this aspect of the case at first instance: *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* [2024] NZCA 616.

81 *Scott v Rawenata* [2022] NZHC 563 ('*Scott*').

82 Ostensibly this was because of a lack of clarity in the legislation regarding service requirements where the Registrar-General is going to use their powers. Perhaps the unsaid reason is that the Registrar-General will be as unwilling to use these powers under the 2017 Act as they were under the 1952 legislation. See the discussion in Houghton (n 4) 265.

83 *Land Transfer Act* (n 7) s 21(1).

84 *Scott* (n 81) [19].

85 Ibid.

86 Ibid [25].

87 [2019] NZHC 3222.

88 Ibid [18]–[19].

immediate indefeasibility than that which existed under the 1952 Act',[89] and that while indefeasibility remains important it was no longer as prescriptive as under the earlier legislation.[90] However, Associate Judge Johnston noted:

> Whilst I am prepared to accept that the exceptions to indefeasibility under the 2017 legislation are marginally wider than they were previously — essentially by reason of the introduction of ss 54 to 57 — I do not see force in the argument that this reflects a wholesale move to a flexible view of indefeasibility. The Law Commission emphasised that immediate indefeasibility would continue to be the bedrock of the legislation and apply in the vast majority of cases.[91]

His Honour stressed that the threshold for establishing manifest injustice is high, but more importantly, the common thread is the registration under a void or voidable instrument.[92] In the absence of such an instrument the provisions simply cannot apply.[93] It followed that an allegation of breach of trust leading to a change of ownership could never be caught by the sections.[94]

This reasoning is uncontroversial and does suggest that the courts will take a conservative approach to interpreting the legislation. They are unlikely to be swayed by arguments that the new provisions insert a degree of flexibility into the concept of immediate indefeasibility itself. Perhaps, it also suggests that in cases of ambiguity, such as whether the provisions apply to a registered owner who has taken by way of a mortgagee power of sale, the courts will err on the side of immediate indefeasibility. This would certainly introduce the least degree of transactional uncertainty possible into the conveyancing system.[95]

VI Overarching Practical Problems: A Reversal of Sympathy in Mr Walker's Favour?

Even if the courts take a conservative line, there remain problems, which might make us begin to feel sorry for Mr Walker, rather than Mr Frazer. Chief amongst these is the cost of all this litigation. Defending himself against Mr Frazer has now become considerably more complex, and as a result, more expensive. Mr Walker would need to establish that, notwithstanding Mrs Frazer's fraud: (1) he is either a third party for the purpose of s 56; (2) the Radomski mortgage would not have been removed from the title for manifest injustice; (3) even if the mortgage was removed it was nonetheless indefeasible at the time the power of sale was exercised;

89 Ibid [56].

90 Ibid [58]–[60].

91 Ibid [60].

92 Ibid [64], [67].

93 Ibid [64].

94 Ibid [69].

95 Houghton (n 4) 25.

or (4) even if the mortgage was not indefeasible, there is no manifest injustice in allowing him to keep his title.

If he wins, he might be able to look to Mr Frazer for costs, but he will probably remain significantly out of pocket. If he loses, he would, presumably, need to pay Mr Frazer's costs. He might find some consolation in the fact he would be able to bring further proceedings against the Crown for compensation.[96] This is, however, calculated on the value of the land,[97] and would not include the costs of defending his — but for the court's exercise of its discretion — indefeasible title. Nor would it include the costs of pursuing proceedings for compensation (with the risk of an adverse costs order again if he loses). As noted by Neil Campbell and Rod Thomas

> [i]t is arguable that a party may be better off losing title as result of a finding of manifest injustice, rather than retaining the title and having to bear all of that party's litigation costs, subject to any costs award made by the court.[98]

VII Conclusion

These provisions are supposed to provide an avenue for justice for those parties who find themselves caught out by immediate indefeasibility, however, they function to inject a high degree of uncertainty into what was a settled area of the law. Although the position of Mr Frazer remains unfortunate, it is hard not to feel sorry for Mr Walker who would now suffer considerable stress and uncertainty defending his otherwise indefeasible title. One of the reasons the Law Commission advocated the new approach was the fact that such cases were likely to be litigated in any event.[99] However, we do not know how many cases have been, or would have been, settled on the basis that they had similar facts to *Frazer v Walker*. Indeed, that is the purpose of the doctrine of precedent. It allows for an assessment of the result of a case based on what has been decided previously and for litigation risk to be balanced against perceived injustice. It seems inevitable that the lack of clarity in the operation of the new provisions will invite considerable litigation in the coming decades.

This means that students need to understand it, but teaching the principle of indefeasibility — and its exceptions — has become more challenging in New Zealand. It is now necessary to get over one's sympathy for Mr Frazer, to understand why the brightline rule adopted in *Frazer v Walker* is the starting point, while also considering when the new discretion might be exercised. It also requires accepting that we do not know how these provisions will operate, or if they will operate in the way the Law Commission intended.

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96 *Land Transfer Act* (n 7) s 59(2)(c).

97 Ibid ss 64–5.

98 Campbell and Thomas (n 45) 129.

99 *A New Land Transfer Act 1952* (n 8) 15 [2.16].

The benefit is that the policy choice underpinning this area of the law is much clearer. Perhaps students will feel sorry for both Mr Frazer and Mr Walker. In turn, this may allow for a discussion of the dichotomy of 'crystals and mud' that lies at the heart of many property law rules.[100] For every hard-edged rule there is a tendency to craft a soft-edged exception. Discussing why this might be so, and why it matters, is an important aspect of learning to think about property. Due to Mrs Frazer's behaviour, someone who did nothing wrong has to lose. Who should it be? Perhaps my view is clear, but what do you think?

100 Carol M Rose, 'Crystals and Mud in Property Law' (1988) 40(3) *Stanford Law Review* 577.

*Michelle Neumann**

DEFINING FRAUD IN THE TORRENS SYSTEM: A LEGISLATIVE APPROACH

Abstract

Fraud regarding real property presents a high risk of serious harm as owner-occupied dwellings are the largest household asset and mortgages comprise the largest component of household debt. Although fraud is one of the main exceptions to indefeasibility of title under the Torrens system, the interpretation of Torrens title fraud remains riddled with uncertainty and disagreement. This article consequently examines the meaning of Torrens title fraud developed by the courts, highlighting areas of uncertainty in the interpretation of fraud, and analyses how statutory definitions of fraud introduced in Canadian Torrens jurisdictions seek to clarify the meaning of fraud under Canada's Torrens system. It then considers the subsequent adoption of a statutory definition of fraud in New Zealand under the *Land Transfer Act 2017* (NZ), contrasting the approach to defining fraud in New Zealand with the approach adopted in the Canadian Torrens jurisdictions.

I Introduction

Sir Robert Torrens first introduced the Torrens system in South Australia in 1858,[1] thereby aiming 'to save persons dealing with registered proprietors from the trouble and expense of going behind the register'.[2] The Torrens system has since been adopted in numerous countries across the Commonwealth, including Australia,[3] Canada,[4] and New Zealand.[5] However, the meaning of fraud under the

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1 See Albert Gillissen, 'Sir Robert Torrens and the Torrens System of Registration' (1974) 26(2) *Australian Surveyor* 142.

2 *Gibbs v Messer* [1891] AC 248, 254.

3 See: *Land Title Act 1994* (Qld); *Land Title Act 2000* (NT); *Land Titles Act 1925* (ACT); *Land Titles Act 1980* (Tas); *Real Property Act 1886* (SA); *Real Property Act 1900* (NSW); *Transfer of Land Act 1893* (WA); *Transfer of Land Act 1958* (Vic).

4 See Greg Taylor, *Law of the Land: The Advent of the Torrens System in Canada* (University of Toronto Press, 2008).

5 See New Zealand Law Commission, *Review of the Land Transfer Act 1952: In Conjunction with Land Information New Zealand* (Issues Paper No 10, October 2008) 12–15 ('*Review of the Land Transfer Act 1952*').

Torrens system remains riddled with areas of uncertainty and disagreement. This is despite fraud constituting one of the principal exceptions to indefeasibility of title, revered as one of 'the twin pillars that support the house of Torrens'.[6] The meaning of fraud has ultimately 'perplexed the courts … possibly more than any other question relating to Torrens system land title legislation'.[7]

As observed by the New Zealand Law Commission, the 'most difficult and unclear features of fraud' under the Torrens system are: (1) the meaning of dishonesty;[8] (2) what more than 'mere knowledge' of an unregistered interest is required;[9] and (3) whether supervening fraud constitutes fraud.[10] This ambiguity in the meaning of fraud is concerning given the high likelihood that serious harm will ensue when fraud regarding real property is perpetrated — a practice that is particularly prevalent in the realm of financial elder abuse.[11] There is a high likelihood of serious harm since, in both Canada and Australia, owner-occupied dwellings are usually a household's largest asset,[12] whilst mortgages comprise the largest component of household debt.[13] Canada has the 'highest level of household debt to disposable income' across the G7 countries,[14] with 74% of that debt consisting of mortgages.[15]

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6 Lynden Griggs, 'Torrens Title in a Digital World' (2001) 8(3) *Murdoch University Electronic Journal of Law* 1, 8.

7 British Columbia Law Institute, *Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests* (Report No 58, January 2011) 15 ('*Report on Section 29(2)*').

8 *Review of the Land Transfer Act 1952* (n 5) 50.

9 Ibid 50.

10 Ibid 49.

11 See: Wendy Lacey et al*, Prevalence of Elder Abuse in South Australia: Final Report: Current Data Collection Practices of Agencies* (Report, February 2017); Australian Institute of Family Studies*, Elder Abuse in Australia: Financial Abuse* (Research Summary, August 2022); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, May 2017); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016).

12 See: Australian Bureau of Statistics, *Household Income and Wealth, Australia* (Catalogue No 6523.0, 28 April 2022) ('*Household Income and Wealth*'); 'National Housing Day: A Look at Homeowners and Renters', *Statistics Canada* (Web Page, 22 November 2022) <https://www.statcan.gc.ca/o1/en/plus/2357-national-housing-day-look-homeowners-and-renters>.

13 See *Household Income and Wealth* (n 12).

14 Statistics Canada, *Research to Insights: Disparities in Wealth and Debt Among Canadian Households* (Catalogue No 11-631-X, 28 February 2024) <https://www150.statcan.gc.ca/n1/pub/11-631-x/11-631-x2024002-eng.htm>.

15 'Mortgages Account for Nearly Three Quarters of Canadian Debt as Consumers Hold Out for Reduced Interest Rate Relief', *TransUnion* (Web Page, 27 August 2024) <https://newsroom.transunion.ca/mortgages-account-for-nearly-three-quarters-of-canadian-debt-as-consumers-hold-out-for-reduced-interest-rate-relief/>.

Over time, the Torrens system has become the dominant system of land title registration in Canada, being utilised in all three federal territories and in seven of the 10 Canadian provinces.[16] Striving to provide greater certainty in the meaning of fraud under the Torrens system, the Canadian Joint Land Titles Committee proposed the adoption of a statutory definition of fraud.[17] The provinces of Nova Scotia,[18] Ontario,[19] and Saskatchewan[20] subsequently adopted statutory definitions. Furthermore, New Zealand adopted a statutory definition of fraud in 2017.[21]

This article considers how the statutory definitions introduced in Nova Scotia, Ontario, and Saskatchewan have sought to clarify the meaning of Torrens title fraud. Part II examines the meaning of Torrens title fraud at common law, highlighting areas of uncertainty in the interpretation of fraud. Part III analyses the statutory definitions of fraud adopted in Torrens jurisdictions in Canada and the consequent scope of Torrens fraud. Part IV examines the subsequent adoption of a statutory definition of fraud in New Zealand and contrasts it with the statutory definitions of fraud found in Canada. The article concludes that the legislative approach to defining fraud under the Torrens system presents an opportunity to clarify areas of uncertainty that have emerged in the meaning of fraud since the introduction of the Torrens system over 160 years ago.

II Fraud

A current registered proprietor or their agent, acting in the actual or apparent authority of the registered proprietor,[22] may perpetrate fraud against 'the prior registered proprietor or the holder of a prior unregistered interest'.[23] Fraud against the holder of a prior unregistered interest is, however, more common.[24] In the seminal case of

16 Greg Taylor, 'The Torrens System in Nova Scotia and New Brunswick' (2009) 16(3) *Australian Property Law Journal* 175, 175–6. The Torrens system has been adopted in the Canadian provinces of Ontario, Nova Scotia, New Brunswick, British Columbia, Saskatchewan, Manitoba, and Alberta.

17 Joint Land Titles Committee, 'Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada' (Report, July 1990) 49 ('Renovating the Foundation').

18 *Land Registration Act*, SNS 2001, c 6, s 4.

19 *Land Titles Act*, RSO 1990, c 1, s 1.

20 *Land Titles Act*, SS 2000, c 5.1, s 2(1)(p.1)–(p.2).

21 *Land Transfer Act 2017* (NZ) s 6.

22 *Assets Co v Mere Roihi* [1905] AC 176, 210 ('*Roihi*').

23 Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Lawbook, 7th ed, 2020) 231. See, e.g., *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 ('*Loke Yew*'), where the Privy Council held that the appellant company's agent had deliberately perpetrated fraud by representing that there was no intention to use the land until the appellant company could do so honestly by acquiring the respondent's subgrant by purchase.

24 Douglas Whalan, *The Torrens System in Australia* (Lawbook, 1982) 312.

Assets Co Ltd v Mere Roihi, the Privy Council described the meaning of fraud under the Torrens system as follows:

> by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, … must be brought home to the person whose registered title is impeached or to his agents.[25]

The concept of fraud under the Torrens system is therefore narrower than constructive or equitable fraud.[26] However, a broader view of Torrens title fraud subsequently emerged in *Bahr v Nicolay (No 2)*,[27] where Mason CJ and Dawson J explained that the Privy Council's observations in *Assets Co Ltd v Mere Roihi* 'do not mean all species of equitable fraud stand outside the statutory concept of fraud'.[28]

Ultimately, each case involving allegations of fraud must 'depend upon its own circumstances'.[29] Justice Blanchard, writing extra-curially, suggested that the assessment of whether a person acted fraudulently could be approached by answering the following questions:

(a) Has the vendor acted with dishonest intent, ie intending to cheat the unregistered party?
(b) If so, did the purchaser have actual knowledge of this when contracting to buy the land?
(c) Did the purchaser understand at the time of contracting that the vendor was acting in a way which would defeat the unregistered interest if registration of the purchaser's transfer occurred?
(d) If the purchaser did so understand, was the purchaser intending to take advantage of the vendor's conduct?[30]

This Part discusses paradoxes and areas of uncertainty that have emerged in the meaning of Torrens title fraud developed by the courts. It respectively examines in Part II(A) what more than 'mere knowledge' of an unregistered interest is required; in Part II(B) the meaning of dishonesty; and in Part II(C) whether supervening fraud constitutes fraud under the Torrens system.

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25 *Roihi* (n 22) 210.

26 For a discussion of the meaning of equitable fraud, see *Hart v O'Connor* [1985] AC 1000, 1024.

27 (1988) 164 CLR 604 ('*Bahr v Nicolay (No 2)*').

28 Ibid 606 (Mason CJ and Dawson J).

29 *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1926] AC 101, 106–7 ('*Waimiha Privy Council*').

30 Peter Blanchard, 'Indefeasibility under the Torrens System in New Zealand' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (LexisNexis, 2003) 29, 45.

A *Knowledge*

The Torrens statutes generally provide that mere knowledge of an unregistered interest or estate is not itself imputed as fraud,[31] thereby abolishing the equitable doctrine of notice. Fraud consequently replaces 'notice as the factor that will cause an earlier equitable estate or interest to be binding on another person later acquiring the legal estate or interest'.[32] One of the essential elements of fraud is knowledge. In *Assets Co Ltd v Mere Roihi*, the Privy Council observed:

> Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.[33]

However, a divergence has emerged regarding 'what extra factor must be present beyond mere knowledge' so as to render a registered proprietor's conduct fraudulent.[34] In Australia, the provisions abolishing the doctrine of notice have been strictly applied.[35] In *Mills v Stockman*, Kitto J observed that 'merely to take a transfer with notice or even actual knowledge that its registration will defeat an unregistered interest is not fraud'.[36] Rather, there must be personal dishonesty.[37] A strict application of the provision has likewise emerged in the province of Saskatchewan.[38]

In contrast, in New Zealand, findings of fraud have been made in circumstances where 'no actual dishonesty exists and unregistered third party interests are known

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31 See, e.g.: *Real Property Act 1900* (NSW) s 43; *Land Titles Act 1980* (Tas) s 41; *Transfer of Land Act 1958* (Vic) s 43; *Transfer of Land Act 1893* (WA) s 134.

32 D W McMorland, 'Notice, Knowledge and Fraud' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (LexisNexis, 2003) 67, 83.

33 *Roihi* (n 22) 210.

34 Blanchard (n 30) 42.

35 R P Thomas, 'Land Transfer Fraud and Unregistered Interests' [1994] (2) *New Zealand Recent Law Review* 218, 225. See, e.g.: *Wicks v Bennett* (1921) 30 CLR 80; *James A Munro Ltd v Stuart* (1924) 41 SR (NSW) 203.

36 (1967) 116 CLR 61, 78 (Kitto J).

37 See: *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 ('*Pyramid Building Society*'); *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133; *Grgic v ANZ Banking Group* (1994) 33 NSWLR 202.

38 See: *Pfeifer v Pfeifer* [1950] 2 WWR 1227; *Canadian Superior Oil v Cugnet* (1954) 12 WWR (NS) 174; *T M Ball Lumber Co v Zirtz* (1960) 24 DLR (2d) 284; *Bensette v Reece* [1969] 70 WWR 705; *Anglican Synod of the Diocese of British Columbia v Tapaneim* [1990] BCJ 1164 (SC) (QL).

to exist before registration is completed'.[39] This approach emerged through the application of Salmond J's view in *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* that

> [t]he true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them.[40]

Justice Salmond's test has become 'an accepted facet of fraud as applied in New Zealand',[41] despite vigorous extra-curial critique of the approach.[42] Similar approaches to that in New Zealand emerged in the provinces of Alberta, British Columbia, Manitoba, and Ontario,[43] although this 'arguably undermines the intent' of provisions abolishing the doctrine of notice.[44] Nonetheless, the thought likely underlying this approach is encapsulated by Richmond J's observation that

> [i]n many instances the rule of equity that notice is fraud, must be recognized as consentaneous with the principles of common morality; for it may be an act of downright dishonesty knowingly to accept from the registered owner a transfer of property which he has no right to dispose of.[45]

Ultimately, the Canadian Joint Land Titles Committee expressed the view that this issue requires clarification. In particular, the Committee recognised that it 'is not, however, easy to determine what, in addition to mere knowledge of the existence of an unrecorded interest, will deprive a purchaser of the protection of' the Torrens

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39 Rod Thomas, 'Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act' [2011] (4) *New Zealand Law Review* 715, 721 ('Reduced Torrens Protection').

40 [1923] NZLR 1137, 1173 (Salmond J) ('*Waimiha New Zealand Court of Appeal*').

41 McMorland (n 32) 86.

42 See, e.g.: Sir Anthony Mason, 'Indefeasibility — Logic or Legend?' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (LexisNexis, 2003) 3, 9; Blanchard (n 30) 44.

43 G J Davies, 'Equity, Notice and Fraud in the Torrens System' (1972) 10(1) *Alberta Law Review* 106, 113–16; Douglas C Harris and May Au, 'Title Registration and the Abolition of Notice in British Columbia' (2014) 47(2) *UBC Law Review* 535, 546–7. See: *Stephens v Bannan* (1913) 5 WWR 201; *Beaver Lumber Co Ltd v Pritchard* [1933] 3 WWR 35; *Hudson's Bay Co v Kearns and Rowling* (1896) 4 BCR 536; *Greveling v Greveling* [1950] 1 WWR 574; *United Trust v Dominion Stores* [1977] 2 SCR 915.

44 *Report on Section 29(2)* (n 7) 25.

45 *National Bank v National Mortgage and Agency Co* (1885) 3 NZLR (SC) 257, 263–4 (Richmond J); Davies (n 43) 117.

statutes.[46] The New Zealand Law Commission, in its review of the meaning of land transfer fraud, reached the same conclusion.[47]

B *Dishonesty*

Proof of dishonesty is essential in order to successfully establish that fraud was perpetrated by the registered proprietor or their agent.[48] In *Anderson v Anderson*, Hallen J reviewed the leading cases on statutory fraud,[49] concluding that 'the critical elements of statutory fraud are dishonesty, moral turpitude, a want of probity, and a wilful and conscious seeking to defeat or disregard another's rights'.[50] As remarked by Buckmaster LJ, that an act is dishonest 'must not be assumed solely by knowledge of an unregistered interest'.[51]

However, the 'dividing line' between dishonesty and a person's knowledge of a prior unregistered interest is in fact 'difficult to draw'.[52] The 'notion of dishonesty' is consequently 'more difficult to define with precision … than expected'.[53] As observed by D W McMorland, there is 'a paradox in our concept of fraud' when a purchaser has notice of an equitable interest in that

> [w]hen a purchaser intends to take free of the interest, the purchaser is potentially fraudulent and bound by it; but when the purchaser, not having expressly undertaken to the holder of the equitable interest to be bound by it, nevertheless subjectively intends to recognise the interest, the purchaser is not fraudulent and not bound by it.[54]

Whether dishonesty may be inferred from the circumstances of a particular case is difficult to discern, and ultimately 'different Judges will have different views' on the subject.[55] This results in unpredictability regarding whether or not a court will regard certain conduct as dishonest.

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46 Renovating the Foundation (n 17) 35.

47 See *Review of the Land Transfer Act 1952* (n 5) 50.

48 *Waimiha Privy Council* (n 29) 106 (Buckmaster LJ); *Pyramid Building Society* (n 37) 193 (Hayne JA, Brooking and Tadgell JJA agreeing).

49 [2016] NSWSC 1204, [368]–[370] (Hallen J) ('*Anderson*'), referring to *Bahr v Nicolay (No 2)* (n 27), *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, *Waimiha Privy Council* (n 29).

50 *Anderson* (n 49) [371] (Hallen J).

51 *Waimiha Privy Council* (n 29) 106–7 (Buckmaster LJ).

52 Moore, Grattan and Griggs (n 23) 233.

53 *Sutton v O'Kane* [1973] 2 NZLR 304 (CA), 322–3 (Turner P) ('*Sutton*').

54 McMorland (n 32) 95.

55 Ibid 95–6. See, e.g.: *Loke Yew* (n 23); *Friedman v Barret; Ex parte Friedman* [1962] Qd R 498, *RM Hosking Properties Pty Ltd v Barnes* [1971] SASR 100; *Sutton* (n 53); *Bunt v Hallinan* [1985] 1 NZLR 450.

C *Supervening Fraud*

Supervening fraud occurs when there is dishonesty by the new registered proprietor after registration. The 'philosophical question' that has occupied the courts with respect to supervening fraud is 'whether a purchaser who has taken title without fraud may become fraudulent by *subsequently* resolving to disregard unregistered interests of which he had adequate notice before taking his title'.[56] That is to say, does supervening fraud fall within the meaning of Torrens title fraud?

Two contrary views regarding this issue emerged in the High Court of Australia in *Bahr v Nicolay (No 2)*.[57] In that case, the appellants entered into a contract to sell their land to Nicolay, which provided that the land would be leased to the appellants for three years and then repurchased by the appellants following the expiry of the lease. Nicolay became the registered proprietor and subsequently sold the land to the Thompsons, with the contract of sale expressly acknowledging the aforementioned agreement between the appellants and Nicolay. The Thompsons became registered proprietors and, although at first acknowledging the appellants' rights, later refused to sell the property to the appellants, contending that their indefeasible title to the property was not affected by 'mere knowledge' of the appellants' right to repurchase.

The case was ultimately decided in favour of the appellants on the basis of an in personam claim.[58] However, Mason CJ and Dawson J expressed favour for the concept of supervening fraud. Their Honours observed that there were no 'definitive pronouncements that fraud is confined to fraud in the obtaining of a transfer or in securing registration' in the authorities.[59] Chief Justice Mason and Dawson J concluded that supervening fraud constitutes fraud within the meaning of Torrens title fraud. Their Honours explained:

> there is no difference between the false undertaking which induced the execution of the transfer in *Loke Yew* and an undertaking honestly given which induces the execution of a transfer and is subsequently repudiated for the purpose of defeating the prior interest. The repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation or assumption underlying the execution of the transfer. For the same reason the subsequent repudiation by a transferee of property of a limited beneficial interest in that property is fraudulent, when the transferee took the property on terms that the limited beneficial interest would be retained by the transferor. It is immaterial that the transferee 'may have been innocent of any fraudulent intent in taking the conveyance in absolute form': *Bannister v Bannister*.[60]

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56 *Sutton* (n 53) 329 (Turner P) (emphasis in original).

57 *Bahr v Nicolay (No 2)* (n 27).

58 Ibid 623 (Mason CJ and Dawson J), 645 (Wilson and Toohey JJ), 660 (Brennan J).

59 Ibid 615 (Mason CJ and Dawson J).

60 Ibid 615–16 (Mason CJ and Dawson J), citing *Bannister v Bannister* [1948] 2 All ER 133, 136.

Chief Justice Mason and Dawson J thus held, as an alternative basis for the decision, that the Thompsons' repudiation of the appellants' equitable interests after registration constituted fraud for the purposes of the Torrens statute.

In contrast, Wilson and Toohey JJ stated that the meaning of Torrens title fraud is 'fraud committed in the act of acquiring a registered title'.[61] Their Honours concluded that the evidence did not establish that 'the designed object of the transfer to the [Thompsons] was to cheat the appellants of a known existing right'.[62] According to Wilson and Toohey JJ, supervening fraud therefore does not constitute Torrens title fraud. Although subsequent authority 'probably favours' the view that supervening fraud does not fall within the meaning of fraud under the Torrens system,[63] successive State Supreme Court authorities have likewise divided on the question, with some favouring the view adopted by Mason CJ and Dawson J,[64] and others that of Wilson and Toohey JJ.[65]

The New Zealand Court of Appeal likewise diverged on the question of whether supervening fraud falls within the fraud exception to indefeasibility and thus vitiates title, rejecting the proposition by a 2:1 majority in *Sutton v O'Kane*.[66] Justice Richmond concluded that 'the legislature cannot have intended the exception of fraud to apply to a subsequent decision by [the registered proprietors] to rely on their registered title', observing that the effect would otherwise 'be paradoxical'.[67] In contrast, Turner P (in dissent) questioned why it should 'be less culpable … to change one's mind and do a dishonest act after registration'.[68] His Honour stated that the proper question is simply '*was the act of the purchaser dishonest?*'.[69] Ultimately, it remains unclear whether supervening fraud falls within the meaning of Torrens title fraud, giving rise to extensive academic debate.[70]

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61 *Bahr v Nicolay (No 2)* (n 27) 633 (Wilson and Toohey JJ), citing *Loke Yew* (n 23) 503–4; *Stuart v Kingston* (1923) 32 CLR 309, 329 ('*Stuart*'); *Breskvar v Wall* (1971) 126 CLR 376, 384.

62 *Bahr v Nicolay (No 2)* (n 27) 636 (Wilson and Toohey JJ). Cf *Loke Yew* (n 23), where the repudiation of the unregistered interest was based on dishonest conduct before registration.

63 Moore, Grattan and Griggs (n 23) 240.

64 See: *Snowlong Pty Ltd v Choe* (1991) 23 NSWLR 198; *Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd* (2003) 59 NSWLR 312.

65 See: *Conlan v Registrar of Titles* (2001) 24 WAR 299; *Ryan v Starr* [2005] NSWSC 170.

66 *Sutton* (n 53).

67 Ibid 344 (Richmond J).

68 Ibid 330 (Turner P), citing *Webb v Hooper* [1953] NZLR 111 (SC); *Wellington City Corporation v Public Trustee* [1921] NZLR 423.

69 *Sutton* (n 53) 330 (Turner P) (emphasis in original).

70 See, e.g.: Elizabeth Toomey, 'Why Revisit *Sutton v O'Kane*? The Tricky Trio: Supervening Fraud; The In Personam Claim; and Landlocked Land' (2007) 13(2) *Canterbury Law Review* 264; Blanchard (n 30) 29; McMorland (n 32) 67.

III Statutory Definitions of Fraud in Canada

A statutory definition of fraud was first proposed by the Joint Land Titles Committee in 1990 under its *Model Land Recording and Registration Act*. The Committee sought to thereby address the 'special problem' that is posed when a registered proprietor attains an interest from the former registered proprietor whilst another person has a conflicting unregistered interest or estate in the property.[71] Section 1.2 of the *Model Land Recording and Registration Act* defines 'fraud' as follows:

> **Fraud**
>
> **1.2**
> (1) In this Act the meaning of fraud is subject to the provisions of this section.
> (2) The equitable doctrine variously known as 'notice' and 'constructive notice' is abolished for the purpose of determining if conduct is fraudulent under this Act.
> (3) A person who engages in a transaction with an owner who holds an interest subject to an interest which is neither recorded nor registered,
> (a) is not affected by actual knowledge of the interest which is neither recorded nor registered,
> (b) may assume without inquiry that the transaction
> (i) is authorized by the owner of the interest which is neither recorded nor registered, and
> (ii) will not prejudice that interest, and
> (c) has no duty to assure the proper application of any assets paid or delivered to the owner.
> (4) The person referred to in subsection (3) obtains the interest acquired under the transaction through his fraud if he had actual knowledge that the transaction
> (a) was not authorized by the owner of the interest which was neither recorded nor registered, and
> (b) will prejudice that interest.

The proposed statutory definition therefore affects the meaning of fraud when there is a dispute about priority between an earlier unregistered interest and a later registered interest, whilst leaving the meaning of fraud for a priority dispute concerning two registered interests unaffected.[72]

The principal contribution of the Joint Land Titles Committee's proposed statutory definition lies in clarifying what more than 'mere knowledge' is required to render a person's conduct fraudulent in a priority dispute between an earlier unregistered interest and a later registered interest. The test under the statutory definition is whether the new registered proprietor had actual knowledge that the owner of the unregistered interest did not authorise the former registered proprietor to grant the

71 Renovating the Foundation (n 17) 34.

72 Ibid 50.

conflicting interest to them.[73] The provision therefore aligns more closely with the approach developed by Salmond J concerning what more than 'mere knowledge' is required, whereby the test is whether the person 'knew enough to make it his duty as an honest man to hold his hand'.[74]

The proposed statutory definition of fraud ultimately gives effect to the Joint Land Titles Committee's views that the meaning of fraud should be clarified as follows:

> (a) the doctrine of constructive notice should not apply;
> (b) proceeding with actual notice of an unrecorded and unregistered interest should not be, by itself, imputed as fraud;
> (c) a person who knows of an existing unrecorded and unregistered interest should be entitled to assume without inquiry that the proposed purchase is authorized by the owner of the unrecorded and unregistered interest;
> (d) proceeding with knowledge that a proposed acquisition is not authorized by the owner of the unrecorded and unregistered interest and that the proposed purchase will prejudice that interest should constitute fraud;
> (e) the same rules should apply to a person who becomes registered without giving value for the acquired interest, but a volunteer who merely records an interest without giving value should not acquire priority over a prior interest.[75]

The provinces of Nova Scotia, Ontario and Saskatchewan subsequently adopted statutory definitions of fraud,[76] although not in the same form as proposed under the *Model Land Recording and Registration Act*. The first definition of fraud adopted in a Torrens jurisdiction is found under the *Land Registration Act 2001* (Nova Scotia) and is the definition of fraud that most closely aligns with the definition proposed by the Joint Land Titles Committee. Section 4 of the *Land Registration Act 2001* (Nova Scotia) provides:

> **4 Interpretation**
>
> (1) In this Act, the meaning of 'fraud' is subject to this Section.
> (2) For the purpose of this Act, the equitable doctrines of 'notice' and 'constructive notice' are abolished for the purpose of determining whether conduct is fraudulent.
> (3) A person who engages in a transaction with the registered owner of an interest that is subject to an interest that is not registered or recorded at the time of the transaction, other than an overriding interest, in the absence of actual knowledge of the interest that is not registered or recorded
> (a) may assume without inquiry that the transaction is authorized by the owner of any interest that is not registered or recorded;

73 Ibid.

74 *Waimiha New Zealand Court of Appeal* (n 40) 1173 (Salmond J).

75 Renovating the Foundation (n 17) 35.

76 *Land Registration Act*, SNS 2001, c 6, s 4; *Land Titles Act*, RSO 1990, c 1, s 1; *Land Titles Act*, SS 2000, c 5.1, s 2(1)(p.1)–(p.2).

> (b) may assume without inquiry that the transaction will not prejudice that interest; and
> (c) has no duty to ensure the proper application of any assets paid or delivered to the registered owner of the interest that is the subject of the transaction.
>
> (4) A person obtains an interest through fraud if that person, at the time of the transaction,
> (a) had actual knowledge of an interest that was not registered or recorded;
> (b) had actual knowledge that the transaction was not authorized by the owner of the interest that was not registered or recorded; and
> (c) knew or ought to have known that the transaction would prejudice the interest that was not registered or recorded.
>
> (5) A person does not obtain an interest through fraud if the interest that was not registered or recorded was not enforceable against the person who transferred the interest.[77]

Consistent with the aim of the Joint Land Titles Committee, the statutory definition of fraud in Nova Scotia ultimately clarifies what more than 'mere knowledge' of an unregistered interest is required.[78] Meanwhile, the meaning of dishonesty for the purposes of priority disputes between two registered interests is left unclarified. The principal difference between the definition of fraud adopted in Nova Scotia and the definition under the *Model Land Recording and Registration Act* ultimately lies in the additional requirement of actual knowledge being present 'at the time of the transaction'.[79] By stipulating that the person must have the relevant knowledge 'at the time of the transaction',[80] the concept of supervening fraud is abrogated. Out of the three possible time periods in which fraud may occur, namely before contract, before registration, and after registration, the likely interpretation is that only conduct prior to entering into a binding contract may fall within the meaning of the statutory definition of fraud in Nova Scotia.

In contrast, the statutory definitions introduced in Ontario and Saskatchewan differ significantly from the definition proposed under the *Model Land Recording and Registration Act*. The definitions found in Ontario and Saskatchewan are largely identical and each contain a definition of a 'fraudulent instrument' and a 'fraudulent person'.[81] The Court of Appeal for Ontario observed that the legislative debates regarding the amendment displayed 'a concern about real estate fraud and the attendant risk that a property owner might lose their property or become responsible for a fraudulent mortgage'.[82] In Ontario, the amendments were made, in part,

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77 *Land Registration Act*, SNS 2001, c 6, s 4.

78 See Renovating the Foundation (n 17) 50.

79 *Land Registration Act*, SNS 2001, c 6, s 4(4); *Report on Section 29(2)* (n 7) 29 n 77.

80 *Land Registration Act*, SNS 2001, c 6, s 4(4).

81 *Land Titles Act*, RSO 1990, c 1, s 1; *Land Titles Act*, SS 2000, c 5.1, s 2(1)(p.1)–(p.2).

82 *Froom v Lafontaine* [2023] ONCA 519, [26] (Feldman, Lowers and Roberts JJA) ('*Froom*').

to address concerns raised by cases such as *Lawrence v Maple Trust Company*,[83] where a forged transfer of a property and a mortgage over the property were settled on the same day, leading to a priority contest between two innocent parties, namely the original homeowner and the mortgagee.[84] Section 1 of the *Land Titles Act 1990* (Ontario) provides:

> 'fraudulent instrument' means an instrument,
> (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
> (b) that is given under the purported authority of a power of attorney that is forged,
> (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
> (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument; ('acte frauduleux')
>
> 'fraudulent person' means a person who executes or purports to execute an instrument if,
> (a) the person forged the instrument,
> (b) the person is a fictitious person, or
> (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument; ('fraudeur')[85]

The Ontario Divisional Court explained that 'it is evident that the Legislature sought to protect landowners against the specific problem of title fraud committed through the use of fraudulent instruments'.[86] 'Fraudulent instrument' is ultimately a 'narrowly defined term' under the legislation.[87] The Court observed that the amendments 'do not address fraud in real estate transactions in general', but rather 'prevent certain kinds of fraudulent activity with respect to title, addressing the situation where someone purports to transfer an interest or estate in land that they do not legally possess — for example, by taking on a false identity or by forging a document, including a power of attorney'.[88]

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83 Ibid [45], [64] (Feldman, Lowers and Roberts JJA), referring to "Bill 152, *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*", 2nd Reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 114 (26 October 2006) at 5822 (the Hon Joseph Tascona).

84 See *Lawrence v Maple Trust Company* (2007) 278 DLR 698.

85 *Land Titles Act*, RSO 1990, c 1, s 1.

86 *1168760 Ontario Inc v 6706037 Canada Inc* [2019] 7 RPR (6th) 48, [28] (Aston, Swinton and Sachs JJ) ('*1168760 Ontario*').

87 *Ontario Securities Commission v Money Gate Mortgage Investment Corporation* [2020] ONCA 812, [52].

88 *1168760 Ontario* (n 86) [32] (Aston, Swinton and Sachs JJ). See also: *CIBC Mortgages Inc v Computershare Trust Company of Canada* [2016] ONSC 7094, [61]; *Froom* (n 82) [28], [42] (Feldman, Lowers and Roberts JJA).

In *1168760 Ontario Inc v 6706037 Canada Inc*, the Ontario Divisional Court considered the meaning of 'fraudulent instrument' and 'fraudulent person' under the *Land Titles Act 1990* (Ontario). In that case, a parcel of vacant land was sold to the respondents by Bertrand, who held the title in trust as both trustee and beneficiary with a 27.03% stake in the property, without the notice and consent of the other beneficiaries.[89] Bertrand had two executions registered against him in favour of two different financial institutions at the time of sale and, in order to complete the sale, signed an affidavit relied upon by the appellant and the Director of Land Titles which stated that he was not the same person as the 'Denis Bertrand' who was subject to the aforementioned executions.[90] The appellant contended that the primary judge erred in finding that the transfer of the land to the respondents was by 'fraudulent instrument', as Bertrand was not a 'fraudulent person' within the meaning of the Act.[91]

In determining whether Bertrand was a 'fraudulent person', Aston, Swinton and Sachs JJ interpreted the meaning of a 'fictitious person' under the *Land Titles Act 1990* (Ontario):

> When applying the modern approach to statutory interpretation (as set out in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26), the first task is to determine the plain meaning of the provision of the statute. The *Oxford English Dictionary* (online edition, 2019) defines 'fictitious' as 'not real or true; imaginary or fabricated'. Thus, applying the ordinary meaning of a 'fictitious person,' the term would mean a person who does not exist. It would apply, for example, where someone has created a false identity in order to transfer the title or interest in the land that he or she purports to convey. It would not encompass an existing person like Bertrand, who was the true registered owner of the property that he conveyed.
>
> Moreover, interpreting 'fictitious person' to mean a person who does not exist is consistent with the purpose of the 2006 amendments, which sought to deal with title fraud committed using fraudulent instruments. When one looks to the cases decided before the amendments, it is evident that a major legislative concern was fraud accomplished by someone who assumed a false identity in order to sell or mortgage property (see for example *Lawrence* and *Rabi v Rosu* (2006), 2006 CanLII 36623 (ON SC), 83 OR (3d) 37 (Ont S C).[92]

The Court thus rejected the contention that Bertrand was a 'fictitious person'.[93] Furthermore, the Court held that Bertrand had not forged the instrument by providing a false affidavit.[94] Justices Aston, Swinton and Sachs observed that forgery 'is an

89 *1168760 Ontario* (n 86) [1], [6] (Aston, Swinton and Sachs JJ).

90 Ibid [6].

91 Ibid [3]–[4].

92 Ibid [36]–[37].

93 Ibid [38]–[39].

94 Ibid [40]–[42].

issue of authenticity, not truth' and that, although there was a false statement in the affidavit, Bertrand 'did not commit forgery in the commonly understood meaning of that term'.[95]

The introduction of the definitions of a 'fraudulent instrument' and a 'fraudulent person' has ultimately been described as 'very helpful' and as bringing 'some much-appreciated clarity to the legislation'.[96] Nonetheless, one must be careful to ensure that the statutory definition does not provide a means for a person to avoid perpetrating fraud merely by circumventing the definition.[97]

IV Adoption of a Statutory Definition in New Zealand

New Zealand introduced a statutory definition of fraud under the *Land Transfer Act 2017* (NZ).[98] The definition was introduced in response to the New Zealand Law Commission's recommendations to: (1) 'define "land transfer fraud" to incorporate the leading cases for both fraud against a previous registered proprietor and against an unregistered interest'; (2) 'further clarify the definition of fraud against an unregistered interest'; and (3) 'exclude "supervening fraud"'.[99] The Law Commission sought to thereby 'improve certainty and reduce litigation',[100] whilst 'allowing scope for judicial development of the concept of fraud when necessary'.[101] The Law Commission consequently recommended that the definition be inclusive and not exclusive, particularly since a broad and encompassing exclusive definition 'could create inflexibility',[102] and may be 'impossible or even dangerous, given the breadth of [fraud's] "forms and methods"'.[103]

In deliberating the adoption of a statutory definition of fraud, the Law Commission canvassed two options for legislative reform.[104] The first option consisted of incorporating the 'well-settled aspects of fraud established by the New Zealand cases' into legislation.[105] The second option comprised introducing an interpretation of

95 Ibid [42].

96 Brian Bucknall, 'Real Estate Fraud and Systems of Title Registration: The Paradox of Certainty' (2008) 47(1) *Canadian Business Law Journal* 1, 52.

97 See also Thomas, 'Reduced Torrens Protection' (n 39) 720.

98 *Land Transfer Act 2017* (NZ) s 6.

99 Law Commission, *A New Land Transfer Act* (Report No 116, June 2010) 22 ('*A New Land Transfer Act Report*').

100 Maurice Williamson, 'Law Commission Report — A New Land Transfer Act' (Cabinet Paper, New Zealand Parliament) 4; ibid 22.

101 *A New Land Transfer Act Report* (n 99) 22.

102 Ibid 2.

103 *Review of the Land Transfer Act 1952* (n 5) 41. See, e.g., *Stuart* (n 61) 359 (Starke J).

104 *A New Land Transfer Act Report* (n 99) 49–51.

105 *Review of the Land Transfer Act 1952* (n 5) 50.

fraud based on the statutory definition adopted in Nova Scotia.[106] Ultimately, the adopted statutory definition does both; it confirms the leading cases on the meaning of fraud, such as *Assets Co v Mere Roihi* and *Waimiha Sawmilling Co v Waione Timber*,[107] whilst being modelled on s 4 of the *Land Registration Act 2001* (Nova Scotia).[108] The statutory definition of fraud under s 6 of the *Land Transfer Act 2017* (NZ) provides:

> (1) For the purpose of this Act, other than subpart 3 of Part 2, fraud means forgery or other dishonest conduct by the registered owner or the registered owner's agent in acquiring a registered estate or interest in land.
> (2) For the purposes of subsection (1), the fraud must be against —
> (a) the registered owner of an estate or interest in land; or
> (b) the owner of an unregistered interest, if the registered owner or registered owner's agent, —
> (i) in acquiring the estate or interest had actual knowledge of, or was wilfully blind to, the existence of the unregistered interest; and
> (ii) intended at the time of registration of the estate or interest that the registration would defeat the unregistered interest.
> (3) For the purpose of subpart 3 of Part 2, fraud means forgery or other dishonest conduct by any person.
> (4) The equitable doctrine of constructive notice does not apply for the purposes of deciding whether conduct is fraudulent.

The statutory definition of fraud under the *Land Transfer Act 2017* (NZ) therefore largely mirrors the definition adopted in Nova Scotia regarding what more than 'mere knowledge' of an unregistered interest is required, but also expressly includes wilful blindness, which is established as constituting actual knowledge under the case law.[109] The New Zealand definition additionally states that fraud means 'forgery or other dishonest conduct'.[110] However, no clarification of what dishonesty means is provided. It has consequently been observed that s 6(1) — stating that fraud means 'forgery and other dishonest conduct' — is arguably 'no less open-textured than fraud itself'.[111]

106 Ibid 52.

107 *Roihi* (n 22); *Waimiha New Zealand Court of Appeal* (n 40).

108 *A New Land Transfer Act Report* (n 99) 21–2.

109 See also: *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 143–4 (Tadgell JA); *Waimiha New Zealand Court of Appeal* (n 40) 1175 (Salmond J).

110 *Land Transfer Act 2017* (NZ) s 6(1).

111 Neil Campbell and Rod Thomas, 'The Fraud Test and "Manifest Injustice" under the New Land Transfer Act' (Conference Paper, New Horizons for Torrens Conference, 29–31 August 2018) 3.

Furthermore, given that both ss 6(1) and 6(2) apply in cases of alleged fraud against the holder of an unregistered interest,[112] it has been contended that the definition 'does little to clarify the test'.[113] Certainly, the tension between *Assets Co Ltd v Mere Roihi* and Salmond J's test in *Waimiha Sawmilling Co v Waione Timber* remains unresolved under the statutory definition in New Zealand. The wording of s 6(1) is derived from *Assets Co Ltd v Mere Roihi*, whilst s 6(2) accords with the test suggested by Salmond J in *Waimiha Sawmilling Co v Waione Timber*.[114] As observed by Rod Thomas, the 'test' provided under the statutory definition of fraud 'should either be fraud which is "forgery or other dishonest conduct by the registered owner" or fraud established merely by knowledge of an unregistered interest obtained at any time up to the time of being registered on the title'.[115] It appears that, in an attempt to clarify both priority disputes involving, on the one hand, two registered interests and, on the other hand, priority disputes involving one registered and one unregistered interest, the statutory definition ultimately does not clarify either, unlike its counterpart in Nova Scotia.

However, the statutory definition does succeed in clarifying that supervening fraud does not constitute 'land transfer fraud' for the purposes of the *Land Transfer Act 2017* (NZ).[116] Unlike the statutory definition of fraud in Nova Scotia, the definition in New Zealand only excludes fraud post-registration, and not conduct occurring between when a contract is entered into and registration.[117] The Law Commission explained that post-registration conduct 'should be dealt with by an in personam claim against the registered owner if appropriate'.[118] There is ultimately 'a considerable area of overlap' between fraud and the in personam jurisdiction, particularly in relation to supervening fraud.[119]

V Conclusion

The meaning of 'fraud' under the Torrens system has become riddled with areas of uncertainty and disagreement since the introduction of the Torrens system of land registration over 160 years ago. The principal areas of uncertainty in the meaning of Torrens title fraud that have emerged are: (1) what more than 'mere knowledge' of an unregistered interest or estate is required; (2) the meaning of dishonesty; and (3) whether supervening fraud constitutes fraud. The adoption of statutory definitions of fraud in the Canadian provinces of Nova Scotia, Ontario, and Saskatchewan

112 *A New Land Transfer Act Report* (n 99) 21. See ibid 13.

113 Katherine Sanders, 'Land Law' [2012] (3) *New Zealand Law Review* 545, 569.

114 *A New Land Transfer Act Report* (n 99) 21. See Thomas, 'Reduced Torrens Protection' (n 39) 725.

115 Thomas, 'Reduced Torrens Protection' (n 39) 725.

116 *Land Transfer Act 2017* (NZ) s 6(2). See *A New Land Transfer Act Report* (n 99) 22.

117 Campbell and Thomas (n 111) 8–9.

118 *A New Land Transfer Act Report* (n 99) 22.

119 Blanchard (n 30) 47. See, e.g., *Bahr v Nicolay (No 2)* (n 27).

represents the emergence of a novel legislative approach to clarifying the meaning of Torrens title fraud. The legislative approach to fraud which emerged in Canada has since gained traction internationally, leading to the introduction of a statutory definition of fraud in New Zealand under the *Land Transfer Act 2017* (NZ). Ultimately, a legislative approach to the meaning of fraud under the Torrens system poses the opportunity to clarify areas of uncertainty that have emerged in Torrens jurisdictions. However, as canvassed throughout the article, there remain dangers and pitfalls in the introduction of a statutory definition of fraud which must be carefully guarded against to ensure that the definition truly clarifies the meaning of 'fraud' under the Torrens system.

*Simon Rice**

FROM THE LORDS SPIRITUAL TO 'RELIGIOUS FREEDOM': THE TRUE PURPOSE OF THE EXCEPTION FOR RELIGIOUS SUSCEPTIBILITIES IN AUSTRALIAN ANTI-DISCRIMINATION LAW

Abstract

A commonly occurring statutory exception in Australia allows religious bodies to discriminate in deference to adherents' 'religious susceptibilities'. This exception was introduced to Australian law, in many different forms, from a precedent in the United Kingdom that had the very particular purpose of accommodating doctrinal dissenters in the Church of England on the issue of sex discrimination when ordaining priests. That very particular purpose was never identified in Australia, and the religious susceptibilities limb went unexplained for many years, until Christian churches attributed to it the purpose of guaranteeing an undefined form of religious freedom. The religious susceptibilities limb has rarely arisen in reported discrimination cases, suggesting that complaints are not made or pursued because of the apparent religious freedom that religious bodies are given by the exception. Adopting the original purpose of the exception — to accommodate the views of doctrinal dissenters — would define and focus the exception for religious susceptibilities on accommodating doctrinal dissent.

I Introduction

In Australian anti-discrimination laws, religious bodies have the benefit of an exception that has two limbs, allowing a religious body to discriminate when religious doctrine requires, and/or when necessary to avoid injury to adherents' 'religious susceptibilities'. What does this mean? Why is reference to religious

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doctrine not all that is needed to allow discrimination? In going further than doctrinal requirements, is the religious susceptibilities limb actually — as it is claimed to be — a guarantee of religious freedom?

In this article, I investigate the religious susceptibilities limb of the religious bodies exception, and answer these questions in light of the origins and intended purpose of the provision in the United Kingdom ('UK') Parliament in 1975. That purpose, lost in the adoption and adaptation of the provision throughout Australia, helps make sense of what the religious susceptibilities limb means, both in its own terms and as a complement to an exception for conformity with religious doctrine. In transporting the religious susceptibilities bodies from the UK to Australia, the loss of the intended purpose of the religious susceptibilities limb has created a confusion of drafting, and an opportunity to attribute to it a 'religious freedom' purpose.

In fact, it is rare that parliaments in Australia have ever enacted the religious susceptibilities limb for a religious freedom purpose. Rather, it is religious institutions that characterise such an exception 'as critical for the purposes of religious freedom'.[1] The existence of the religious susceptibilities limb, and its promotion as a 'religious freedom' measure, matter; as Carolyn Evans says, 'the implications of the relatively wide exemptions for religious bodies are significant'.[2] Australia is very reliant 'on religious organisations to provide community services, including social welfare, healthcare, aged care, social housing and education'; Eleni Poulos cites research that shows that religious organisations deliver over 50% of these services.[3] Evans points out that religious run service providers 'are huge employers … and provide services to hundreds of thousands of people. In some areas, for example, in regional communities, the local church may be the only provider of these services'.[4] As a result, religious bodies exceptions 'apply to huge swathes of the workforce and service provision'.[5]

The combined effect of the prevalence of religious organisations in providing community services, and an exception for religious susceptibilities that allows freedom to discriminate, is far reaching, notably for LGBTQIA+ communities.[6]

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1 Carolyn Evans, 'Religious Freedom, Religious Discrimination and the Role of Law' (Current Legal Issues Lecture, Queensland Bar Association and the TC Beirne School of Law, 13 October 2022) 8.

2 Ibid.

3 Eleni Poulos, 'Three Discourses of Religious Freedom: How and Why Political Talk about Religious Freedom in Australia has Changed Religions' (2023) 14(5) *Religions* 1, 3.

4 Evans (n 1) 8.

5 Ibid.

6 In this article I use the term 'LGBTIQA+' for 'people who have identified themselves as lesbian, gay, bisexual, transgender, intersex, or questioning' (Queensland Human Rights Commission <https://www.qhrc.qld.gov.au/your-rights/for-lgbtiq-people/lgbtiq-terminology>) but when another term is used by a quoted source, I use that other term.

It can mean, for example, that 'people identifying as LGBTI do not seek access to emergency services, as these have been outsourced to [faith-based organisations] that vocally oppose non-normative sexual orientations'.[7] Such vocal opposition was apparent in the submission of the Anglican Church Diocese of Sydney to the *Religious Freedom Review* 'that all its community services must be offered conditionally, consistently with its teaching that "heterosexual … marriage is both the norm and ideal"',[8] and in the submission of the Australian Christian Lobby and Human Rights Law Alliance that 'commercial businesses operated by Christians … should have a right to discriminate against LGBTQ+ clients and staff'.[9]

There are many examples of what a religious freedom to discriminate allows: a long-time and highly respected teacher was dismissed from a Christian school for being lesbian;[10] gay students at an independent religious school were bullied and vilified without protection;[11] LGBTIQ+ people 'might not get the medical assistance which is required',[12] and 'many LGBTQ+ people … have left Christianity, or changed denominations or congregations due to experiences of discrimination'.[13]

To understand how the religious susceptibilities limb actually works in Australia — for whose benefit, and in what circumstances — I explain in Part II the various ways it is has been drafted. This informs a generalised version of the religious bodies exception that I use in this article.

In Part III — to understand how a religious freedom purpose has been attributed the religious susceptibilities limb in Australia — I go back to the beginning, to debates

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7 Cameron Parsell et al, 'Created in the Image of God? Progressive Social Services and Faith-Based Organizations' (2021) 36(3) *Journal of Contemporary Religion* 471, 466, citing Dale Dominey-Howes, Andrew Gorman-Murray and Scott McKinnon, 'Emergency Management Response and Recovery Plans in Relation to Sexual and Gender Minorities in New South Wales, Australia' (2016) 16 *International Journal of Disaster Risk Reduction* 1, 8.

8 Douglas Ezzy et al, 'LGBTQ+ Non-Discrimination and Religious Freedom in the Context of Government-Funded Faith-Based Education, Social Welfare, Health Care, and Aged Care' (2023) 59(4) *Journal of Sociology* 931, 935, quoting Anglican Church Diocese of Sydney, Submission No 7482 to Expert Panel on Religious Freedom, *Religious Freedom Review* (13 February 2018) [4.3.2].

9 Ibid 935, citing Australian Christian Lobby and Human Rights Law Alliance, Submission No 14932 to Expert Panel on Religious Freedom, *Religious Freedom Review* (14 February 2018).

10 Bronwyn Fielder, Douglas Ezzy and Angela Dwyer, 'Educators' Hands are Tied: The Impact of Heteronormative and Cisnormative Discourses on Students in Faith-based Schools in Australia' (2024) 60(2) *Journal of Sociology* 458, 464.

11 Ibid 465.

12 Douglas Ezzy et al, *LGBTIQ+ Employees in Tasmanian Workplaces Report: Findings from a Survey 2019–2020* (Report 14 July 2021) 58.

13 Douglas Ezzy, Bronwyn Fielder and Angus McLeay, 'LGBTQ+ Christians in Australia' (2024) 71(2) *Social Compass* 326, 338.

in 1975 in the UK House of Lords. That history reveals that the religious susceptibilities limb had a very particular and narrow purpose: to protect the decision of the Church of England to continue to discriminate against women despite there being no doctrinal imperative.

I recount in Part IV how the religious susceptibilities limb was brought from the UK to South Australia ('SA'), and then replicated around Australia with the drafting variations I set out in Part II. In that process of replication, the origins of the religious susceptibilities limb were lost, and it was simply accepted as a part of the religious bodies exception.

This context for the religious susceptibilities limb — its original purpose, forgotten in the translation to Australia — has resulted in the attribution of a 'religious freedom' purpose. In Part V, I look at this phenomenon and argue that not only was the religious susceptibilities limb in Australia not enacted for a 'religious freedom' purpose, but that, as an exception to a discrimination prohibition, it cannot actually have this purpose. Rather, it conditionally permits conduct that would otherwise be prohibited, and only to that extent does it allow some freedom to discriminate. The conditions attaching to the exception therefore become critical to understanding when discrimination in the name of religion is permissible, and meeting those conditions requires evidence.

In Part VI, I review the cases where the religious susceptibilities limb has been relied on, almost always unsuccessfully for want of evidence, and consider how the outcome might have been different under the original purpose of the exception.

I conclude with a reflection on how regard to that original purpose would alter the approach of courts and the nature of public debate on religious discrimination, being specific about the purpose of the religious susceptibilities limb as one that accommodates doctrinal dissent.

II Parsing the Religious Bodies Exception

Discrimination, on the basis of a number of personal attributes in a wide range of circumstances, is unlawful in all Australian jurisdictions. The prohibitions in anti-discrimination legislation are subject to exceptions (also called exemptions), which, in the case of religious bodies, allows discrimination that would otherwise be unlawful — the 'religious bodies exception'.[14] In some jurisdictions, the religious

14 *Sex Discrimination Act 1984* (Cth) s 37(1); *Age Discrimination Act 2004* (Cth) s 35; *Discrimination Act 1991* (ACT) ss 32(1)(d)(i), 32(1)(e)(i), 32(1)(g)(i); *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1992* (NT) s 40(3); *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) ss 82, 82B; *Equal Opportunity Act 1984* (WA) s 72.

bodies exception extends to religious educational institutions,[15] and to control over places of cultural or religious significance,[16] and the particular terms of the religious susceptibilities limb occur in other legislation for other purposes.[17]

Scholars have described the religious bodies exception in varying degrees of detail;[18] in particular, Sarah Moulds helpfully categorises the different approaches in Australian jurisdictions as 'narrow', broad', 'novel', and distinctive to each of the Commonwealth and Victoria,[19] and Liam Elphick usefully outlines, in a table, the various ways that Australian jurisdictions have structured the religious bodies exception.[20] The following account both updates earlier accounts and provides a deeper analysis of the differences in drafting and their implications.

A bewildering variety of terms are used across nine jurisdictions to say much the same thing. This is the more bewildering for the fact that the enactments came one after the other, over many years, each largely copying the previous one but each introducing a new variation on the terms previously used. In some instances, there may be what Elphick calls 'terminological' differences that are 'largely immaterial',[21] but in others the differences appear to be substantial, as I discuss below. When trying to make sense of these provisions it must be assumed that 'where the parliament could have used the same word but chooses to use a different word, the

15 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73; *Anti-Discrimination Act 1991* (Qld) s 25(2); *Anti-Discrimination Act 1998* (Tas) s 51A.

16 *Anti-Discrimination Act 1992* (NT) s 43(1); *Anti-Discrimination Act 1991* (Qld) ss 48, 80; *Anti-Discrimination Act 1998* (Tas) s 42; *Equal Opportunity Act 2010* (Vic) s 83.

17 *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of 'discrimination' for some purposes); *Fair Work Act 2009* (Cth) s 153 in relation to terms of an industrial award, s 195 in relation to terms of an enterprise agreement, s 351(2) in relation to adverse action, s 772(2)(b) in relation to terminating employment; *Marriage Act 1961* (Cth) ss 47(3), 47B(1), 81(2) in relation to refusing to solemnise a marriage; *Industrial Relations Act 2016* (Qld) s 295(2) in relation to adverse action.

18 See, e.g.: Greg Walsh, 'An Opt-In Approach to Regulating the Employment Decisions of Religious Schools' (2014) 14 *Macquarie Law Journal* 163; Carolyn Evans and Leilani Ujvari, 'Non-discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31; Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34(2) *Melbourne University Law Review* 392.

19 Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform' (2020) 47 *University of Western Australia Law Review* 11.

20 Liam Elphick, 'Sexual Orientation and "Gay Wedding Cake" Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149, 161.

21 Ibid 159.

intention is to change the meaning'.[22] It is never clear what different meaning the parliament intended.

A *The Coverage of the Exception*

The religious bodies exception usually attaches to any conduct that is covered by the anti-discrimination statute; a typical provision is to the effect that 'nothing in this Act applies' to the prescribed conduct of a religious body.[23] In some jurisdictions, however, the religious bodies exception is available only in particular circumstances. For example, in the Northern Territory ('NT') it applies only for restricting access to land, a building or place of cultural or religious significance, and in relation to religious accommodation;[24] in Tasmania it applies only when the discrimination is on the basis of religious belief or affiliation or religious activity;[25] and in SA it applies only when the discrimination is on the basis of sex, sexual orientation or gender identity.[26]

B *The Structure of the Religious Bodies Exception*

The religious bodies exception has two limbs:[27] (1) an exception for when discrimination is necessary to conform with doctrine (the 'doctrinal conformity limb'); and (2) an exception for when discrimination is necessary to avoid injury to religious susceptibilities of adherents (the 'religious susceptibilities limb'). But there is an important qualification on the way that these two limbs are part of the religious bodies exception: in different jurisdictions they operate either disjunctively or conjunctively.

In Australia's earlier anti-discrimination laws — in SA, New South Wales ('NSW'), Victoria,[28] Western Australia ('WA') and in the *Sex Discrimination Act 1984* (Cth) ('*SDA*') and the later *Age Discrimination Act 2004* (Cth) ('*ADA*')[29] — the religious bodies exception allows discrimination if it is necessary *either* to conform with doctrine *or* to avoid injury to religious susceptibilities. In the later laws — in the

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22 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 10th ed, 2024) 74 [4.13]; Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 3rd ed, 2024) 166–7 [4.13].

23 See e.g.: *Anti-Discrimination Act 1977* (NSW) s 56; *Equal Opportunity Act 2010* (Vic) s 82(1).

24 *Anti-Discrimination Act 1992* (NT) ss 40(3), 43(1).

25 *Anti-Discrimination Act 1998* (Tas) ss 42, 52.

26 *Equal Opportunity Act 1984* (SA) s 50. A limited religious bodies exception is also available for discrimination on the basis of marital or domestic partnership status: s 85ZM.

27 Elphick (n 20) 159.

28 The *Equal Opportunity Act 2010* (Vic) is the most recent successor to the original anti-discrimination law in Victoria, the *Equal Opportunity Act 1977* (Vic).

29 Neither the *Racial Discrimination Act 1975* (Cth) nor the *Disability Discrimination Act 1992* (Cth) makes an exception for religious bodies.

Australian Capital Territory ('ACT'), the NT, Tasmania and Queensland — the two limbs were from the outset separated by the conjunctive 'and' (although in Tasmania the limbs in an earlier 1978 Bill had been drafted disjunctively).[30] As a result, in what I call the 'conjunctive jurisdictions', it is not enough that discrimination is necessary to conform with doctrine, it must *also* be necessary to avoid injuring adherents' religious susceptibilities.

For a religious body to discriminate lawfully in the conjunctive jurisdictions, satisfying the requirements of doctrinal conformity is necessary but not sufficient, and the requirements of the religious susceptibilities limb must also be satisfied. On the other hand, for a religious body to discriminate lawfully in the disjunctive jurisdictions, satisfying the requirements of the doctrinal conformity limb is sufficient, but it is not necessary if, instead, the requirements of the religious susceptibilities limb are satisfied. As I discuss below, the disjunctive structure of the religious bodies exception is the same structure that Australian anti-discrimination law initially copied from the UK in 1975.

In the conjunctive jurisdictions, there is no avoiding the usual meaning of the word 'and' when it occurs.[31] To understand why the word 'or' in existing laws was replaced by the word 'and' in new laws, it must be assumed that the intention was to change the meaning,[32] but we can only guess at the policy decision that led to the drafting choice. The drafting went unremarked when enacted in the ACT,[33] and in Tasmania.[34] In Queensland the drafting was explicitly acknowledged but went unexplained: 'The discrimination is only permitted if the two tests set out in the clause are met. The discrimination must be in accordance with the doctrine of the religion and be necessary to avoid offending the religious sensitivities of people of that religion'.[35] WA is the only jurisdiction to consider and explain a policy rationale for the conjunctive approach, in a law reform recommendation that has not been acted on, saying that 'there is no principled reason for giving religious bodies the ability to discriminate more broadly' than in conformity with doctrines, tenets or beliefs.[36]

30 Anti-Discrimination Bill 1978 (Tas) cl 31.

31 Pearce (n 22) 75 [2.52]; Herzfeld and Prince (n 22) 136 [5.270].

32 Pearce (n 22) 166–7 [4.13].

33 Explanatory Statement, Human Rights and Equal Opportunity Bill 1991 (ACT), 11.

34 Tasmania, *Parliamentary Debates,* House of Assembly, 20 May 1998, 63–102 (Raymond Groom); Tasmania, *Anti-Discrimination Bill 1998* (Facts Sheet, tabled 20 May 1998).

35 Explanatory Notes, Anti-Discrimination Bill 1991 (Qld), 8.

36 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, Project 111, May 2022) 173–8 [4.5.4.4], recommendation 77.

C *The Terms of the Religious Bodies Exception*

Because of the variety of approaches taken by Australia's nine different legislatures, the terms used in the religious bodies exception require clarification. To start with, I use the term 'religious bodies' in this article to identify to whom the religious bodies exception is available, although different terms are used in the legislation: 'religious bodies' in the ACT and Victoria;[37] 'a body established for religious purposes' under the *SDA* and *ADA* (Cth) and in Queensland, SA and WA;[38] a body 'established to propagate religion' in NSW;[39] and 'a person' in certain circumstances in the NT and Tasmania.[40]

An exception in much the same terms as the religious bodies exception is available in some jurisdictions for a specific type of religious body: a religious educational institution in Victoria; an educational institution established for religious purposes under the *SDA* and in WA;[41] an educational institution under the direction or control of a body established for religious purposes in Queensland;[42] and an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion in Tasmania.[43] The exception for a religious educational institution in the ACT is more limited than the usual religious bodies exception and does not have the religious susceptibilities limb.[44]

These many terms to describe much the same thing can of course have different meanings, leading to what Evans politely calls 'a lack of clarity or consistency'.[45] For example, a 'body established for religious purposes' is not necessarily 'a religious institution',[46] and it is unclear whether a body 'established to propagate religion' could include a religious school.[47] When considering the term 'established to propagate religion', the NSW Court of Appeal said that the term 'invites the questions

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37 *Discrimination Act 1991* (ACT) s 32; *Equal Opportunity Act 2010* (Vic) ss 82, 82B, 83.

38 *Sex Discrimination Act 1984* (Cth) s 37; *Age Discrimination Act 2004* (Cth) s 35; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Equal Opportunity Act 1984* (WA) s 72.

39 *Anti-Discrimination Act 1977* (NSW) s 56.

40 *Anti-Discrimination Act 1992* (NT) ss 40(3), 43(1); *Anti-Discrimination Act* (Tas) 1998 ss 42, 52.

41 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73.

42 *Anti-Discrimination Act 1991* (Qld) s 25(2).

43 *Anti-Discrimination Act 1998* (Tas) s 51A.

44 *Discrimination Act 1991* (ACT) s 46.

45 Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (Report, Centre for Comparative Constitutional Studies Melbourne, June 2009) 36 [4.4.1].

46 *Re Pamas Foundation (Inc) v Deputy Commissioner of Taxation* (1992) 35 FCR 117, 119.

47 Evans and Ujvari (n 18) 50.

"established by whom" and "to propagate what religion"',[48] and commented that '[t]he answers to those questions will, of course, be a matter of fact in the circumstances of the particular case'.[49]

In a NSW tribunal case, for example, the evidence did not establish that a body established to 'educate the general public about Islam' was 'established to propagate a religion'.[50] In Victoria, the Court of Appeal upheld the view at first instance that the body in question was not 'a body established for religious purposes';[51] rather, it was an incorporated body run by the Christian Brethren conducting activities at an adventure resort that 'do not involve the spread or strengthening of spiritual teaching, the maintenance of the doctrines of the Christian Brethren religion or of the observances that promote or manifest it'.[52] It was found that '[t]he purposes of [the body], are not directly and immediately religious. They relate to the conduct of camping for both secular and religious groups'.[53] As these cases illustrate, there is indeed a 'lack of clarity or consistency' in the terms of the religious bodies exception from one jurisdiction to another.

D *The Terms of the Doctrinal Conformity Limb*

The terms of the doctrinal conformity limb will matter in the conjunctive jurisdictions, and may matter in the disjunctive jurisdictions. The doctrinal conformity limb refers to 'doctrines, tenets or beliefs' in s 37 of the *SDA* (for religious bodies), in the *ADA* , and in the ACT and WA;[54] to 'doctrines, tenets, beliefs or teachings' in s 38 of the *SDA* (for religious educational institutions); to 'religious doctrines, beliefs or principles' in Victoria;[55] to 'doctrines' in NSW;[56] to 'precepts' in SA;[57] and to 'doctrine' in NT.[58]

As I describe below, in its original form in the UK the doctrinal conformity limb was in fact the doctrinal *compliance* exception. It is a doctrinal *conformity* limb throughout Australia except in Queensland, where conduct must be 'in accordance

48 *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606, [33] ('*OV and OW (CA)*').

49 Ibid. See also, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 312–13 [223] ('*Cobaw*'), quoting *Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, 216–17 [17], 224 [34].

50 *Bevege v Hizb ut-Tahrir Australia* [2016] NSWCATAD 44, [18], [97] ('*Bevege*').

51 *Cobaw* (n 49) 306–20 [199]–[260].

52 Ibid 311 [218].

53 Ibid.

54 *Sex Discrimination Act 1984* (Cth) s 37; *Age Discrimination Act 2004* (Cth) s 35; *Discrimination Act 1991* (ACT) s 32; *Equal Opportunity Act 1984* (WA) s 72.

55 *Equal Opportunity Act 2010* (Vic) ss 82, 82B, 83.

56 *Anti-Discrimination Act 1977* (NSW) s 56.

57 *Equal Opportunity Act 1984* (SA) s 50.

58 *Anti-Discrimination Act 1992* (NT) s 43(1)(a).

with' doctrine.[59] A requirement to conform — perhaps having much the same meaning as 'in accordance with' — seems more generous than a requirement to comply.[60] A NSW Tribunal described the requirement to conform as a 'singularly undemanding' test,[61] but Maxwell P in the Victorian Court of Appeal, did not agree that the phrase 'conforms with' means no more than 'complies with, or is in accord or harmony with', deciding that, in context, the phrase 'conforms with' means 'requires, obliges or dictates'.[62] To refine the terms further, the Law Reform Commission of WA considered that 'conforms with' imposes a higher standard than the phrase 'in conformity with'.[63]

E *The Terms of the Religious Susceptibilities Limb*

As all but four jurisdictions do, I use the term 'religious susceptibilities' for discussion in this article to identify the phenomenon with which the exception is concerned; the term that is used in the *ADA*, the NT, Queensland, and Victoria is 'religious sensitivities'. Variations in terms can happen even in the one jurisdiction; Victoria changed from 'susceptibilities' in the *Equal Opportunity Act 1984* (Vic) to 'sensitivities' in the *Equal Opportunity Act 1995* (Vic), and the Commonwealth uses 'susceptibilities' in the *SDA* but 'sensitivities' in the *ADA*. When quoting legislation or commentary, I use the cognate terms they use, such as 'sensitivities' or 'sensibilities' for susceptibilities.

The Victorian Anti-Discrimination Tribunal said that 'the sensitivities must have some connection with the religion itself. It is not enough that for some reason unconnected with their religion, the adherents of a religion find conduct embarrassing or unacceptable.'[64] Against this, a NSW tribunal found the religious susceptibilities limb was made out merely on the basis of conduct that would be unacceptable.[65] But even if 'unacceptability' is sufficient, it must be 'religiously' unacceptable — the exception is for religious susceptibilities, not for mere susceptibilities.

Those who hold the religious susceptibilities are usually referred to as 'adherents' of the religion, which is the term I use for discussion in this article, but in the NT and Queensland the term is 'people' of the religion, and in Tasmania it is 'any person' of the religion. Again, Victoria decided to change terms, from 'people' in the *Equal*

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59 *Anti-Discrimination Act 1991* (Qld) s 109(1)(d).

60 See, e.g.: the way the two terms are used in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, and *Newcrest Mining* (WA) *Ltd v Commonwealth* (1997) 190 CLR 513.

61 *OW and OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [35] ('*OW and OV (ADT)*').

62 *Cobaw* (n 49) 326 [286]–[287].

63 Law Reform Commission of WA (n 36) 177 [4.5.4.4.3].

64 *Jubber v Revival Centres International and Lovelock* [1998] VADT 62, 8 ('*Jubber*').

65 *OW and OV (ADT)* (n 61) [22], accepting the statement made in paragraph 62 of Dr Garner's affidavit.

Opportunity Act 1984 (Vic) and the *Equal Opportunity Act 1995* (Vic) to 'adherents' in the *Equal Opportunity Act 2010* (Vic).

The concern of the religious susceptibilities limb is usually 'to avoid injury' and that is the term I use, but in the NT and Queensland the concern is 'to avoid offending' which is, probably unknowingly, a reversion to the terms of the original UK provision that is the source of the religious susceptibilities limb, as I discuss below. The Victorian Court of Appeal considered the term 'injury', deciding that 'in this particular statutory context' injury must be 'significant' and 'unavoidable', and the harm caused must be 'real harm'.[66]

The discriminatory conduct must be 'necessary' at the relevant time to avoid injury to the religious susceptibilities, except in Victoria where the conduct must be 'reasonably necessary'.[67] The Victorian Court of Appeal agreed with the Victorian Civil and Administrative Tribunal ('VCAT') that 'necessary' means 'more than convenient or reasonable',[68] and said that 'for conduct to be exempted, there must have been no alternative to engaging in the conduct if "injury to religious sensitivities" was to be avoided'.[69] On the unique 'reasonably necessary' variation in Victoria, it was submitted to VCAT that this qualification 'alters the test to become one of convenience or reasonableness, rather than one of significance and unavoidability',[70] but the Tribunal did not have to decide the issue and it has not arisen since.

In WA and under the *SDA*, for discriminatory conduct by an educational institution established for religious purposes to engage the religious susceptibilities limb, it must be done 'in good faith',[71] with evidentiary implications that I note in Part VI below.

F *A Generalised Expression of the Religious Bodies Exception*

In summary, the generalised version of the religious bodies exception that I use for purposes of discussion in this article is this: it allows discrimination by a religious body when necessary to conform with the doctrines of that religion, and/or to avoid injury to the religious susceptibilities of the adherents of that religion.

III Context and Purpose of the Religious Susceptibilities Limb

The religious susceptibilities limb has been copied-and-pasted in every new anti-discrimination statute around Australia without scrutiny or thought, and with

66 *Cobaw* (n 49) 330 [299]–[301].

67 See e.g., *Equal Opportunity Act 2010* (Vic) ss 82(2)(b), 82B(1)(d), 83(2)(b).

68 Cobaw (n 49) 328 [291].

69 *Cobaw* (n 49) 328 [291].

70 *Trkulja v Dobrijevic* [2013] VCAT 925, [55].

71 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73.

parliaments rarely explaining its purpose. It appeared, for example, in cl 67(d) of the Anti-Discrimination Bill 1976 (NSW) that was introduced into the Parliament with an Explanatory Note that referred merely to 'a number of general exceptions … [that] relate to … the practice of religious bodies'.[72] The Bill was said to be 'along the lines of the bill[s] and of legislation that [had] already been introduced in the United Kingdom and SA'.[73] Similarly in Victoria, the religious susceptibilities limb of the religious bodies exception was cl 32(c) of the Equal Opportunity Bill 1977 (Vic), merely as one of 'a number of exemptions … [that] include certain practices of a religious order'.[74] The religious bodies exception with its religious susceptibilities limb has been in all other anti-discrimination bills, as presented to the respective parliaments, that were then enacted.[75]

The persistent absence of a stated purpose for the religious susceptibilities limb has opened the way for a 'religious freedom' purpose to be attributed to it. But the religious susceptibilities limb has a history that is instructive, telling us what its explicitly intended purpose and scope was.

A *The Origins of the Religious Susceptibilities Limb*

The religious bodies exception first appeared in Australia in the *Sex Discrimination Act 1975* (SA), Australia's first civil law statute prohibiting discrimination.[76] In March 1975 the South Australian Premier, Don Dunstan, delayed introducing a sex discrimination bill on the basis, he said, that a similar bill in the UK Parliament 'contains many provisions I believe the South Australian Parliament should examine because they could be usefully incorporated into the original proposal which has come to this House from a Select Committee'.[77]

The UK's Sex Discrimination Bill 1975 had a religious bodies exception that was specifically for 'employment for purposes of an organised religion where the employment is not limited to one sex'.[78] It was available in two alternative

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72 Explanatory Note, Anti-Discrimination Bill 1976 (NSW) 2.

73 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 1976, 3194 (Sir Eric Willis).

74 Victoria, *Parliamentary Debates*, Legislative Council, 19 April 1977, 7477–8 (Haddon Storey).

75 Sex Discrimination Bill 1981 (Cth) cl 112(c); Sex Discrimination Bill 1983 (Cth) cl 37(d); Age Discrimination Bill 2003 (Cth) cl 35(b); Human Rights and Equal Opportunity Bill 1991 (ACT) cl 32(d); Anti-Discrimination Bill 1992 (NT) cl 51(d)(ii); Anti-Discrimination Bill 1991 (Qld) cl 109(d); Anti-Discrimination Bill (No 3) 1998 (Tas) cl 52(d); Equal Opportunity Bill 1984 (WA) cl 72(d).

76 The *Racial Discrimination Act 1976* (SA) criminalised racial discrimination in limited circumstances.

77 South Australia, *Parliamentary Debates*, Legislative Assembly, 25 March 1975, 3170 (Don Dunstan).

78 Sex Discrimination Bill 1975, cl 19, as introduced to the House of Commons, 12 March 1975.

circumstances: 'so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of any of its followers'.[79] The religious susceptibilities limb of the exception was strongly opposed in the House of Commons but, despite motions in the Commons to delete it,[80] the Bill went to the House of Lords with the religious susceptibilities limb intact. There was further opposition to the religious susceptibilities limb on its arrival in the House of Lords,[81] but it was saved by the unique composition of the House of Lords, and the serendipitous timing of the debate.

The unique composition of the House of Lords is that 26 places are reserved for archbishops and bishops of the Church of England, referred to collectively as the 'Lords Spiritual'.[82] The serendipitous timing of the debate was the occurrence, two days after the Bill was introduced into the House of Lords on 1 July 1975, of a meeting of the General Synod of the Church of England. On 3 July 1975, while the Bill was in the House of Lords, each of the three Houses of the General Synod — the House of Bishops, the House of Clergy and the House of Laity — resolved '[t]hat this Synod considers that there are no fundamental objections to the ordination of women to the priesthood'.[83]

It is important to an understanding of the purpose of the religious susceptibilities limb to know that the Synod's vote that there was no doctrinal barrier to the ordination of women was not overwhelming: there were 255 in favour and 180 against.[84] In deference to that 'very large minority' the Synod then voted 'by 226 votes to 184, with one abstention, not to proceed to [allow] the ordination of women in the Church of England'.[85] Thus the position on and after 3 July 1975 was that there was no doctrinal impediment to the Church of England's ordaining women as ministers but — because this view was opposed by 42% of the Synod — the Church decided to continue to not ordain women for the time being.

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79 Ibid.

80 United Kingdom, House of Commons, Wednesday 26 March 1975, vol 889 col 600 (Maureen Colquhoun); United Kingdom, House of Commons, 18 June 1975 vol 883 col 1536 (Ivor Clemitson).

81 See, e.g., United Kingdom, House of Lords, 1 July 1975, vol 362 col 113 (Baroness Vickers).

82 See Mark Hatcher, 'Bishops in the House of Lords: Fit for the Future?' (2024) 26(2) *Ecclesiastical Law Journal* 147, 153, citing the *Bishopric of Manchester Act 1847* (UK) 10 & 11 Vict, c 108 also known as the *Ecclesiastical Commissioners Act 1847* (UK).

83 Judith-Ann Mackenzie, 'Sex Discrimination and the Church of England' (1979) 4(2) *Poly Law Review* 33, 34; G H Newsom, 'The Ordination of Women' (1984) 87(717) *Theology* 180, 184; House of Bishops' Working Party on Women in the Episcopate, *Women Bishops in the Church of England?* (The Archbishops' Council, London, 2004) 4.2.36.

84 Mackenzie (n 83) 34. The Lord Bishop of Southwell gives slightly different figures: see United Kingdom, House of Lords, Tuesday 15 July 1975, vol 362 col 1118.

85 United Kingdom, House of Lords (n 84) col 1119. See also Mackenzie (n 83) 35.

The doctrinal decision of the Great Synod on 3 July 1975 changed the course of the debate in the House of Lords. The religious susceptibilities limb became vital to the Church of England because the doctrinal conformity limb was not enough to save the Church from engaging in unlawful discrimination if it refused to ordain women. Nevertheless, opposition to the religious susceptibilities limb persisted. Baroness Seear, aware that the Church of England was 'agreed that there are no reasons of doctrine why women should not be ordained',[86] moved an amendment to omit the religious susceptibilities limb,[87] with extensive support.[88] Lord Beaumont of Whitley (an Anglican priest) stated clearly a principled position opposing the religious susceptibilities limb, differentiating it from the doctrinal conformity limb:

> In the religious field we quite rightly say that we can find an exception; that where a Church or a religion of any kind has doctrines on this matter we must not legislate against those doctrines. But it is an entirely different matter when we are dealing with something which is considerably less than doctrine and concerns a particular case.[89]

Against this, the Lords Spiritual and other Lords defended the religious susceptibilities limb for a number of reasons, all of which were premised on its purpose being to relieve the Church of England from having to ordain women.[90] In the debates, it is apparent that what was being argued for in retaining the religious susceptibilities limb was not an exception for just any religious view, but for a dissenting view on doctrine that was strongly held by a large minority. Had the Great Synod's view been supported by a very large majority there would have been little reason for a religious susceptibilities limb, but that wasn't the case — 42% dissented from the Great Synod's statement of doctrine.

B *The Purpose of the Religious Susceptibilities Limb*

The Church of England's opposition to the ordination of women, despite there being no doctrinal barrier, was explicitly justified on the basis that a very large minority of the General Synod was in dissent;[91] the Church's decision to defer ordination was to avoid being 'so insensitive as to overrule tender conscience', and 'it would hurt the Church of England greatly if at this time we were to proceed in the face of that expression of contrary opinion'.[92] Speaking 'more or less officially on behalf of the Church of England',[93] the Lords Spiritual were exhorting the Lords to respect the religious susceptibilities of a great many adherents at a time when doctrinal views on the role of women in the Church were in a state of flux and contest.

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86 United Kingdom, House of Lords (n 84) col 1116.

87 Ibid col 1115.

88 See, e.g., ibid col 1129–30 (Lord Gardiner), col 1131 (Viscount Colville of Culcross).

89 Ibid col 1126.

90 See, e.g., ibid col 1118–21, col 1130 (Viscount Gage), col 1130 (Baroness Berkeley).

91 Ibid col 1118 (The Lord Bishop of Southwell).

92 Ibid col 1119.

93 United Kingdom, House of Lords, (n 81) col 134 (The Lord Bishop of Leicester).

Because the justification for the religious susceptibilities limb was the need to accommodate the religious susceptibilities of a significant minority, a criterion that considered merely '*any* followers' was inapt. This issue was raised in both the House of Commons[94] and the House of Lords,[95] and the religious susceptibilities limb was amended by replacing 'any' of its followers with 'a significant number' of its followers.[96] With this amendment, the pleas of the Lords Spiritual prevailed, and the *Sex Discrimination Act 1975* (UK) was enacted with both limbs of the religious bodies exception:

> 19 **Ministers of religion etc.**
>
> (1) Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.[97]

Two aspects of the religious bodies exception in the UK are noteworthy; it was enacted: (1) for the limited purpose of protecting 'employment for purposes of an organised religion where the employment is limited to one sex', and (2) to accommodate the many adherents of the Church of England who dissented from the newly-arrived at and strongly opposed doctrinal position that women could be ordained as priests. The religious susceptibilities limb of the religious bodies exception was thus a provision designed for the explicit and confined purpose of avoiding 'consequences for the Church of England [that] at this time would be immense' if it were to discriminate against women in ordaining ministers, because to do so would be unlawful.[98] Essentially, the purpose of the religious susceptibilities limb was to accommodate doctrinal dissent.

IV Transportation to Australia

None of this context or purpose accompanied the religious bodies exception and its religious susceptibilities limb into the parliamentary debates on the South Australian Sex Discrimination Bill. The first bill that the Premier introduced lapsed on the proroguing of Parliament, but in the next Parliament the Premier introduced an identical Bill.[99] In the Second Reading Speech on both occasions the Premier noted a 'religious bodies' exception,[100] but the exception otherwise went unremarked in

94 United Kingdom, House of Commons, 18 June 1975 col 1537 (Ivor Clemitson).

95 United Kingdom, House of Lords (n 84) col 1124 (Lord Clitheroe).

96 Ibid col 1241 (Lord Harris of Greenwich).

97 *Sex Discrimination Act 1975* (UK) s 19(1).

98 United Kingdom, House of Lords (n 84) col 1118 (The Lord Bishop of Southwell).

99 South Australia, *Parliamentary Debate*, Legislative Assembly, 19 August 1975, 348 (Don Dunstan).

100 Ibid 349; South Australia, *Parliamentary Debate*, Legislative Assembly, 11 June 1975, 3298.

both houses. The *Sex Discrimination Act 1975* (SA) was assented to on 4 December 1975 with a religious bodies exception that provided that the Act did not apply to:

> (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
> (b) the training or education of persons seeking, ordination or appointment as priests, ministers of religion, or members of a religious order; or
> (c) any other practice of a body established to propagate religion that conforms with the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.[101]

In this way, the religious bodies exception travelled from the UK to SA with amendments that significantly expanded its scope, without explanation. Where the UK's exception was for 'an organised religion', South Australia's was for 'a body established to propagate religion'; where the UK's exception was for 'where the employment is limited to one sex', South Australia's was for 'any other practice' apart from ordination and training of ministers; where the first limb of the UK's exception was for employment 'so as to comply with' the doctrines of that religion, South Australia's was for a practice 'that conforms with' the doctrines of the religion; where the UK's second limb was for employment 'so as to … avoid offending the religious susceptibilities of a significant number of its followers', South Australia's was for a practice 'necessary to avoid injury to the religious susceptibilities of the adherents of that religion'. I illustrate these changes in the following figure.

Figure 1: Comparison between UK and SA's Sex Discrimination Acts

***Sex Discrimination Act 1975* (UK)**		***Sex Discrimination Act 1975* (SA)**
an organised religion		a body established to propagate religion
where the employment is limited to one sex		any other practice apart from ordination and training of ministers
so as to comply with the doctrines of that religion		that conforms with the doctrines of the religion
so as to ... avoid offending the religious susceptibilities		necessary to avoid injury to the religious susceptibilities
of a significant number of its followers		of the adherents of that religion

101 *Sex Discrimination Act 1975* (SA) s 36.

SA's religious bodies exception was copied throughout Australia, in every state and territory anti-discrimination law, and in the *SDA* and *ADA*,[102] in varying terms and with the shift into the conjunctive in some jurisdictions, as I describe above in Part II.

Ignorance of the origins of the religious bodies exception helps to explain the many different ways it has been drafted throughout Australia, taking it well away from its original purpose and scope. Where it occurs, the conjunctive 'and' between the two limbs quite simply negates the original purpose of religious susceptibilities limb. The original exception was drafted in the UK with the disjunctive 'or' precisely to accommodate conduct that does not conform with doctrine but that does accord with a widely held dissenting view of doctrine.

This ignorance of the religious bodies exception's origins is apparent not only in legislative drafting; it is also apparent among parliaments, commentators, law reform bodies, courts and tribunals. An early example is the NSW Law Reform Commission's 1999 review of the *Anti-Discrimination Act 1977* (NSW), where the Commission said:

> [I]t is not clear what the [religious susceptibilities limb] is intended to achieve: if the employment of a woman in a particular position does not contravene the doctrines of the religion or creed, it is not clear in what way it could legitimately affect 'religious susceptibilities' of followers of those doctrines.[103]

It *is* clear, when the origins of the provision are known. What the NSW Law Reform Commission describes was precisely the situation in the UK: the 'particular position' of ordaining women did not contravene the doctrines of the Church of England, but *was* seen to legitimately affect religious susceptibilities of followers because of the high degree of dissent from that doctrinal position.

The Law Reform Commission of WA, in its own reasoning to explain the religious susceptibilities limb, came close to identifying its original purpose, saying 'it is appropriate in order to recognise the differences in beliefs of adherents to the same religion'.[104] But mere recognition of differences in belief falls short of the high degree of dissent that was the reason for the religious susceptibilities limb in the first place. The Australian Law Reform Commission ('ALRC'), in its review of discrimination exceptions in the *SDA* as they relate to religious educational institutions,[105] discusses the religious bodies exception, and the religious susceptibilities limb in particular, without examining its history, purpose or meaning, and without referring to accounts

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102 See above n 14.

103 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999) [4.126].

104 Law Reform Commission of Western Australia (n 36) 177 [4.5.4.4.3].

105 Australian Law Reform Commission ('ALRC'), *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, December 2023).

of its origins in the *SDA*.[106] Commentators are similarly unaware of the origins of the religious bodies exception. One reference to the religious susceptibilities limb in the UK has the story back-to-front: Greg Walsh has written that '[a] similar approach to a religious sensitivities test [in Australia] has been adopted in the United Kingdom under the *Equality Act 2010* (UK)',[107] but the converse is the case. Australia adopted the approach of the *Sex Discrimination Act 1975* (UK), and the provisions of the *Equality Act 2010* (UK) are the successor provisions to those of 1975.[108]

The religious susceptibilities limb's loss of connection with its UK origins has left its purpose open to speculation and assertion. The rationale that has increasingly been attributed to it is that of preserving or guaranteeing religious freedom.

V A 'Religious Freedom' Purpose?

At the outset I note that the discussion here of 'religious freedom' is not necessarily a discussion about the international human right set out in art 18 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'). As I discuss below, reliance on 'religious freedom' in the context of the religious bodies exception is often unreferenced and undefined, presented as a general assertion rather than a reasoned argument.

Before looking at how a 'religious freedom' purpose has been attributed to the religious susceptibilities limb, I consider reasons that have been proposed for the religious bodies exception as a whole.

Chris Ronalds made two early forays into this void left by the loss of connection with UK origins. In the first, she offered a public/private rationale for the exception, saying that it is 'part of a philosophy that anti-discrimination legislation is designed to regulate people's public life, and that religion is a private matter which should not be intruded on by such types of legislation'.[109] Similarly, the Victorian Attorney-General, when introducing the bill for the *Equal Opportunity Act 1995* (Vic), identified as a factor in exceptions 'the desire to infringe as little as possible on private spheres of activity'.[110] More closely aligned to the UK

106 See, e.g.: Chris Ronalds, *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* (Pluto Press, 1987) 124, 154 ('*Affirmative Action*'); Chris Ronalds, *Anti-Discrimination Legislation in Australia* (Butterworths, 1979) 92 ('*Anti-Discrimination Legislation*'); Human Rights and Equal Opportunity Commission ('HREOC'), *Report of Review of Permanent Exemptions under the Sex Discrimination Act 1984* (Parliamentary Report No 216, 1992) ch 4.

107 Walsh (n 18) 165.

108 See, e.g., *Equality Act 2010* (UK) sch 3, pt 1, para 29(1)(c); sch 9, pt 1, para 2(6); sch 23, para 9(a).

109 Ronalds, *Anti-Discrimination Legislation* (n 106) 92.

110 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1252 (Jan Wade, Attorney-General).

origins of the religious bodies exception, Ronalds later suggested that the religious bodies exception in the *SDA* was 'recognition of the political difficulties that would arise with the major churches if the *SDA* was to apply the appointment of clergy', pointing to the 'controversy which surrounds the appointment of women clergy in the Church of England'.[111] This latter argument — the politics of dealing with the major churches — is borne out by the well documented history of the enactment of the religious bodies exception in the *SDA*.[112]

A *The Religious Bodies Exception in the* SDA

At the time of the debates on the *SDA*, the religious bodies exception merely replicated one that already existed at the time in the anti-discrimination laws in SA, NSW and Victoria.[113] Explaining the exceptions in the Sex Discrimination Bill 1983 — including those for religious bodies — the Prime Minister, Bob Hawke, said that they were 'done in order to have the legislation widely accepted within the community as fair and reasonable'.[114] A review of the *SDA* exceptions by the Human Rights and Equal Opportunity Commission ('HREOC') reported that '[i]t is widely believed that the exemptions in the *SDA* reflect the political compromises that were necessary to secure the passage of the Act'.[115] HREOC reported that the exception for religious educational institutions 'was the culmination of extensive consultation between the Federal Government and church lobby groups'.[116]

Nevertheless, Neil Foster credits parliament with a 'freedom of religious' purpose in enacting the religious bodies exception in the *SDA*:

> Clearly, in the most basic sense, the decision to include these provisions was a 'deliberate legislative choice' — the words did not just magically appear. The question is, what was the reason for the choice? Were these provisions just inserted as temporary measures designed to be soon repealed? I suggest, rather, that the reason these provisions were included in the *SDA* is that the legislation does not only aim to protect one human right (the right not to be subject to discrimination). Instead, the Parliament was recognising, in adding these sections, that Australia's obligations to protect human rights *also* included the right to religious freedom.[117]

111 Ronalds, *Affirmative Action* (n 106) 154.

112 Ibid 124, 154; HREOC (n 106) ch 4.

113 See above n 14.

114 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives 5 March 1984, 481, cited in HREOC (n 106) [2.24].

115 HREOC (n 106) 42 [2.57].

116 Ibid 63 [4.25]

117 Neil Foster, 'Religious Freedom, the Sex Discrimination Act, and Section 109: A Surrejoinder to Butler' (2024) 5 *Australian Journal of Law and Religion* 14, 17 (emphasis in original).

Foster is right to ask 'what was the reason for the choice?'.[118] The answer lies in the legislative history of the provisions that I describe above which, contrary to Foster's assertion, shows that in 1983 the government of the day was not thinking about religious freedom but was negotiating a political deal to get its legislation through. More formally, the Explanatory Memorandum for the Sex Discrimination Bill 1983 offered no explanation for the exceptions for religious bodies and religious schools, and nor did the Minister's second reading speech.[119] In the extensive, combative and at times hostile parliamentary debates on the Bill,[120] the exception for religious schools was 'highly contentious',[121] and was 'probably the area that … provoked the most controversial responses'.[122] In the debates, the exception was characterised in many ways: allowing 'a school or like institution to insist on standards of sexual behaviour on the part of its employees or students';[123] going 'some way to protect the integrity of independent schools';[124] and addressing a fear 'that something is going to be imposed in some way from the outside'.[125]

In short, 'religious freedom' did not feature as a reason for the government's legislating a religious bodies exception in the *SDA*. The government had copied the religious bodies exception that already existed elsewhere, and was negotiating to get its legislation through against hostile opposition and making the necessary political compromises 'to placate the opposition by Church groups'.[126] If the church lobby groups had a sense of 'religious freedom', they never made it explicit when they sought to expand exceptions that were already in the Bill.

So how has a religious freedom purpose been attributed to the religious bodies exception, and to the religious susceptibilities limb in particular? For context, in all the debates in the UK Parliament in 1975, a single reference was made to 'religious freedom'; in the House of Commons, Miss Janet Fookes was disappointed with the religious bodies exception but conceded that the sex discrimination prohibition would otherwise 'have conflicted with the idea of religious freedom'.[127]

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118 Ibid.

119 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 February 1984, 68 (Michael Young).

120 See Margaret Thornton and Trish Luker, 'The Sex Discrimination Act and its Rocky Rite of Passage' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 25.

121 Commonwealth of Australia, *Parliamentary Debates*, Senate, 16 December 1983, 3990 (Kathryn Martin).

122 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 362 (Ronald Edwards).

123 Ibid 348 (Peter Drummond).

124 Ibid.

125 Commonwealth of Australia, *Parliamentary Debates* (n 119).

126 Ronalds, *Affirmative Action* (n 106) 124.

127 United Kingdom, House of Commons, 26 March 1975, vol 889, col 560 (Janet Fookes).

Perhaps because a religious freedom purpose has been attributed by different people at different times, and not in a central or formal way such as through the stated intent of the legislature, it can be unclear whether an attribution is for the whole of the religious bodies exception or only for the religious susceptibilities limb. It probably amounts to the same thing, as there is little argument that the first limb allows a religious body freedom to act in conformity with its doctrine; the real question is whether some type of religious freedom is being attributed to the religious susceptibilities limb.

B *The Intention of the Legislature*

Looking first at the legislatures in Australia, the religious bodies exception has rarely been enacted explicitly for a religious freedom purpose. The exception was copied by SA from the UK, and copied from there around Australia, without thought or comment. The usual sources of a stated purpose for legislation — such as parliamentary debates and the executive's explanatory statements — are silent on a provision that has simply been replicated. Even when the terms of the exception have been changed, as they have consistently, parliaments have rarely offered an explanation.

Submissions of church lobby groups to the 1992 review of the exceptions in the *SDA* were an early organised effort to attribute a religious freedom rationale to the religious bodies exception; submissions on the religious bodies exception as it related to schools 'stressed the need for religious liberty as a dominant right'.[128] All of the Australian Catholic Bishops Conference, the Anglican General Synod, the Seventh Day Adventist Church, the National Catholic Education Commission and the Australian Association of Christian Schools argued for the exception in the name of religious freedom, in some cases referring to art 18 of the *ICCPR*.[129] The review recommended[130] — as did the ALRC over 30 years later[131] — that the religious bodies exception for religious schools be removed from the Act, but the recommendations have not been acted on.

A relationship between the religious bodies exception and religious freedom rarely arose in the legislature. It was referred to in a second reading speech when Victoria re-enacted the religious bodies exception in the *Equal Opportunity Act 1995* (Vic),[132] and it came up briefly in Queensland in 2002, when, in parliamentary debates on amendments to the *Anti-Discrimination Act 1991* (Qld), many of the arguments

128 HREOC (n 106) 69 [4.44].

129 Ibid 76 [4.61].

130 Ibid 82 [4.76].

131 ALRC (n 105) recommendation 1. See also Alastair Lawrie, 'Déjà vu for LGBTQ Students and Teachers in Religious Schools' (2024) 30(3) *Australian Journal of Human Rights* 466.

132 Victoria, *Parliamentary Debates* (n 112) 1249 (Jan Wade, Attorney-General).

in defence of the religious bodies exception were framed in terms of protecting religious freedom.[133]

The issue of discrimination and religious freedom really came into the legislature with the proposed Commonwealth Religious Discrimination Bills in 2019–22, which were bold in their attempt to legislate a religious freedom to discriminate. The context for those Bills was that there had been increasing claims for legal recognition of religious freedom in Australian society from around 2011, 'when the campaign for marriage equality began to gain increasing traction in public debate … [and] the Australian Human Rights Commission released its first report on LGBT+ discrimination'.[134] The 'Yes' vote in the 2017 Marriage Equality plebiscite precipitated a strong conservative Christian outcry on loss of religious freedom. Then treasurer Scott Morrison, a conservative Christian himself,[135] said to Parliament 'There are almost five million Australians who voted no in this survey who are now coming to terms with the fact that they are in the minority. That did not used to be the case … They have concerns that their broader views and beliefs are … therefore under threat'.[136]

The Government's *Religious Freedom Review* followed soon after,[137] a chapter of which 'focusses entirely on issues that relate to the freedom of organisations, especially schools, and individuals (freedom of conscience) to discriminate against others on the basis of sexual orientation, gender identity and relationship status'.[138] In its submission to the review, the Australian Catholic Bishops Conference was explicit in describing discrimination exceptions as central to religious freedom: 'One of the principal ways religious freedom is recognised in Australia is in exceptions or exemptions to anti-discrimination'.[139] In its submission to the same review, the Anglican Church Diocese of Sydney describes discrimination exceptions as 'necessary for Christian institutions to "participate in national life as Christians", suggesting that without them Christian bodies could not be Christian or be involved in public life'.[140]

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133 See, e.g., Queensland, *Parliamentary Debates*, Legislative Assembly, 29 November 2002, 5032 and 5164 (Michael Horan), 5163 (Fiona Simpson).

134 Louise Richardson-Self, Elenie Poulos and Sharri Lembryk, 'The Debate about Religious Discrimination is Back, So Why Do We Keep Hearing About Religious "Freedom?"', *The Conversation* (online, 19 November 2021). See Poulos (n 3) on the emergence of the 'freedom of belief' discourse from 2015.

135 Mark Jennings, 'Explainer: What is Pentecostalism, and How Might it Influence Scott Morrison's Politics?', *The Conversation* (online, 1 October 2018).

136 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12348, quoted in Richardson-Self, Poulos and Lembryk (n 134).

137 Expert Panel, *Religious Freedom Review* (Report, 18 May 2018).

138 Eleni Poulos, 'Constructing the Problem of Religious Freedom: An Analysis of Australian Government Inquiries into Religious Freedom' (2019) 10(10) *Religions* 583, 594.

139 *Religious Freedom Review* (n 139) quoted in Ezzy et al (n 8) 947 n 2.

140 Ibid 934–5.

After two exposure drafts,[141] and purporting to give effect to recommendations of the *Religious Freedom Review*,[142] the Commonwealth Government introduced a final Religious Discrimination Bill in 2022. The religious bodies exception in the Bill was identified as a 'religious freedom' provision; the Explanatory Memorandum for the Bill stated that its drafting 'promotes the right to freedom of religion'.[143] Apart from controversial provisions that promoted a religious freedom to discriminate,[144] the Bill would have enacted a religious bodies exception with significantly lower thresholds: conduct necessary to conform with doctrine became conduct 'that a person of the same religion as the religious body could reasonably consider to be in accordance with' doctrine,[145] and the requirement of necessity was removed for conduct engaged in to avoid injury to religious susceptibilities.[146] The Government withdrew the Bill 'when it became clear it faced defeat in the Senate'.[147]

C *Deliberation by the Courts and in Law Reform*

The courts have turned to 'religious freedom' when they have had difficulty in understanding the purpose of the religious susceptibilities limb. As Maxwell P observed in the Victorian Court of Appeal, 'injury to religious sensitivities' is 'not a phrase in ordinary parlance', and it 'presents obvious difficulties of interpretation'.[148] Evans and Ujvari see the religious susceptibilities limb as 'rather vague'; they question not only its 'legal clarity', but also 'the principled justification supporting it'.[149] This vagueness, unfamiliarity and legal clarity invites interpretation, for which it is essential to understand context and purpose.[150]

In the absence of any stated parliamentary intention, courts and tribunals have readily attributed to the religious susceptibilities limb a religious freedom purpose.

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141 Luke Beck, 'Third Time Lucky? What has Changed in the Latest Draft of the Religious Discrimination Bill?', *The Conversation* (online, 19 November 2021).

142 Replacement Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) [2].

143 Ibid [20].

144 See Religious Discrimination Bill 2022 (Cth) cl 12. See also Kate Gleeson and Elenie Poulos, 'Religion and Politics After Marriage Equality in Australia: Contemporary Challenges in the Politics of Religious Freedom' (2024) 59(1) *Australian Journal of Political Science* 72; David Betts and James Bennett, 'Resurgent Prejudice: Responses to Marriage Equality in Australia' (2023) 58(4) *Australian Journal of Social Issues* 732; Adam Possamai and Rachel Sharples, 'Freedom of Religion and Fortress Christianity in Australia' in Olga Breskaya, Roger Finke and Guiseppe Giordan (eds), *Religion Between Governance and Freedoms. Boundaries of Religious Freedom: Regulating Religion in Diverse Societies* (Springer, 2024) 47.

145 Religious Discrimination Bill 2022 (Cth) cl 7(2).

146 Ibid cl 7(4).

147 Gleeson and Poulos (n 144) 74.

148 *Cobaw* (n 49) 329 [296].

149 Evans and Ujvari (n 18) 53.

150 Pearce (n 22) 40 [2.1], 46 [2.9]; Herzfeld and Prince (n 22) 107–10 [5.10]–[5.20].

This was, for example, 'accepted' by a NSW tribunal without reference to a source,[151] although the observation was not repeated in any of the subsequent related litigation.[152] President Maxwell stated, similarly without reference to a source, that the whole religious bodies exception is 'directed at protecting freedom of religion',[153] and in the same case Redlich J referred to the religious bodies exception 'the freedom of religion exemption',[154] and saw the provision as 'protect[ing] aspects of what may be described as the 'right to religious freedom'.[155]

Law reform bodies consistently attribute a religious freedom purpose to the religious bodies exception. As early as 1999, the NSW Law Reform Commission saw the general exception for religious bodies as 'guarantee[ing] the right of religious groups to practise their beliefs'.[156] Much the same has been said in subsequent law reform reports,[157] where religious freedom is readily asserted to be the reason for

151 *OV v QZ (No 2)* [2008] NSWADT 115, [116] ('*OV v QZ*').

152 *OV and OW (CA)* (n 48); *OW and OV (ADT)* (n 61).

153 *Cobaw* (n 49) 314 [229].

154 Ibid 381 [489].

155 Ibid 378 [475], 389 [514], 395 [538], 399 [548].

156 NSW Law Reform Commission (n 103) [6.71].

157 ALRC (n 105) recommendation 1, [4.28], [4.44], [4.80], [4.108]; Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 23 December 2015) 15 [130]; Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) 13 [2.17], 56–7 [5.20], 58 [5.23], 93 [7.65]–[7.66]; Senate Legal and Constitutional Affairs Legislation Committee, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Provisions]* (Report, June 2013) additional comments by the Australian Greens, 37–8 [1.7]; Rosalind Croucher et al, *Religious Freedom Review* (Report, 18 May 2018) 37 [1.97]–[1.101], table C1; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Report, 18 March 2015) 104–5; ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform, Discussion Paper 1: Extending the Protections of Discrimination Law* (Discussion Paper, 22 October 2021) 19–20; Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (Report, March 2021); Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 367; South Australian Law Reform Institute, *'Lawful Discrimination': Exceptions Under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status* (Report, June 2016) 58 [6.1.7]; Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (Final Report, 2009) 60, Minority Report 116; Law Reform Commission of WA (n 36) 174 [4.5.4.4]. See also the survey of 'Religious Freedom Inquiry Reports' in Poulos (n 138) 5 (table 1).

the religious bodies exception, often reflecting submissions made to that effect. Commentators make the same attribution.[158]

D *An Undefined 'Religious Freedom'*

The post-hoc attribution of a 'religious freedom' purpose for the religious bodies exception — and with it the religious susceptibilities limb — is now well established in Australia, born out of persistent extra-parliamentary claims and assertions to that effect. But this religious freedom is undefined; Maxwell P refers to it as 'an abstract concept, of uncertain scope',[159] and use of the term 'religious freedom' rarely refers to its nature or source.

It is common to say that the religious bodies exception is intended to guarantee the freedom to manifest one's religion or beliefs set out in art 18(3) of the *ICCPR*. An early example is in the churches' submissions to the 1992 review of the *SDA* exceptions;[160] a more recent one is in the Australian Law Reform Commission's 2023 report, where proposed reforms to the religious bodies exception in the *SDA* were discussed unquestioningly in terms of justifiable limits on human rights under international law.[161] It is, however, not clear that Australian parliaments enacted the religious bodies exception to recognise the international human right of freedom of religion in art 18 of the *ICCPR*; for example, Foster's claims for the *SDA* assert, against the evidence, an unsourced and undefined 'religious freedom', and the Explanatory Memorandum for the Commonwealth's Religious Discrimination Bill makes no reference to art 18.[162]

An exception may be in Victoria where, as I note above, the Attorney-General said when introducing the bill for the *Equal Opportunity Act 1995* (Vic) that the religious bodies exception 'aims to strike a balance between two very important and sometimes conflicting rights — the right of freedom of religion and the right to be free from discrimination'.[163] As Maxwell P observed in *Christian Youth Camps*

158 See, e.g.: Evans (n 45) 30 [4.4.1]; Elphick (n 20); Moulds (n 19) 116; Joel Harrison and Patrick Parkinson, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40(2) *Monash University Law* Review 413, 414; Evans and Ujvari (n 18) 54; Evans and Gaze (n 18) 396; Anthony Gray, 'The Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42(1) *Monash University Law Review* 72; Foster (n 117); Patrick Parkinson, 'Adolescent Gender Identity and the *Sex Discrimination Act*: The Case for Religious Exemptions' (2022) 1 *Australian Journal of Law and Religion* 76, 80; Beth Gaze and Belinda Smith, *Equality and Anti-Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 158 [57].

159 *Cobaw* (n 49) 306 [198].

160 HREOC (n 106) 69 [4.44].

161 See, e.g., ALRC (n 105) recommendation 1, [4.28], [4.44], [4.80], [4.108].

162 Replacement Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth).

163 Victoria, *Parliamentary Debates* (n 110).

Ltd v Cobaw Community Health Services Ltd ('*Cobaw*'),[164] this is a reference to the right of freedom of religion 'without elaboration',[165] and a necessary elaboration — if there was genuinely an intention to accommodate two human rights — would be a proportionality analysis to establish justifiable limits on the rights.[166]

There is much more that can be said about freedom of religion and its relationship with the religious bodies exception and its religious susceptibilities limb.[167] The point I make here is that the attribution of a religious freedom purposes arises not because it was intended by parliaments, but because parliaments have been largely silent on their intention, and the UK origins have never been recognised.

VI It's Just an Exception

An exception to a prohibition is not a statement of freedom. The religious bodies exception conditionally negatives a legislative prohibition on discrimination. As a number of submissions to a NSW Parliamentary committee pointed out, 'a right to freedom of religion is distinct from anti-discrimination law, as it creates rights or privileges, rather than prohibiting discrimination against individuals with a particular attribute'.[168] Indeed, Nicholas Aroney and Patrick Parkinson are impatient with the characterisation of the religious bodies exception as a religious freedom guarantee, pointing out that the exception for religious educational institutions in s 38 of the *SDA* makes 'no mention … of the rights of religious educational institutions to freedom of religion or freedom of association'.[169]

Close attention to the ALRC's analysis illustrates the technical mechanisms behind the religious bodies exception. For the ALRC — as for anyone considering the operation of an anti-discrimination statute — the starting position is that

164 *Cobaw* (n 49).

165 Ibid 305–6 [198].

166 See, e.g., ALRC (n 105) 119–21 table 4.1: Proportionality of the recommended limitation on the freedom to manifest religion or belief.

167 See e.g.: ALRC (n 105); *Cobaw* (n 49) 304–6 [189]–[198].

168 Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (Report, March 2021) 1.61, citing submissions from Anti-Discrimination NSW, Public Interest Advocacy Centre, Kingsford Legal Centre, The Law Society of NSW and the Australian Discrimination Law Experts Group. See the analysis of exceptions, for purposes of a constitutional inconsistency argument, in Nicholas Butler, 'May Australian States Impose Sexual Orientation and Gender Identity Non-Discrimination Obligations on Religious Schools? A Rejoinder to Foster' (2023) 2 *Australian Journal of Law and Religion* 1.

169 Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australian Journal of Legal Philosophy* 1, 23. Note that the ALRC has recommended the repeal of s 38 of the SDA: ALRC (n 105) recommendation 1.

discrimination is prohibited.[170] An exception to that prohibition allows discrimination only to the extent that is allowed by the criteria for the exception. The religious bodies exception is merely a particular instance of the way that exceptions work generally. The effect of an anti-discrimination prohibition is to 'render prima facie unlawful any discrimination' in the identified conduct.[171] That prima facie unlawfulness prevails 'unless the [respondent] could affirmatively establish that the relevant discrimination … came within the exception'.[172] In this way, discriminatory conduct is 'cleansed of fault' by the operation of an exception.[173] This is why the religious bodies exception in anti-discrimination laws does not — cannot — give a right to religious bodies. The exception cannot found a cause of action; rather, it relieves religious bodies of a prohibition against discriminating — it cleanses them of fault.

Justice of Appeal Basten and Handley AJA state it clearly in *OV & OW*, in relation to the religious susceptibilities limb in particular: the provision 'does not accept [sic] all acts and practices by bodies established to propagate religion … a religious body which discriminated … would need to justify its act' within the terms of the religious susceptibilities limb.[174] This exercise in justification is, as Allsop P points out, a matter of evidence: 'The question will be a factual one and likely be answered in an objective sense — the avoidance of injury to the religious susceptibilities of people who are adherents of that religion'.[175]

A *A Matter of Evidence*

OV and OW, and *Cobaw* are the two superior court cases that have considered the issue of proof of the religious susceptibilities limb. The Court in *OV and OW* addressed the issue of how many adherents have to be shown to have the religious susceptibilities that would be injured — exactly the issue that was debated by the UK Parliament, which decided that what is required is 'a significant number'. But, as I note above in Part III, that quantification has been omitted in every enactment of the religious susceptibilities limb in Australia. In NSW the religious susceptibilities limb requires proof of the religious susceptibilities only of 'the adherents', and Allsop P said:

> I doubt that it is correct to read the word 'the' … as meaning every single adherent of the religion such that if the 'susceptibilities' of one adherent were not likely to be 'injured' the provision could not be satisfied … It is a mistake to identify quantity or number, beyond saying that 'the adherents' must be a significant proportion of the

170 ALRC (n 105) [2.13]; *OV and OW (CA)* (n 48) [72].

171 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 339.

172 Ibid.

173 *Jamal v Department of Health* (1988) 14 NSWLR 252, 265.

174 *OV and OW (CA)* (n 48) [72].

175 Ibid (n 61) [12]. See also Law Reform Commission of Western Australia (n 36) 175 [4.5.4.4]: 'These are matters about which the parties may need to call evidence from theological experts'.

> group, such that the phrase as a matter of fact is satisfied: that it was necessary to avoid injury to the religious susceptibilities of the adherents of that religion.[176]

In saying this, Allsop P read into the religious susceptibilities limb the same test for adherents — a 'significant' number or proportion — that was in the original exception in the UK. In the UK, Ian Gilmour MP asked for 'some indication of what "a significant number" means', to which Shirley Summerskill MP replied 'It would be for the courts to decide in a particular case.'[177]

On the same issue, Basten JA and Handley JA appeared to criticise the approach of the Tribunal at first instance:

> [The Tribunal] expressly accepted that the source of the susceptibility need not be a doctrine or practice to which members of the religion universally adhered. However, it concluded that it was not sufficient that the practice was necessary to avoid injury to 'some' or 'an unknown proportion of' the adherents of the religion. It appears to have approached that question on the basis that there was evidence of 'diversity of views' amongst adherents of both the Christian religion and, more specifically, of the Uniting Church, 'on the issue of homosexuality.'[178]

Before the Tribunal at first instance it was 'common ground' that there was a 'diversity of views' among adherents of the Christian religion about homosexuality,[179] and that 'members of the Uniting Church hold a range of views on the issue of homosexuality'.[180] This is just the scenario that the drafting of the original religious bodies exception in the UK was intended to address: adherents held a dissenting view that, contrary to the doctrinal position, potential adoptive parents should be discriminated against on the basis of their homosexuality. Having to make sense of the failure of the religious susceptibilities limb to specify a relevant number or proportion of adherents, the Tribunal's approach, apparently unwittingly, was consistent with the original purpose of the religious susceptibilities limb in the UK in 1975, to a point.

The Tribunal acknowledged that members of a religion may not universally adhere to a doctrine, which was actually the case in the UK. The Tribunal considered that it was not sufficient that the practice was necessary to avoid injury to 'some' or 'an unknown proportion of' adherents;[181] again, this was the view that the UK Parliament came to in agreeing on the terms of the religious susceptibilities limb. And the Tribunal accepted that there was a diversity of views among adherents on

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176 Ibid.

177 United Kingdom, *Parliamentary Debates*, House of Commons, 16 August 1975, vol 897, col 1619–20.

178 *OV and OW (CA)* (n 48) [46].

179 *OV v QZ* (n 151) [127].

180 Ibid [140].

181 Ibid [141].

the issue of homosexuality,[182] just as the UK parliament accepted that there was a diversity of views among adherents on the issue of appointing women as priests. In the UK, this led to specifying in the religious susceptibilities limb 'a significant number' of followers, while no quantification is specified in the terms of the Act in NSW (or in any other Australian jurisdiction). This forced the Tribunal away from the UK approach; it had to decide what to do with evidence of the views merely of a diversity of adherents, and felt that it could not read the religious susceptibilities limb 'to mean "some" or "an unknown proportion" of the adherents of the [relevant] religion. The use of the definite article, "the", makes this clear'.[183] The Tribunal therefore decided that '[g]iven the diversity of views among adherents … the [discrimination] cannot be said to be necessary to avoid injury to the religious susceptibilities of the adherents'.[184]

When a differently constituted tribunal reconsidered the matter after it was remitted back from the Court of Appeal,[185] its approach to the religious susceptibilities limb was cursory. It found that the exception was established because, on the affidavit evidence of an ordained minister, '[i]f Wesley Mission was required to appoint homosexual foster carers, this would make our provision of foster care services unacceptable to those who support the ethos of Wesley Mission'.[186] This evidence fails to establish the religious susceptibilities limb in two respects: the Tribunal heard evidence of what would be 'acceptable', not of what would injure religious susceptibilities, and it did not hear evidence that accords with Allsop P's view that evidence must establish the religious susceptibilities of a 'significant proportion' of adherents.

In Victoria there is, again, no statement in the religious susceptibilities limb of the necessary number or proportion of adherents whose 'sensitivities' have to be established. The Court of Appeal in *Cobaw* did not directly address the issue[187] (nor did the Tribunal at first instance[188]) and appeared content to accept evidence generally of the sensitivities of people of the religion. The Court observed that 'the question of necessity was intended to be judged objectively',[189] and upheld the finding of the Tribunal at first instance;[190] the Tribunal had found that the evidence given by some members of the Christian Brethren failed to show that discrimination against same sex attracted people, or against people who engaged in sexual activity outside

182 Ibid [142].

183 Ibid [139].

184 Ibid [142].

185 *OW and OV (ADT)* (n 61).

186 Ibid [34].

187 *Cobaw* (n 49).

188 *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 [344] ('*Cobaw (VCAT)*').

189 *Cobaw* (n 49) [292].

190 Ibid [303]–[304], referring to *Cobaw (VCAT)* (n 188).

marriage, was necessary to avoid injury to 'the sensitivities *common to* adherents of the religion'.[191]

At first instance,[192] the complaint was that Christian Youth Camps Ltd, operated by the Christian Brethren, had discriminated against potential hirers of its facilities on the basis of their (same sex) sexual orientation. An attempt to rely on the religious bodies exception failed because the Tribunal found that Christian Youth Camps Ltd was not a religious body. Although the Tribunal noted that it was 'unnecessary' to do so,[193] it nevertheless considered whether the facts supported the religious bodies exception.

The Tribunal heard evidence of the beliefs on homosexuality held by some members of the Christian Brethren, but was 'not satisfied those beliefs constitute a doctrine of the religion of the Christian Brethren'.[194] The Tribunal then considered the alternative, the religious susceptibilities limb. Evidence of previous hiring out of the facilities satisfied the Tribunal that to refuse bookings to same sex attracted people 'was not necessary to avoid injury to the religious sensitivities of the Christian Brethren'[195] so the exception under the religious susceptibilities limb was not made out. It is arguable whether an inference based on evidence of previous practice is enough to show that no adherents' religious susceptibilities that were offended. There was clear evidence that the religious susceptibilities of some adherents were offended; the Tribunal's approach may again have followed from the absence of any legislatively prescribed quantification of relevant adherents in the legislation.

There are few other reported cases when a religious body has relied on the religious susceptibilities limb; Elphick notes that relevant case law 'is sparse due to the expense of litigation, the resolving of most matters through private conciliation, and the under-reporting of discrimination'.[196] To these I would add obstacles such as: (1) obtaining legal advice and representation; (2) the inherent challenges of running proceedings as a self-represented litigant; (3) well-resourced and 'repeat player' respondents; (4) risks of orders for security for costs and adverse costs; and (5) a likely low level of damages awards.[197]

Apart from *OV and OW*, in only one case was the religious susceptibilities limb successfully relied on, but the digested report is difficult to make sense of. It seems that Dr Hazan complained that his expulsion from a centre run by religious body

191 *Cobaw (VCAT)* (n 188) [259], [329] (emphasis added).

192 *Cobaw (VCAT)* (n 188).

193 Ibid [255].

194 Ibid [307].

195 Ibid [344].

196 Elphick (n 20) 161.

197 See 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; Gaze and Smith (n 158) 57–8 [35]–[39], 176–7 [8]–[10], 182 [22], 196–9 [60]–[67].

was an act of victimisation for his having made a discrimination complaint against the centre. It is hard to say what evidence was led to support reliance on the religious susceptibilities; the digest reports only that 'it was clear on the evidence that the expulsion … was necessary to avoid injury to the religious susceptibilities of the particular religion'.[198]

In the remaining few cases, the religious body has repeatedly failed to discharge its burden of proof. Two strike-out cases show, in different ways, that evidence is required to establish the religious susceptibilities limb. In one case it was argued that a discrimination claim should be struck out on that basis that the religious susceptibilities limb clearly applied. The Tribunal declined to strike out, because:

> No evidence was led by the respondent as to the sensitivities of people of the Roman Catholic religion which would be injured [by the conduct] or of whether to avoid injuring any such sensitivities, [the conduct] was necessary rather than merely convenient or desirable …[199]

In another strike-out application, the Tribunal decided that whether the discrimination was reasonably necessary to avoid injury to the religious sensitivities of the members of the Serbian Orthodox Church was a matter for evidence at a full hearing.[200]

When led, evidence can fail to establish the necessary facts to engage the religious susceptibilities limb. In a case where a man was excluded from a religious body for wearing an earring, contrary to a code of conduct, the Tribunal said:

> On the evidence, we are not satisfied that the Respondents [sic] conduct in relation to Jacob was necessary to avoid injury to the religious sensitivities of those who attend the RCI Churches … There is no evidence before us as to what the religious sensitivities of the adherence [sic] of RCI are, or of whether the wearing of earrings in church by males would injure those sensitivities, or as to whether the banning of males who wear earrings from Church is necessary to avoid injury to those sensitivities.[201]

In another case, evidence in a complaint of sexual orientation discrimination showed that the Catholic doctrinal view was that 'a chaste homosexual person' can teach in Catholic schools.[202] Evidence also showed that any injury to adherents' religious susceptibilities caused by employing a gay teacher was based an assumption 'that a person who acknowledges his or her homosexual orientation is sexually active …

198 *Hazan v Victorian Jewish Board of Deputies* (1990) EOC 92–298.

199 *Tassone v Monsignor Francis Hickey* [2001] VCAT 47, [47].

200 *Trkulja v Dobrijevic* [2013] VCAT 925, [69].

201 *Jubber* (n 64) 74.

202 Human Rights and Equal Opportunity Commission, *Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Sexual Preference* (Report No 6, March 1998) 22, digested in *Griffin v Catholic Education Office* (1998) EOC 92–928.

[which] is contrary to Catholic teaching'.[203] It followed that 'any injury to the pupils and parents of the school … would not be an injury to their religious susceptibilities 'but an injury to their prejudices'.[204]

In two other cases where evidence was led, reliance on the religious susceptibilities limb failed because the party relying on it was not a religious body. However, in both cases the Tribunal went on to say that, in any event, the evidence failed to show that the discrimination was necessary to avoid injury to the religious susceptibilities of adherents. In one case, the evidence showed that separate seating for men and women at a public lecture 'was not necessary in order to avoid injury to the religious susceptibilities of adherents to the Islamic faith who were also attending the lecture', but was a matter of choice.[205] In another case the evidence showed that refusal to let a home unit to an unmarried couple was the imposition of a belief rather than an act done to avoid injury to the susceptibilities.[206]

Evidence of whether the discrimination is 'necessary' to avoid injury to religious susceptibilities is a common issue in these cases. That evidence may not be required, however, when the discrimination must be done 'in good faith', as is the case in WA and under the *SDA*.[207] The religious susceptibilities limb in the *Fair Work Act 2009* (Cth) also has the good faith requirement,[208] and it has been held that 'to satisfy the conditions of the exemption …[a religious body] need only demonstrate that the decision … was made in good faith for the purpose of avoiding injury to the religious susceptibilities of its adherents'.[209]

VII Conclusion

The original purpose of the religious susceptibilities limb of the religious bodies exception was to accommodate a significant number of dissenters when the Church of England resolved that its doctrine did not prevent the ordination of women as priests. That exception then embarked on a long journey: from the House of Lords in 1975 to the ALRC review in 2023, by way of SA then all other states and territories, through law reform reviews, parliamentary debates, academic articles, and legal decisions. Along the way the religious susceptibilities limb lost its original purpose, adopted many different forms, and was eventually attributed with a new purpose.

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203 Ibid.

204 Ibid.

205 *Bevege* (n 50) [98].

206 *Burke v Tralaggan* [1986] EOC 92–161.

207 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73.

208 *Fair Work Act 2009* (Cth) s 772(2)(b). See previously *Workplace Relations Act 1996* (Cth) s 659(4), *Industrial Relations Act 1988* (Cth) s 170DF(3).

209 *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, 444. See also *Lainie Chait v Church of Ubuntu Inc* [2024] FWC 703, [55]–[68].

The attribution of a religious freedom purpose may never had happened had Don Dunstan in SA in 1975 understood what he was doing when he examined the *Sex Discrimination Act 1975* (UK) to see what 'could be usefully incorporated' into the South Australian legislation. He might have said, 'we are enacting a religious bodies exception with two alternative limbs: one that allows discrimination that is necessary so as to comply with doctrine, and one that allows discrimination in circumstances where discrimination is not necessary to conform with doctrine, but a significant minority of adherents of the religion disagree with the doctrinal position'. But he did not say that, or anything like it. Neither then nor in subsequent enactments in Australia was a reason given for the religious susceptibilities limb, until an idea of religious freedom began to emerge.

The original purpose of the religious susceptibilities limb was much narrower than has developed in Australia. Its purpose was to deal with religious doctrine in a state of flux; when, although discrimination is not required to conform with doctrine, there is a widely-held dissenting view on that issue. That was so in both *OV and OW* and *Cobaw*, where there was no doctrinal need to discriminate on the basis of sexual orientation; they would have been apt cases for taking a narrow approach to the religious susceptibilities limb, one that accorded with its original purpose.

Cases that turn on the religious susceptibilities limb are rare, however, and in half of the few that have been reported, reliance on the religious susceptibilities limb failed because the entity was not a religious body. This suggests that the work the religious susceptibilities limb does occurs well before a discrimination complaint is litigated: the contemporary understanding of the religious susceptibilities limb is so broad — allowing religious freedom to discriminate — that discrimination complaints may simply not be made, or may be quickly disposed of in the mandatory conciliation phase. It has been pointed out that even though 'faith-based Christian institutions may not intend to discriminate, *the possibility that they can and that they demand the right to*, may leave LGBTI people uncertain and cautious in seeking assistance'.[210] The religious susceptibilities limb presents this possibility.

The mere existence of the religious bodies exception — especially under a heading, as is usually the case, 'Exceptions: religious bodies' — may be effective in deterring complaints against religious bodies of discrimination. As for all acts of discrimination, we simply do not know how many discriminatory acts are not complained of or why. When a complaint *is* made, the mere assertion of the exception by a religious body may lead to withdrawal of the complaint; we rarely know how complaints are resolved as the process is hidden behind a private mandatory conciliation process, usually conducted confidentially.[211]

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210 Parsell et al (n 7) 466, quoting Dale Dominey-Howes, Andrew Gorman-Murray and Scott McKinnon, 'Emergency Management Response and Recovery Plans in Relation to Sexual and Gender Minorities in New South Wales, Australia' (2016) 16 *International Journal of Disaster Risk Reduction* 1, 8 (emphasis added).

211 See Dominique Allen and Alysia Blackham, 'Using Empirical Research to Advance Workplace Equality Law Scholarship: Benefits, Pitfalls and Challenges' (2018) 27(3) *Griffith Law Review* 337, 347–50; Gaze and Smith (n 158) 187 [32].

More generally than the religious susceptibilities limb's deterrence effect in relation to complaints, the broad 'religious freedom' claim that it enables is defining public debate on the place of religious bodies in public life. The absence of a stated purpose for the religious susceptibilities limb has enabled church lobby groups, since at least the early 1990s, to assert a religious right to discriminate unbounded by the confined original purpose of the exception. This assertion reached its peak in the failed Religious Discrimination Bill (Cth) 2022, with its aggressive and unprecedented approach to promote a religious freedom to discriminate.

Both the deterrence effect of the religious susceptibilities limb on complaints, and its use as a basis for arguing in public debate for a broad religious freedom to discrimination, would be limited if its intended purpose was understood as accommodating widely held doctrinal dissent on the issue of discrimination. In 1975 in the UK there was widely held doctrinal dissent on the issue of sex discrimination in the ordination of woman as priests in the Church of England; in 2025 in Australia there is widely held doctrinal dissent on the issue of sexual orientation discrimination in faith-based employment and the provision of goods and services; and in the future there will no doubt be widely held doctrinal dissent on other issues of religious doctrine. That — and not a broad licence to discriminate — is what the religious susceptibilities limb was intended to address. It would help, too, if the many ways that the religious bodies exception is drafted around Australia could transcend federal divisions and — achieving the art of the impossible[212] — be drafted with national uniformity!

212 Guzyal Hill, 'Categories of the "Art of the Impossible": Achieving Sustainable Uniformity in Harmonised Legislation in the Australian Federation' (2020) 48(3) *Federal Law Review* 350.

*Megan Beatrice**

CRITICAL RACE THEORY IN THE AUSTRALIAN CARCERAL CONTEXT: THINKING DIFFERENTLY ABOUT OVER-INCARCERATION

Abstract

First Nations people in Australia are among the highest growing carceral populations in the world, and yet countless attempts to reverse the trend have been unsuccessful. This paper contends that notions of race play a foundational role in the over-incarceration of First Nations people, and to that end applies a Critical Race Theory lens to this crisis. By considering the historical and jurisprudential development of Critical Race Theory from its inception in the 1970s and looking at how the lens has been utilised outside of the United States, an opportunity arises to reimagine the problem of over-incarceration. This paper conducts a comparative analysis of two key cases which center race: *Brown v Board of Education* in the United States, and *Mabo v Queensland (No 2)* in Australia, to illustrate the practical limitations of symbolic judgments and how the legacies of these cases contribute to the treatment of racialised people in Western criminal justice systems. These analyses, supported by consideration of Canadian and Australian sentencing decisions, ultimately lead to the conclusion that Critical Race Theory underscores the failure of law to provide justice to racialised people in the criminal justice system.

I Introduction

In 1998, in the Minnesota Supreme Court case *State v Buggs*,[1] Page J, in his dissenting judgment stated that '[i]n part, what makes race a confounding problem and what causes many people to not know what race is, is the view that the problems of race are the problems of the racial minority'.[2] When considering the alleged racially discriminatory reasons for excluding a particular juror in that case, his Honour continued: 'The problems of race belong to all of us, no matter where our ancestors come from, no matter what the color of our skin … *Race is an*

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1 *State v Buggs*, 581 NW 2d 329, 344 (Minn, 1998).

2 Ibid.

issue'.[3] Words like 'race', 'racist', and 'racialised' are, in many ways, confounding. They are employed in a multitude of contexts, they are loaded with inconsistencies and inconsistent intentions, they mean very different things to different groups and individuals.[4] Nevertheless, the 'distinct division' of race as manufacturing the colonised other,[5] is central to an analysis of the over-incarceration of First Nations people in Australia.

Race, its 'fixity',[6] and the distinction and naming of race, is a powerful tool of colonial law in settler-colonial jurisdictions like the United States ('US'), Australia, Canada, and New Zealand. Indeed, some scholars suggest that in jurisdictions like Australia, notions of race are informed by 'the legacy of white colonisation'.[7] This has, seemingly contradictorily, allowed for 'one … to distance oneself from white domination by adhering to a liberal position of universal sameness', a position which 'erases race' and has unique implications for colonial power and violence.[8] Distinctions of race are, however, essential to the legitimisation of the colonial project. The 'truth' of race within colonial structures maintains and perpetuates an othering[9] of First Nations people and reinforces the ongoing power of settler-colonial structures of law and justice. These ideas are reflected in the work of Australian scholars, including Irene Watson's decolonial theory and Maria Giannacopoulos' work on nomocide, which are examined in more detail below.[10] This paper outlines the history and development of Critical Race Theory ('CRT') and considers how this theoretical framework might allow us to think differently about the ways in which race has impacted, and continues to impact, the over-incarceration for First Nations people in Australia.

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3 Ibid (emphasis added).

4 See, e.g., Destiny Peery, '(Re)defining Race: Addressing the Consequences of the Law's Failure to Define Race' (2017) 38(5) *Cardozo Law Review* 1817, 1854–6.

5 Edward Said, *Orientalism* (Vintage Books, 1979) 45.

6 Homi K Bhabha, *The Location of Culture* (Routledge Classics, 2004) 94.

7 Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (University of Texas Press, 1998) 91.

8 Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Minnesota Press, 2021) 145.

9 See, e.g.: Said (n 5) 206; Frantz Fanon, *Black Skin, White Masks*, tr Richard Philcox (Grove Press, rev ed, 2008); Frantz Fanon, *Wretched of the Earth*, tr Constance Farrington (Penguin Classics, 2002) (Grove Press, 1963) 41. See also for discussion of 'truth', 'knowledge', and the 'other': Jean-Paul Sartre, 'Introduction' in Frantz Fanon, *The Wretched of the Earth*, tr Constance Farrington (Penguin Classics, 2002) 7; Jean-Paul Sartre, *Anti-Semite and the Jew: An Exploration of the Etiology of Hate*, tr George Becker (Knopf US, rev ed, 1995); Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge*, tr Robert Hurley (Penguin Classics, 2020) ('*History of Sexuality*').

10 See, e.g.: Irene Watson, 'Buried Alive' (2002) 13(3) *Law and Critique* 253; Maria Giannacopoulos, 'White Law/Black Deaths: Nomocide and the Foundational Absence of Consent in Australian Law' 46(2) (2022) *Australian Feminist Law Journal* 1.

This paper is broken into five sections. First, this introduction details the concept of race itself, including definitions of race and the ways in which race is understood for different purposes. Second the paper turns to a brief history of CRT, exploring its development and common applications. The third section discusses the key tenets of CRT and how they relate to the Australian context. The fourth section examines the conceptualisation of race as a social construct, allowing for a comparative analysis of the Australian common law which exposes this. The fifth section then considers common critiques of CRT, including the four-point critiques identified by Mari Matsuda: that race does not exist, that it is not unique to people of colour, that it is paranoid and/or separatist, and that it is theoretically unsound.[11]

A critical analysis is then undertaken comparing the US Supreme Court decision of *Brown v Board of Education of Topeka* ('*Brown*'),[12] popularly considered a watershed moment in the development of CRT, and the similarly symbolic High Court of Australia decision in *Mabo v Queensland (No 2)* ('*Mabo*').[13] This section applies Derrick Bell's 'interest-convergence' theory, discussed in more detail in the following sections of this paper, and argues that both *Brown* and *Mabo* are the products of a point in time at which the material and/or psychological interests of the white majority and the racialised other converged, or, at least, were not divergent. Finally, this paper considers how conceptions of race in the Australian criminal justice system influence incarceration. This is achieved by analysing the sentencing practices of Australian courts in the context of *Bugmy v The Queen* ('*Bugmy*').[14] This article ultimately concludes that the CRT lens, despite criticism, offers an invaluable perspective on the over-incarceration of people of colour, particularly First Nations people, which differs from the dominant view.[15]

11 Mari Matsuda, *Where is Your Body? And Other Essays on Race, Gender and the Law* (Beacon Press, 1996) 55.

12 347 US 483 (1954) ('*Brown*').

13 (1992) 175 CLR 1 (*'Mabo'*).

14 (2013) 249 CLR 571 ('*Bugmy*').

15 This methodology, which promotes an alternative view of the crisis of over-incarceration of First Nations people, draws on Michel Foucault's 'Theory of the Present', a methodological framework which is 'patchworked' together from a number of his works, including: Michel Foucault, *The Archaeology of Knowledge*, tr Alan Sheridan (Routledge, 2nd ed, 2002); Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Penguin Classics, 2020) ('*Discipline and Punish*'). See also: Friedrich Nietzsche, *On the Genealogy of Morals*, tr Michael Scarpitti (Penguin Classics, 2013); David Garland, 'What Is a "History of the Present"? On Foucault's Genealogies and Their Critical Preconditions' (2014) 16(4) *Punishment & Society* 365; Michael S Roth, 'Foucault's "History of the Present"' (1981) 20(1) *History and Theory* 32.

II What Is Race?

In order to frame the ideas considered in this paper, it is necessary to clarify the concept of race, particularly in the context of this paper. The *Macquarie Dictionary* defines 'race' as follows:

> 1. a group of people sharing genetically determined characteristics such as skin pigmentation or hair texture. 2. the differentiation of people according to genetically determined characteristics: genetic studies of race; discrimination on the grounds of race. 3. a large class of living beings: the human race; the race of fishes. 4. a group of people sharing a language or culture of traditional beliefs or practices: the Scottish race. 5. Zool. a distinctive group within a species; subspecies.[16]

Each of these definitions are markedly physical in nature, focusing on physical characteristics, physical distinctions, and physical groups, reflecting the biological theory of race.[17] The biological theory of race consists of two distinct, but compatible, sub-theories: the typological theory of race is an essentialist lens which relies on systematic classifications of schemes; geographical race, which was developed later, holds that 'race is a geographically localized subdivision of a species'.[18] It is important to note that the biological theory of race has been largely discredited,[19] and as such it is necessary to consider the theoretical interpretations of race relevant to this research.

In outlining his understanding of what race means, Ian Haney Lopez concedes that it is our physical characteristics, including hair, skin, and facial structure, that influence 'whether we are figuratively free or enslaved'.[20] However, Lopez argues that race can be defined not only as physical, which has its roots in biological essentialism, but also as economic, as political, and as fundamental to identity.[21] For Lopez, the 'primitive view' of race — exemplified by the empirical definition set out in *Hudgins v Wright*,[22] where race is determined by having a 'single African

16 *Macquarie Dictionary* (online at 1 April 2025) 'race' (def 4).

17 See, e.g: Robin O Andreasen, 'Race: Biological Reality or Social Construct?' (2000) 67(53) *Philosophy of Science* S653, S663; Robin O Andreasen, 'The Meaning of "Race": Folk Conceptions and the New Biology of Race' (2005) 102(2) *The Journal of Philosophy* 94, 94.

18 Robin O Andreasen, 'Biological Conceptions of Race' in Mohan Matthen and Christopher Stephens (eds), *Philosophy of Biology* (Elsevier, 2007) 455, 460.

19 See, e.g: Andreasen, 'Biological Conceptions of Race' (n 18); Lisa Gannett, 'The Biological Reification of Race' (2004) 55(2) *British Journal of Philosophy and Science* 323; Joseph L Graves, *The Emperor's New Clothes: Biological Theories of Race at the Millennium* (Rutgers University Press, 2001); Andreasen, 'Race: Biological Reality or Social Construct?' (n 17).

20 Ian Haney Lopez, 'The Social Construction of Race' in Julie Rivkin and Michael Ryan (eds), *Literary Theory: An Anthology* (Wiley-Blackwell, 2nd ed, 2004) 965.

21 Ibid.

22 11 Va (1 Hen & M) 134 (Va, 1806).

antecedent', a 'flat nose', or a 'woolly head of hair' — is not sufficient.[23] Race, and the ways in which we define it and it defines us, goes beyond the physical.

This view is consistent with Alain Locke's theory of atavism. Locke's essay, *The New Negro*, marks a 'turning point' in how the associations between race and 'cultural traits' was understood.[24] 'Biological atavisms' refers to the theory that physical characteristics of some animals, including humans, can revert to an earlier evolutionary point, sometimes referred to as a 'throw-back'.[25] As Clarence Walker explains in the context of the *Brown* decision, the environment in the American South which allowed racial segregation was consistent with an atavistic social attitude.[26] For Walker, 'America and the South's atavism *was* segregation'.[27]

Lopez challenges the atavistic view of race, arguing that race, is 'a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry … a sui generis social phenomenon'.[28] However, Destiny Peery, in her paper identifying the historic and ongoing reluctance of the law to define race, argues that despite the silence of the law on 'race', doing justice frequently relies on constructions of race, making racial classifications both important and necessary.[29] For the purpose of this paper, race is understood consistently with Lopez's definition: as socially constructed distinctions between groups linked by common ancestry. This paper utilises CRT to interrogate the construct of race and its application to the Australian carceral context. While CRT encapsulates a large field of theoretical propositions, it can be represented with a broad approach like Lopez's for the purpose of this paper. In discussing and conducting a critical analysis of First Nations peoples' incarceration through the lens of CRT, this paper demonstrates the ways in which race, as a category of disadvantage in the Australian context, is pervasive.

III History of Critical Race Theory

CRT has its roots in the mobilisation and activism of lawyers and legal scholars in post-civil rights era America, and at least for the moment, remains an undeniably

23 Lopez, 'The Social Construction of Race' (n 20).

24 Leonard Harris, 'Identity: Alain Locke's Atavism' (1988) 24(1) *Transactions of the Charles S. Peirce Society* 65, 65; Alain Locke (ed), *The New Negro: An Interpretation* (Atheneum, 1925).

25 Jerry Bergman, 'The Biological Theory of Atavism: A History and Evaluation' (1992) 29 *Creation Research Society Quarterly* 33, 33.

26 Clarence Walker, 'The Effects of Brown: Personal and Historical Reflections on American Racial Atavism' (2004) 70(2) *The Journal of Southern History* 295.

27 Ibid 300 (emphasis added).

28 Lopez, 'The Social Construction of Race' (n 20) 966.

29 Peery (n 4) 1877.

US-centric lens.[30] As a movement, CRT 'sprang up' in the 1970s as it became apparent that the gains made through the American civil rights movement were deteriorating.[31] Emerging from the foundations of the US Critical Legal Studies ('CLS'),[32] and owing a substantial debt to the work of radical and Black feminism,[33] CRT is characterised by its focus on the 'historical patterns of physical and psychic dispossession' and domination of people of colour, particularly within the law.[34]

For early CRT scholars embedded within the critical legal movements, CLS did not do enough for people of colour.[35] CLS is described by James Gilchrist Stewart as a 'historical movement … concerning fields of legal inquiry that are posed to critique law from a critical position'.[36] While the lower-case, 'broad' CLS encompasses a range of lenses, including CRT and Feminist Legal Theory, 'narrow' CLS constitutes a movement in itself,[37] though it is not without criticism. Through her allegory, *The Brass Ring and the Deep Blue Sea*, Patricia Williams demonstrates the way in which movements like CLS contribute to 'legal strategies which affect — literally from on high — the poor and oppressed'.[38] CLS was, unwittingly or not, reproducing the power imbalance that oppressed minorities experienced, and was not an appropriate forum for what Mari Matsuda calls 'subordinated communities'.[39] The moniker itself, 'Critical Race Theory', was first used by Kimberlé Crenshaw in 1989 to describe the work radical people of colour in legal academia were doing.[40]

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30 Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 4th ed, 2023) 4 ('*CRT: An Introduction*').

31 Ibid.

32 Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017); James Gilchrist Stewart, 'Demystifying CLS: A Critical Legal Studies Family Tree' (2020) 41(1) *Adelaide Law Review* 121. See also Matsuda (n 11).

33 Delgado and Stefancic, *CRT: An Introduction* (n 30) 4–5; Kehinde Andrews, *The New Age of Empire: How Racism and Colonialism Still Rule the World* (Penguin Books, 2021) xx–xxi; Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); bell hooks, *Feminist Theory: From Margin to Center* (Pluto Press, 2nd ed, 2000); bell hooks, *Ain't I a Woman: Black Women and Feminism* (Pluto Press, 1986).

34 Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22(2) *Harvard Civil Rights-Civil Liberties Law Review* 401, 405.

35 Kimberlé Crenshaw, 'The First Decade: Critical Reflections , or "A Foot in the Closing Door"' (2002) 49 *UCLA Law Review* 1343, 1355; Matsuda (n 11); Williams (n 34).

36 James Gilchrist Stewart, 'Demystifying CLS: A Critical Legal Studies Family Tree' (2020) 41(1) *Adelaide Law Review* 121, 121.

37 Davies (n 32) 191.

38 Williams (n 34) 402–3.

39 Matsuda (n 11) 30.

40 Angela Onwuachi-Willig, 'Celebrating Critical Race Theory at 20' (2009) 94(5) *Iowa Law Review* 1497; Delgado and Stefancic, *CRT: An Introduction* (n 30).

At its most basic form, Matsuda argues that CRT 'uncovers racist structures within the legal system and asks how and whether law is a means to attain justice'.[41] It is a place within the 'critical chorus' for those who seek to study and transform the relationship between race, racism, and power.[42] There are a number of tenets that form the basis of CRT and which are explored in more detail below, but CRT scholars typically embrace Oliver Wendell Holmes' argument that '[t]he life of the law has not been logic: it has been experience'.[43] Instead, as Roy L Brooks argues, the law 'validates the experiences and values of those in control of our society — insiders — who consist of White heterosexual males', and does not support or recognise the experiences of people of colour.[44]

IV Propositions of Critical Race Theory

Despite drawing on the principles of CLS and radical feminism, CRT is unique in its methodology, its characterisation of the law, and its calls for social change.[45] This section engages in some discussion of the key tenets of CRT.

The first of the CRT tenets identifies the omnipresence of racism, positing that racism is pervasive in the lives of people of colour.[46] In her book, *Aboriginal Women, Law and Critical Race Theory*, Nicole Watson argues that 'racism manifests in overt actions and subtle gestures'.[47] While overt actions are often prohibited by laws,[48] there is little protection afforded to First Nations women from 'covert forms of racism, such as institutional racism and microaggression'.[49]

A second key tenet of CRT is the concept of 'white-over-color ascendency', which is instrumental in maintaining both the 'psychic and material' power of the dominant group.[50] This can be exemplified by the power of racial-colonial structures, like the police, to protect the interests of the dominant group at the expense of racialised

41 Matsuda (n 11) 47.

42 Ibid; Delgado and Stefancic, *CRT: An Introduction* (n 30).

43 Oliver Wendell Holmes Jr, *The Common Law* (Harvard University Press, 2009) 3.

44 Roy L Brooks, 'Brown v. Board of Education Fifty Years Later: A Critical Race Theory Perspective' (2004) 47(3) *Howard Law Journal* 581, 582.

45 Delgado and Stefancic, *CRT: An Introduction* (n 30) 4–5; Matsuda (n 11) 51.

46 Delgado and Stefancic, *CRT: An Introduction* (n 30) 8; Nicole Watson, *Aboriginal Women, Law and Critical Race Theory* (Palgrave Macmillan, 2022) 12.

47 Nicole Watson (n 46) 12.

48 Note that in her early work on intersectionality, Crenshaw disputes the effectiveness of anti-discrimination laws. See, e.g.: Kimberlé 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.

49 Nicole Watson (n 46) 12–13.

50 Delgado and Stefancic, *CRT: An Introduction* (n 30) 8.

First Nations people in Australia.[51] Alex Vitale disputes the conception that the purpose of police is to protect society, arguing:[52]

> The reality is that the police exist primarily as a system for managing and even producing inequality by suppressing social movements and tightly managing the behaviors of poor *and nonwhite people*: Those on the losing end of economic and political arrangements.[53]

This is consistent with 'white-over-color ascendancy' as the dominant class in Australia, those situated within the white, colonial structures, benefit both economically (materially) and psychically (socially, politically) from the maintenance of a particular social order. Vitale goes on to argue that management of minority groups is fundamental to protecting the 'systems of exploitation' which benefit the dominant group.[54] The creation and maintenance of a racial underclass both protects and maintains the interests of the dominant class by ensuring that social, political, and economic upward movement is controlled and minimised.

A third tenet of CRT is grounded in the 'social construction thesis',[55] which characterises racial distinctions as 'products of social thought and relations' based on the theory of biological determinism.[56] Biological determinism is the idea that race is 'biologically extant', and is closely related to the concept of racial essentialism, which holds that traits and characteristics of different races result in 'racially varied social outcomes'.[57] However, the general consensus among the scientific community today is that 'race does not biologically exist' and is, in fact, a social construct.[58] Lopez argues that it is 'human interaction rather than natural differentiation [that] must be seen as the source and continued basis for racial categorization'.[59] CRT resoundingly rejects claims of biological determinism or racial essentialism — for critical race theorists, race is a social construct, which creates and maintains

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51 See: Alex Vitale, *The End of Policing* (Verso, 2017); Chris Cunneen, *Defund the Police* (Bristol University Press, 2023).

52 Vitale (n 51).

53 Ibid 34 (emphasis added).

54 Ibid.

55 Delgado and Stefancic, *CRT: An Introduction* (n 30) 9.

56 Ibid. See W Carson Byrd and Matthew W Hughey, 'Biological Determinism and Racial Essentialism: The Ideological Double Helix of Racial Inequality' (2015) 661(1) *The ANNALS: The American Academy of Political and Social Sciences* 8.

57 Byrd and Hughey (n 56) 9.

58 Ibid 10. See also: Lopez, 'The Social Construction of Race' (n 20); Gannett (n 19); Joseph L Graves Jr, 'Why the Nonexistence of Biological Races Does Not Mean the Nonexistence of Racism' (2015) 59(11) *American Behavioral Scientist* 1474; Audrey Smedley and Brian D Smedley, 'Race as Biology is Fiction, Racism as a Social Problem is Real' (2005) 60(1) *American Psychologist* 16; Neven Sesardic, 'Race: A Social Destruction of a Biological Concept' (2010) 25(2) *Biology & Philosophy* 143.

59 Lopez, 'The Social Construction of Race' (n 20) 968–9.

privileges in the dominant group and disadvantages for those who are subjugated.[60] These structures are explored further later in this paper.

The fourth tenet considered in this section is grounded in Derrick Bell's theory of 'interest convergence'.[61] In his analysis of judicial activity before and after the landmark US case of *Brown*,[62] which declared racial segregation unconstitutional, Bell defines his thesis as follows: 'The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites'.[63] Nicole Watson expands on this theory, arguing that relief will only be granted to people of colour where that relief 'also serves the interests of those at the apex of the racial hierarchy'.[64] This 'interest convergence' thesis is applied later in this paper, in an analysis of both *Brown* and *Mabo*.[65]

V Race and the Social Construction of Guilt

This paper has identified that race ought not be understood as biologically determined but rather as a social construct. The structures of our society, including legal institutions, maintain, and are maintained by this construction.[66] The criminalisation of subjugated populations, particularly those subjugated on racial lines, is necessarily a product of the way crime is defined along these constructions of race.[67] Lopez discusses the ways in which law — and, for the purposes of this paper, primarily the criminal law — plays a role in 'the social production of knowledge', contending that 'categories embedded in law … defines, while seeming only to reflect, a host of social relations', which includes race.[68]

Michel Foucault's knowledge/power dialectic is also useful here.[69] To offer a brief and perhaps simplistic overview of the central theme of this dialectic, Foucault argues that knowledge creates power, that power creates knowledge, and that there cannot be one without the other.[70] This constructed knowledge of race is based in the

60 Nicole Watson (n 46) 13; Stephanie M Wildman and Adrienne D Davis, 'Language and Silence: Making Systems of Privilege Visible' in Richard Delgado and Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* (Temple University Press, 2000) 657.

61 Derrick A Bell, 'Brown v. Board of Education and the Interest-Convergence Dilemma' (1980) 93(3) *Harvard Law Review* 518.

62 *Brown* (n 12).

63 Bell (n 61) 523.

64 Nicole Watson (n 46) 14.

65 *Brown* (n 12); *Mabo* (n 13).

66 Lopez, 'The Social Construction of Race' (n 20) 965.

67 Ibid 86; Delgado and Stefancic, *CRT: An Introduction* (n 30) 123.

68 Ian Haney Lopez, *White By Law* (New York University Press, 2006) 86–7.

69 Foucault, *Discipline and Punish* (n 15).

70 Foucault, *History of Sexuality* (n 9).

good-bad/innocent-guilty dichotomies: racialised groups are criminalised because of the myth of Black criminality as it stands in opposition to White innocence, or White purity.[71] Lopez identifies a trend in the US whereby Black people who victimise White people are given longer sentences than those who victimise non-Whites, which serves to reinforce these dichotomies.[72]

VI Critical Race Theory and Precedent

Racial lines and the racialisation of the other intersect with law and judicial practice at an interesting point: the use of precedent. The position of CRT on the use and maintenance of precedent requires a brief discussion here. Lopez argues that precedent prevents racial lines from shifting because racial definitions constructed in the past continue to control the outcomes of new cases.[73] In doing so, a 'false historicity' is created, which 'perpetually reclaims the past for the present'.[74]

Lopez gives the example of the 1979 Mashpee Indian case, in which the Mashpee — a First Nations tribal group in the US — were required to prove they qualified as a tribe.[75] The Mashpee people relied on a law from 1790 to support their submissions, while the Supreme Court case defining their status was rendered in 1901. The Mashpee were ultimately unable to prove that they fell within the meaning of 'tribe' to the Court's satisfaction. The law in this case did not reflect the changes in racial grouping, or indeed of identification, that naturally occur over time: by relying on precedent from over a century ago, to apply a law set out over 200 years ago, outdated racial constructs are upheld.

In Australia, this is evident in the requirement for First Nations people to 'prove' their Aboriginality, which may be necessary for anything from access to sentencing to courts, to welfare payments, and child protection.[76] While this proof is intended to allow First Nations people to obtain certain benefits, the difficulty in demonstrating 'proof' to a sufficient degree results in a dissonance between theoretical benefit and practical difficulty. The tripartite test is cumbersome and difficult to satisfy:

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71 Lopez, 'The Social Construction of Race' (n 20) 965.

72 Ibid.

73 Lopez, *White By Law* (n 68) 89.

74 Ibid 114.

75 *Mashpee Tribe v New Seabury Corp* 592 F.2d 575 (1st Cir. 1979).

76 See, e.g: Magistrates Court of Victoria, *Koori Court*, (Web Page, 2024) <https://www.mcv.vic.gov.au/about/koori-court>; Aboriginal Housing Office, *AHO Eligibility for Services Policy*, (Web Page, 2014) <https://www.aho.nsw.gov.au/applicants/confirmation-of-Aboriginality>; *Aboriginal Housing Act 1998* (NSW) s 4; Central Australian Aboriginal Congress, *Application Form — Proof of Aboriginality*, (online)<https://www.caac.org.au/wp-content/uploads/old-files/CAAC-Proof-of-Aboriginality-Form-Template-October-2019.pdf>; Services Australia, *Confirm Your Indigenous Heritage for Our Jobs*, (Web Page, 2022) <https://www.servicesaustralia.gov.au/confirm-your-indigenous-heritage-for-our-jobs?context=1>.

for example, establishing the tripartite test for Aboriginality can be made almost impossible due to the loss of records and the historical and ongoing practices of child removal which operate to render invisible the 'nativeness' of First Nations people.[77] In failing to embrace or integrate the lived experience of First Nations people the law fails to recognise new forms of identity and identification, reinforcing old ideas and constructions of race.[78]

VII Critiques of Critical Race Theory

Critics of CRT, and its storytelling methodology, have become more vocal with the resurgence of CRT in the wake of the Black Lives Matters movement.[79] For CRT scholars, storytelling, or counter-storytelling, serves to challenge the dominant discourses and ideologies around race, at times quite literally giving voice to those in the margins.[80] This section of the paper considers some of the more prominent critiques, including the perceived ineffectiveness of storytelling, that CRT is deterministic, that it is separatist, and that it is, as Richard Posner eloquently describes, 'a lunatic fringe'.[81] This section also addresses some counterarguments to the critiques, including those presented by Richard Delgado and, more recently, Nicole Watson in an Australian context.

Some critical scholars, including Mark Tushnet, argue that storytelling is ineffective, and that it is an 'analytically unsound form of discourse'.[82] Scholars including Randall Kennedy, and Daniel Farber and Suzanna Sherry, are also critical of CRT. Kennedy took issue with CRT claims of discrimination based on the lack of 'voice' given to minority scholars by movements like CLS, arguing that an absence of voice does not necessarily equate to discrimination.[83] Kennedy was also of the view that

77 See, e.g.: Lester Irabinna Rigney, 'Native Title, the Stolen Generation, and Reconciliation' (1998) 1(1) *Interventions* 125; Alison Whittaker, 'White Law, Blak Arbiters, Grey Legal Subjects' (2017) 20(2) *Australian Indigenous Law Review* 4; Michael Dodson, 'The Wentworth Lecture The End in the Beginning: Re(de)fining Aboriginality' (1994)1 *Australian Aboriginal Studies* 1.

78 Lopez, 'The Social Construction of Race' (n 20) 972.

79 See, e.g: Adrienne D Dixson, '"What's Going on?": A Critical Race Theory Perspective on Black Lives Matter and Activism in Education' (2018) 53(2) *Urban Education* 231; Nicholas C Murphy, 'Do Black Lives Matter? Capital Punishment, Critical Race Theory, and the Impact of Empirical Evidence' (2023) 6 *University of Central Florida Department of Legal Studies Law Journal* 39; Angela Onwuachi-Willig, 'The CRT of Black Lives Matter' (2022) 66(4) *Saint Louis University Law Journal* 663.

80 Minerva S. Chávez, 'Autoethnography, a Chicana's Methodological Research Tool: The Role of Storytelling for Those Who Have No Choice but to do Critical Race Theory' (2012) 45(2) *Equity and Excellence in Education* 334, 342.

81 Richard Posner, 'The Skin Trade' (1997) 217(15) *The New Republic* 40, 40.

82 Delgado and Stefancic, *CRT: An Introduction* (n 30) 55.

83 Randall L Kennedy, 'Racial Critiques of Legal Academia' (1989) 102(8) *Harvard Law Review* 1745, 1802; Delgado and Stefancic, *CRT: An Introduction* (n 30) 102.

CRT relies on 'highly charged rhetoric and imagery' and has significant 'empirical weaknesses'.[84] Put simply, as Bennett Capers does, Kennedy accuses critical race theorists of 'playing, and overplaying, the race card'.[85]

Farber and Sherry accused critical race theorists of, as Delgado paraphrases, 'lacking respect for traditional notions of truth and merit', and of being 'anti-Asian and anti-semitic' because CRT implicitly characterises minority groups like Asian and Jewish people, who stereotypically perform well in conventional Western structures, as 'unimaginative mimics and drones' or of cheating to gain advantage.[86] However, it is unlikely that the founding scholars of CRT intended to accuse Jewish and Asian people of being 'mimics and drones'.[87] Rather it seems that early-CRT has used a broad brush to paint the voiceless 'minority' and has over time, failed to account for the successes of individuals from minority backgrounds within the dominant system. This is undoubtedly a limitation of CRT but does not necessarily warrant the accusations made by Farber and Sherry. In her book, *Where is Your Body?*, Matsuda considers the critiques of CRT and distils them into four points:

1. It does not exist;
2. It is not unique to people of colour;
3. It is paranoid and separatist; and
4. It is rosy, superficial, and theoretically wrong.[88]

Matsuda counters these criticisms swiftly, arguing that it is nonsensical to declare that a theory does not exist when 'several writers all come up with related ideas, deeply divergent from mainstream thought, and when the commonality in their life experience is racism'.[89] This is a simple, yet arguably effective response to the claim that CRT is not real: it does exist because people are doing it. Similarly, Matsuda addresses the argument that CRT is not unique by stating that CRT never claimed to be unique — the theory uses appropriate methods in order to uncover experiences of racism in the law that have long been experienced by people of colour.[90] Finally, Matsuda addresses claims of paranoia and separatism, not necessarily arguing against the critics but instead stating the there is, perhaps, 'value in occasional separatism' if it means that subjugated people are given a voice, to communicate, but not to separate.[91]

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84 Kennedy (n 83) 1808–9.

85 Bennett Capers, 'Critical Race Theory and Criminal Justice' (2014) 12(1) *Ohio State Journal of Criminal Law* 1, 5.

86 Daniel A Farber and Suzanna Sherry, 'Beyond All Criticism?' (1999) 83 *Minnesota Law Review* 1735; Delgado and Stefancic, *CRT: An Introduction* (n 30) 102.

87 Farber and Sherry (n 86).

88 Matsuda (n 11) 55.

89 Ibid.

90 Ibid.

91 Ibid 56.

While CRT undoubtedly has limitations and has faced its share of criticism from a broad range of both critical and non-critical scholarship, it is a useful lens and serves a distinct purpose for the research conducted here. The following section of this paper conducts a comparative analysis of the *Brown* and *Mabo* decisions, to determine if, or how, CRT can assist in understanding the experience of subjugated minorities — like African American people in the case of *Brown*, and First Nations people in *Mabo* — within Western legal structures. This will also include consideration of how decisions like *Mabo* and the subsequent operation of native title affect First Nations women differently from First Nations men.

VIII The 'Sterile Symbolism' of Racial Equality in the Law

The preceding section of this paper provided an overview of CRT, providing context for a comparative analysis of two 'watershed' common law decisions concerning 'race' and racial equality. The first, *Brown*,[92] was decided in the US in 1954; the second, *Mabo*,[93] is a 1992 decision of the High Court of Australia, nearly four decades after *Brown*. The purpose of this analysis is to examine the extent to which the tenets of CRT apply beyond the US borders, and to assess the utility of Bell's interest-convergence theory in understanding 'racial equality' as it is itself underpinned by highly racialised ideas and attitudes.[94] This then has some application to the ways in which racial justice in the Australian criminal justice system may be impeded and facilitates discussions on CRT's potential to inform alternative understandings of the over-incarceration of First Nations people in Australia.

A *Brown v Board of Education*

1 *Brown: An Introduction*

The US Supreme Court unanimously decided *Brown* on 17 May 1954, ushering in what would become one of the most significant civil rights movements in modern history. During the course of the late 1960s, civil rights activists like Rosa Parks, Harriet Tubman, Martin Luther King Jr, and Malcolm X would all contributed to a shift of enormous symbolic significance, but as argued, one with limited practical legacy.[95] *Brown* effectively ended the 'separate but equal' doctrine set down in 1896 in the Supreme Court case *Plessy v Ferguson* ('*Plessy*'),[96] in which the court upheld the state of Louisiana's rights to require Black passengers to travel on separate, but 'similar', train cars.[97] The doctrine was held not to be in violation of the Fourteenth

92 *Brown* (n 12).

93 *Mabo* (n 13).

94 Bell (n 61).

95 See, e.g: Bell (n 61); Capers (n 85); Mark Tushnet, 'The Significance of Brown v. Board of Education' (1994) 80(1) *Virginia Law Review* 173.

96 163 US 537 (1896) ('*Plessy*').

97 Ibid.

Amendment of the *United States of America Constitution*, which guarantees equal protection under the law for all citizens, because the facilities, though segregated, were deemed equal.[98] The decision in *Brown* arguably ended the *Plessy* doctrine and heralded the advancement of equal rights for African American people in the US.[99]

Brown centred on the segregation of Black and White students in schools 'solely on the basis of race, pursuant to state laws permitting or requiring such segregation', a practice which denied '[Black] children the equal protection of laws guaranteed by the Fourteenth Amendment'.[100] The Fourteenth Amendment, which was also the subject of judicial consideration in *Plessy*, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[101]

This means in essence that no State is permitted to make or enforce a law which denies the equal protection of the law to all people, which arguably includes discrimination on the basis of race. *Brown* was an appeal from the US District Court for the District of Kansas, though the cases consolidated in this decision originated from various jurisdictions, including Kansas, South Carolina, Virginia, and Delaware.[102] The common thread was the refusal of the States to admit students to schools on a non-segregated basis, which was consistent with the *Plessy* precedent.[103] The basis of the plaintiff's arguments was the practice of school segregation necessarily meant that it was not possible to create 'equality', that 'public schools are not "equal" and can never be made "equal"'.[104] The Supreme Court in *Brown* determined that the protections of the Fourteenth Amendment extended to education.[105] Chief Justice Warren stated the following in his decision:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[106]

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98 See Harry E Grovers, 'Separate but Equal: The Doctrine of Plessy v. Ferguson' (1951) 12(1) *Phylon* 66.

99 *Plessy* (n 96).

100 *Brown* (n 12).

101 *United States Constitution* amend XIV.

102 'Brown v. Board of Education (1954)', *National Archives* (Web Page, 18 March 2024) <https://www.archives.gov/milestone-documents/brown-v-board-of-education>.

103 *Plessy* (n 96); *Brown* (n 12) (Warren CJ).

104 *Brown* (n 12) (Warren CJ).

105 Ibid.

106 Ibid 493 (Warren CJ).

Lopez summarises that in effect, *Brown* 'declared … that separate conditions are inherently unequal' and argued that the Court was, in the case of *Brown*, attempting to move from using explicit racial categories as a tool of oppression, to using them to 'ameliorate racial discrimination'.[107] Chief Justice Warren quite consciously wrote the decision in *Brown* such that it could be understood by the average American citizen,[108] symbolically providing access to a legal, and social, shift in the way race was to be understood in the US.

However, some scholars have argued that, despite this 'great triumph of civil rights legislation',[109] little materially changed for the majority of Black Americans.[110] Bell observes that in the current day most Black children in American public schools are 'both racially isolated and inferior … render[ing] further progress in implementing *Brown* impossible'.[111] Drawing on the work of Alexander Bickel, Bell notes that while it is unlikely that *Brown* will be overturned, it may nonetheless 'be headed for — dread word — irrelevance', due to its current lack of practical value for Black children.[112] This descent into 'irrelevance' is a concern levelled similarly against decisions in the Australian context, like *Mabo*, which is discussed in greater detail below.

2 *CRT Critiques of Brown*

The tenets of CRT have much to add to the way cases predicated on race are understood. Bell's interest-convergence theory is particularly informative, as becomes apparent throughout the following sections. The second tenet of CRT discussed above, the principle of 'white-over-colour ascendency', is imperative to the application of interest-convergence theory to cases like *Brown*. The (psychic) interests of poor whites and the (material) interests of wealthy whites are both advanced by 'white-over-colour' ascendency. However, there may be a lack of alignment between sub-groups within the dominant group.[113] For example, Delgado and Jean Stefancic argue that the convergence of Black and White interests in the case of *Brown* was driven more from the elite Whites' self-interest than it was from the desire from either group to 'help' Black people.[114] It is perhaps this fact, that the interests converging to allow for *Brown* were material on the part of Black Americans but only symbolic and self-interested on the part of the dominant white group. This distinction is most important in understanding why the 'prized doctrines

107 Lopez, 'The Social Construction of Race' (n 20) 78.

108 Tushnet (n 95) 177.

109 Delgado and Stefancic, *CRT: An Introduction* (n 30) 9.

110 Nicole Watson (n 46) 11; Delgado and Stefancic, *CRT: An Introduction* (n 30) 49; Tushnet (n 95) 173.

111 Bell (n 61) 518.

112 Ibid; Alexander Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row, 1970) 151.

113 Delgado and Stefancic, *CRT: An Introduction* (n 30).

114 Ibid 9.

and principles' of civil rights victories like *Brown* were revealed to be 'shams — hollow pronouncements issued with great solemnity and fanfare, only to be silently ignored, cut back, or withdrawn when the celebrations die down'.[115]

While Bell's position that no conflict of interest existed between the Black and White populations at the time of *Brown* may be correct, Bell goes on to suggest that later Supreme Court decisions indicated 'a growing divergence … that makes integration less feasible'.[116] Henry Wechsler, a contemporary of Bell at Harvard University, rejected the claims that *Brown* purported to be based on a bar to racial segregation under the Fourteenth Amendment, and considered and rejected too the argument that the decision was a response to the injury segregation caused to Black children.[117] Rather, Wechsler contended that the Supreme Court in *Brown* relied on the view that 'racial segregation is, *in principle*, a denial of equality to the minority against whom it is directed'.[118] Despite Bell's later challenge to this position,[119] Wechsler's focus on the *principle* behind the decision rather than the practical change the decision may or may not usher in is significant as it highlights the practical instability of the foundations upon which the civil rights movement was built.

There is some argument that the ruling in *Brown* is attractive in *theory*, as it is difficult for people, particularly those in the dominant group, to 'recognize that racial segregation is much more than a series of quaint customs that can be remedied … without altering the status of whites.'[120] This is because in order to grant racial equality to Black people, the racially granted privileges bestowed on whites must be revoked.[121] In the case of *Brown*, the law required plaintiffs to prove that alleged acts, policies, or practices of segregation are the result of racial discrimination, 'intentionally and invidiously conducted or authorized' rather than 'naturally foreseeable consequences' of law or policy.[122] Tushnet points to the decision of Judge John Parker one year after *Brown* in the case *Briggs v Elliott*.[123] Barely one year on from the decision in *Brown*, the American courts were looking for ways to step away from the potential practical implications of the decision.[124]

115 Ibid 49.

116 Bell (n 61) 518.

117 Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73(1) *Harvard Law Review* 1, 32.

118 Ibid 34 (italics in original). See also Tushnet (n 95) 176.

119 Bell (n 61). Note that while Bell did challenge Wechsler's search for a principled basis for the decision, he did acknowledge that Wechsler's critique of the decision was helpful in explaining the ultimate 'disappointment' of *Brown*.

120 Bell (n 61) 522.

121 Ibid 523.

122 Ibid 527.

123 *Briggs v Elliott*, 132 F Supp. 776, 777; Tushnet (n 95) 175.

124 See, e.g., ibid.

The enduring effects of *Brown*, both practical and theoretical, are observable in the present day over-incarceration of racialised people which persists. The practical limitations of the symbolic significance of *Brown* are reflected in what Capers refers to as the 'unsettling' fact that Black Americans are incarcerated at a greater rate now than at the time *Brown* was decided.[125] The increasing interest-divergence and the lack of a solid theoretical basis for the decision in *Brown* mean that the 'triumph' of civil rights so often characterised by *Brown* have not achieved practical change for Black Americans.[126]

The 'rights' plight of First Nations people is well embedded within Australia's highly racialised legal and social structures. The ongoing difficulties First Nations people endure is observable in the context of acquiring land rights under the doctrine of native title despite the symbolic victory of *Mabo*, which is examined through the CRT lens below.

B *Mabo*

1 *Mabo: An Introduction*

The High Court of Australia's decision in *Mabo* marked a turning point in the way the rights of First Nations people were viewed from a legal standpoint: reflecting the popular movement toward racial equality in the decades following World War II.[127] Nicole Watson argues that *Mabo* is Australia's 'equivalent to the *Brown*' decision, in that overturning the doctrine of *terra nullius*, as this section will discuss, symbolically aided in shifting social and legal conceptions of race and the racial hierarchy

125 Capers (n 85) 2.

126 See, e.g: Bell (n 61); Lopez, 'The Social Construction of Race' (n 20); Delgado and Stefancic, *CRT: An Introduction* (n 30); Capers (n 85); Joe R Feagin and Bernice McNair Barnett, 'Success and Failure: How Systemic Racism Trumped the *Brown v. Board of Education* Decision' [2004] (5) *University of Illinois Law Review* 1099; Gerardo R Lopez and Rebeca Burciaga, 'The Troublesome Legacy of *Brown v. Board of Education*' (2014) 50(5) *Educational Administration Quarterly* 796; James T Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001).

127 See generally: Jon Stratton, *Uncertain Lives: Culture, Race and Neoliberalism in Australia* (Cambridge Scholars Publishing, 2011); Will Sanders, 'Destined to Fail: The Hawke Government's Pursuit of Statistical Equality in Employment and Income Status Between Aborigines and Other Australians by the Year 2000 (or, a Cautionary Tale Involving the New Managerialism and Social Justice Strategies)' (1991) 2(2) *Australian Aboriginal Studies* 13; Kevin Dunn, James Forrest, Ian Burnley and Amy McDonald, 'Constructing Racism in Australia' (2004) 39(4) *Australian Journal of Social Issues* 409; Jan Carter, 'Social Equality in Australia' in Peter Saunders and Sheila Shaver (eds), 'Theory and Practice in Australian Social Policy: Rethinking the Fundamentals, Proceedings of the National Social Policy Conference Sydney July 14–16 1993 Volume 1: Plenary Papers' (Working Paper No 111, University of NSW, 1993) 63, 73.

equivalent to *Brown*.[128] This is consistent with Wechsler's emphasis on the 'in principle' effects of *Brown*;[129] in this case, the High Court overturned in principle a documented source of inequality. In practice, the critiques levelled at the *Mabo* bench are similar to those levelled at the court in *Brown*.

Mabo concerned a native title claim by Meriam man Eddie Mabo against the State of Queensland. Native title refers to rights and interests in land held before Crown colonisation, which includes rights to both land and waterways.[130] The Meriam people are the traditional owners of the Murray Islands, a small archipelago in the far east of Torres Strait, and have been in occupation of the land since prior to colonisation.[131] The Murray Islands were annexed to Queensland in 1879, before which they lay outside of the dominion of the Crown, though in his decision, Brennan J notes that the Queensland authorities did appear to exert some 'de facto control' over the islands in the 1880s.[132] John Douglas, who was at the time Premier of the colony, wrote to the Governor of Queensland in 1877 describing this 'de facto' control as being 'a sort of police surveillance … outside our limits' and noting that it would be desirable to 'possess a real authority' over the 'somewhat doubtful characters' who occupied the area.[133]

In its judgement handed down in 1992, the High Court characterised an 'over-simplification' of the chief question before it as whether the incorporation of the Murray Islands into Queensland 'had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands'.[134] The plaintiffs argued that they had a claim over the land in native title, and the defendant argued that the British laws became the law of the colony when the territory is settled and, as such, the Murray Islands fell within the bounds of the colony.[135] In essence, the State of Queensland relied on the doctrine of *terra nullius,* that the land belonged to no one and could therefore be claimed, to justify the validity of colonial acquisition of the Murray Islands.[136] However, Brennan J questioned the fundamental basis of the doctrine, observing that colonial practices as we understand them today 'do not fit the "absence of law"

128 Nicole Watson (n 46) 25.

129 Wechsler (n 117) 32.

130 'Establishing Native Title Rights and Interests', *Australian Law Reform Commission* (Web Page, 27 May 2015) <https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/4-defining-native-title-2/establishing-native-title-rights-and-interests-2/>); 'What is Native Title?', *Kimberley Land Council* (Web Page) <https://www.klc.org.au/what-is-native-title>.

131 *Mabo* (n 13) 16–17 (Brennan J).

132 Ibid 19 (Brennan J).

133 Ibid 19 (Brennan J).

134 Ibid 25 (Brennan J).

135 Ibid 26 (Brennan J).

136 The doctrine of *terra nullius*, a Latin term which translates to 'land belonging to no one', was used to justify the colonisation of Australia in 1788.

or "barbarian" theory underpinning the colonial reception of the common law of England'.[137] Indeed, his Honour went so far as to argue that:

> These fictions [that customary rights cannot be reconciled with civilised society] denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony *was no more a legal desert than it was* '*desert uninhabited*' in fact, it is necessary to ascertain by evidence the nature and incidents of native title.[138]

Ultimately, the Court unanimously found that the Crown had not acquired absolute ownership of the Murray Islands; instead, the Murray Islands were subject to native title.[139] What is important for the purpose of this paper is the *theoretical* outcome of this case: the doctrine of *terra nullius* was declared to be a fiction.[140] However, while Brennan J acknowledged that the doctrine of *terra nullius* was a legal fiction, the effects of this declaration were limited by the act of state doctrine. His Honour recognised that 'the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'.[141] His Honour further limited the effects of nullifying *terra nullius* by clearly stating that it was not the business of the High Court of Australia to 'canvass the validity of the Crown's acquisition of sovereignty over the [Murray] Islands'.[142] For Irene Watson, this fell short of any meaningful challenge to the doctrine of *terra nullius* as the Court failed to question the legitimacy of the British occupation of Australia, deciding instead that the invasion and the British Crown's acquisition of sovereignty over the Australian colony was an 'act of state' that could not be challenged in any Australian court.[143] This practical passivity served to 'sanction colonialism, dispossession and the disempowerment of Nungas as a legitimate "act of state"'; and so without dismantling the Australian legal system, the legal theory of *terra nullius* remained very much in place.[144]

2 *CRT and Mabo*

This paper now considers the High Court's decision in *Mabo* through a CRT lens to ascertain whether the critiques of *Brown* can be similarly applied. Indeed, it appears that the scholarly consensus is that *Mabo* 'did little to disrupt the impacts of two centuries of dispossession';[145] that *Mabo* was symbolically significant, but

137 *Mabo* (n 13) 39 (Brennan J).

138 Ibid 58 (Brennan J) (italics added).

139 Ibid 76 (Brennan J).

140 Ibid 58.

141 Ibid 30–3.

142 Ibid 32–3.

143 Irene Watson, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 47–8.

144 Ibid.

145 Nicole Watson (n 46) 25.

in practice had little effect on racial equality before the law.[146] This is of course consistent with the critique of scholars including Bell of *Brown*. *Mabo* was followed in 1993 by the *Native Title Act 1993* (Cth), which set out the requirements a plaintiff would be required to meet to establish a claim of native title. The legislation also confers the right to extinguish native title in certain circumstances.[147] A retention of a statutory right to extinguish native title, and the failure of the High Court of Australia to address sovereignty over Australian land mean that some issues *Mabo* aspired to resolve have not, in practice, been resolved. In light of the native title doctrine which emerged from *Mabo*, the case is consistent with Delgado's characterisation of *Brown* as being 'hollow pronouncements … silently ignored, cut back, or withdrawn',[148] as silences around First Nations rights and equality that followed *Mabo* are, arguably, reflected in the comparably persistent crisis of over-incarceration of First Nations people in Australia. The failure of Mabo to resolve First Nations rights and equality is reflected in the present day issue of overincarceration.

Bell's interest-convergence theory is helpful in explaining why, and how, *Mabo* failed to live up to the 'fanfare' of its pronouncement. The High Court bench which decided *Mabo* was sitting at a time of racial and, more broadly social, upheaval in the Australian community.[149] The material and psychic interests of the White community, including those who made up the *Mabo* bench, as in *Brown*, apparently converged with the interests of the First Nations communities who had sought land rights under the law. However, like *Brown*, this convergence was not necessarily consistent across all White sub-groups; indeed, native title was, and continues to be, resisted by some segments of the community, including some pastoralists and mining corporations.[150] Despite these pockets of resistance, the interests of the

146 See, e.g.: ibid; Irene Watson, 'Buried Alive' (n 10); Megan Davis, *Competing Notions of Constitutional 'Recognition': Trust and Justice of Living 'Off the Crumbs that Fall Off the White Australian Tables'* (Papers on Parliament No 62, October 2014); Janice Gray, 'The Mabo Case: A Radical Decision?' (1997) XVII(1) *The Canadian Journal of Native Studies* 33; Michael Mansell, 'Australians and Aborigines and the Mabo Decision: Just Who Needs Whom The Most' (1993) 15(2) *Sydney Law Review* 168.

147 See generally *Native Title Act 1993* (Cth) Divs 2, 3.

148 Delgado and Stefancic, *CRT: An Introduction* (n 30) 49.

149 See, e.g.: Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006); Fiona Wheeler and John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19; Greg Craven, 'Judicial Activism: The Beginning of the End of the Beginning' (2004) 10(16) *Upholding the Australian Constitution* 77; Tanya Josev, 'Twenty Years After the High Court's Wik Decision, How Does the "Judicial Activism" Charge Stand Up?', *The Conversation* (Web Page, 11 April 2016) <https://theconversation.com/twenty-years-after-the-high-courts-wik-decision-how-does-the-judicial-activism-charge-stand-up-56420>.

150 See, e.g.: '25 Years of Native Title Recognition', *National Native Title Tribunal* (online report, 2017) <http://www.nntt.gov.au/Documents/Native%20title%20becomes%20law.pdf>; 'The Destruction of Juukan Gorge', *ANTAR* (Web Page, 14 May 2025) <https://antar.org.au/issues/cultural-heritage/the-destruction-of-juukan-gorge/>;

White elite who were charged with making a decision on the matter and the interests of First Nations people did appear to align, allowing the High Court to overturn the 'fiction' of *terra nullius* and to grant symbolically significant land 'rights' to First Nations people and communities.

Bell's belief that the Supreme Court cases which came after *Brown* reflected not a consistent convergence of interests, but rather a 'growing divergence' between the Black and White populations which operated to prevent integration is worth revisiting here.[151] This divergence has, in recent years, become particularly apparent in the Australian context. In 2023, the Australian public voted on a referendum to include a First Nations 'Voice to Parliament' in the *Constitution*, which would represent the first time First Nations people have been afforded constitutional recognition. However, the referendum was voted down resoundingly: 60.06% of Australian voters rejected constitutional recognition.[152] While this is an act of the people, not of the courts, it does a regression from closer race relations in Australia.[153] There appears to be a 'growing divergence' between racially distinct populations in Australia — as Bell notes in the context of *Brown,* this necessarily has implications for efforts at integration and practical change.[154]

Irene Watson argues that *Mabo* 'created an illusion of doing justice, while also justifying and expanding the "*muldarbi*",[155] into a new form — and life — in its power of extinguishment'. Irene Watson, in arguing *muldarbi* colonialism is 'central to the contemporary condition' of First Nations people and that, therefore, decolonisation presents a healing opportunity, asks whether such decolonisation is possible in the context of the 'one dimensional universal world order' of the Australian State.[156] This question raises the argument that while the Australian State and, more specifically, its systems of law and justice, maintain a 'one dimensional' commitment to universal racial distinctions. Therefore the illusion will continue to be perpetuated as colonial courts cannot possibly account for the experience of First Nations

'Destruction of the Juukan Gorge Highlights Flaws in Native Title', *ANU Reporter* (Web Page, 1 November 2022) <https://reporter.anu.edu.au/all-stories/destruction-of-juukan-gorge-highlights-flaws-in-native-title>.

151 Bell (n 61) 518. See for examples utilised by Bell: *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *Milliken v Bradley*, 418 US 717 (1974); *Dayton Board of Education v Brinkman*, 443 US 526 (1979).

152 'Referendum', *Australian Electoral Commission* (Web Page, 2023) <https://results.aec.gov.au/29581/Website/ReferendumNationalResults-29581.htm>.

153 See, e.g.: Paul Sharrad, 'History, Culture, Democracy, and the "Voice" Referendum' (2025) 1 *Journal of Literary and Cultural Studies* 12; Shireen Morris, *Broken Heart: A True History of the Voice Referendum* (Black Ink, 2024).

154 Bell (n 61) 518.

155 Irene Watson, 'Buried Alive' (n 10) 259. Note that Watson uses the term 'Muldarbi-coloniser', 'muldarbi' translating to 'demon spirit'.

156 Irene Watson, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) *Overland* 1, 1.

people subjected to a settler-colonial power that is embedded in law.[157] Indeed, Maria Giannacopoulos' theory of nomocide is consistent with this, as she identifies the 'direct link between settler-colonial legal infrastructures … and the violation of Indigenous and black lives'.[158]

For Irene Watson, the colonial power being represented by the Australian Parliament, used the *Mabo* case to expand its power by granting itself the power of extinguishment.[159] At the same time, both the federal Parliament and High Court of Australia positioned themselves as doing justice for a group which are typically disadvantaged and disempowered before the law. According to Irene Watson, *Mabo* and the doctrine of native title are little more than the Australian State persisting in the burial of First Nations people, the 'voiceless amidst the chaos'.[160] Michael Dodson supports this view, arguing that 'the *Mabo* decision does not recognise equality of rights … it recognises the legal validity of Aboriginal title until the white man wants that land … the *Mabo* decision is a belated act of sterile symbolism'.[161] This disconnect between theory and praxis is consistent across the examples discussed in this section. In the US, *Brown* allows for the theoretical, formal, equality of Black and White children in American schools, but in practice Black children are not afforded substantive equality, and Black children, indeed Black communities, are left no better off than they were under the *Plessy* doctrine.[162] For First Nations people in Australia, the practical limitations of the *Native Title Act* perpetuate the racial distinctions between First Nations people and land, and settler-colonial people and land. This distinction then maintains the racialised groupings which result in the subjugation of the racialised other in the context of colonial structures of law and justice.

This may suggest that the interests of the two groups did not in fact converge at the time of *Mabo*, except in an illusory sense, and that the reason for the decision and the legislation that followed it came not from a place of law, but of power.[163] Irene Watson argues that the High Court was given the opportunity to consider their own power, and the power of the colonial structures more broadly, and to determine the freedom and co-existence of First Nations people with the Australian State 'by accepting that Australian sovereignty was based on an "act of state"',[164] an act

157 Ibid. See also: Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *Alter*native 508 ('Re-Centring'); Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2014).

158 Giannacopoulos (n 10).

159 See, e.g., Irene Watson, 'Buried Alive' (n 10).

160 Irene Watson, 'Re-Centring' (n 157) 253.

161 Nicole Watson (n 46) 25–6.

162 Bell (n 61) 530.

163 Irene Watson, 'Buried Alive' (n 10). Note that Irene Watson uses the term 'muldarbi' here to denote the coloniser.

164 Ibid 259.

which was not consented to by First Nations people.[165] However, the Court was unwilling to 'fracture' the Australian legal system in this way and ensured that, despite what it may have looked like, 'no radical departure was made' from the status quo.[166] Importantly, Irene Watson identifies a specific racial quality to the decision in *Mabo*:

> The never-ending hopefulness that we will become empowered and recognised for who we are fades post-*Mabo (No. 2)*. When *terra nullius* was identified as the muldarbi [an Indigenous word denoting the coloniser], there was support for change and pulling Nungas from the belly of genocide. Instead we are now left with the illusion of change while the white man of this country breathes out a false belief that a special Aboriginal advantage was created by native title at the expense of white privilege. Similar to the myth of *terra nullius* they have created a racist muldarbi: fear and loathing of a native title right. But the racism exceeds any advantage.[167]

Race is central to this critique, but so, more specifically, is the way in which race is wielded as a weapon of colonial law. For example, the establishment, exercise, and control over First Nations people is, in part, a function of their criminalisation and the criminalisation of 'traditional systems of law … lore, and philosophies'.[168] As noted above, Irene Watson is critical of the ways in which constructs like race function as weapons of colonial law, and that the naming of First Nations people, their traditions, and systems, reinforce racial boundaries.[169]

The decision in *Mabo*, driven by the desire to present an illusion of justice while extending power over the racialised other, also created a racist 'loathing' of First Nations peoples' land rights.[170] In this way, *Mabo* may *appear* consistent with Bell's interest-convergence theory, but in practice the decision was influenced by *and* perpetuated colonial attitudes toward race. The 'triumphs' of common law, like those pronounced in the cases of both *Brown* and *Mabo*, were not the victories they appeared to be;[171] rather, the decisions cloaked a consolidation of power for the dominant group and entrenched racial attitudes in judicial decision-making.

IX CRT and First Nations People in the Australian Criminal Justice System

The analysis above, coupled with the ability of CRT to depict the crisis of over-incarceration differently from the dominant lens, presents potential benefits for

165 Giannacopoulos (n 10).

166 Ibid 259.

167 Ibid 265.

168 Ross (n 7) 12.

169 Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (n 157).

170 Irene Watson, 'Buried Alive' (n 10) 265.

171 Nicole Watson (n 46) 29.

theory, policy, and practice. As such, it is important to ascertain how the preceding analyses might inform a discussion of the present crisis. First Nations people in Australia are catastrophically over-represented in the Australian carceral system. The Australian Bureau of Statistics reports that in 2023, First Nations people accounted for 33% of the Australian prison population,[172] despite only representing 3.8% of the Australian population at the 2021 Census.[173] It is therefore imperative that progressive lenses, like CRT, are utilised to assist in gaining an understanding of the underlying causes of this trend.

This use of symbolic legal change to 'cloak' the advancement of racial-colonial interests is significant in the context of this research: this section engages in discussion of how conceptions of 'race' are 'pervasive', and how the racial undertones of the Australian criminal justice system affect First Nations people. CRT is increasingly utilised in the Australian jurisdiction, with Janet Ransley and Marchetti noting even as early as 2001 in their analysis of *Cubillo v Commonwealth*,[174] that there is a difficulty in 'translating' the symbolic protection of First Nations peoples' rights into something resembling a legitimate cause of action.[175] Nicole Watson argues that whatever gains in equality First Nations people have made, after 'long and arduous campaigns', have gradually lost their significance, such that racism continues to pervade the White, patriarchal, colonial Australian society,[176] even in the face of an allegedly 'colour-blind' criminal justice system.[177] Consistent with traditional notions of intersectionality, it is possible to examine the intersectional disadvantage of First Nations *women* in the colonial criminal justice system. Intersectionality, first articulated by Crenshaw in 1989, originally located intersectional disadvantage at points of race and gender.[178] As noted above, First Nations women, despite accounting for approximately 2% of the adult female population in Australia, make up approximately 33% of the adult female *carceral* population.[179] There has been in recent decades a substantial amount of research into why this might be the case,

172 'Prisoners in Australia', *Australian Bureau of Statistics* (Web Page, 25 January 2024) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

173 'Estimates of Aboriginal and Torres Strait Islander Australians', *Australian Bureau of Statistics* (Web Page, 31 August 2023) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/30-june-2021>.

174 (2000) 174 ALR 99 ('*Cubillo*').

175 Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 1(1) *Griffith Law Review* 139, 150.

176 *Cubillo* (n 174); Nicole Watson (n 46) 21.

177 Michelle Alexander, *The New Jim Crow* (Penguin, 2010) 183.

178 Crenshaw (n 48).

179 See, e.g: Sacha Kendall Jamieson, S Lighton, J Sherwood and Eileen Baldry, 'Incarcerated Aboriginal Women's Experiences of Accessing Healthcare and the Limitations of the 'Equal Treatment' Principle' (2020) 19(1) *International Journal for Equity in Health* 1, 2; Deirdre Howard-Wagner and Chay Brown, 'Increased Incarceration of First Nations Women is Interwoven with the Experience of Violence and

including into the criminogenic factors unique to First Nations women, as well as the ways in which incarceration is itself criminogenic.[180] Indeed, while First Nations people more broadly account for 33% of the Australian prison population, First Nations women represent 37% of the adult female prison population.[181]

Thalia Anthony argues that truly seeing and understanding the ways in which the criminal law impacts those who come into contact with it in a highly racialised manner 'disrupts the "white" moral order' and 'usurps' the white monopoly on criminal law.[182] This is consistent with Bell's interest-convergence theory. To draw an example from the Victorian CLS, laws like the *Bail Act 1977* (Vic) ('*Bail Act*'), highly criticised for casting both a racial and gendered net, and in the same jurisdiction the *Sentencing Act 1991* (Vic), impact First Nations people, and specifically First Nations women, differently to how they affect the state's non-Indigenous population.[183] Following the death in custody of First Nations woman Veronica Nelson in January 2020, Nelson's family and the community more broadly called for reform to address the bail laws that disproportionately affected First Nations women; however, very few of the recommendations made by Coroner McGregor in his report on Nelson's death have been implemented.[184]

The Victorian Aboriginal Legal Service are critical of the reforms passed by the Andrews Government in late-2023, arguing that '*if implemented properly*' the laws should assist in reducing the number of people held on remand, but that the reforms in practice 'fell well short of … the reforms that Veronica's family asked for, but also what the Coroner recommended and what expert reviews have

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Trauma', *The Conversation* (online, 6 August 2021) <https://theconversation.com/increased-incarceration-of-first-nations-women-is-interwoven-with-the-experience-of-violence-and-trauma-164773>.

180 See, e.g: Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 277; Thalia Anthony and Harry Blagg, 'Biopower of Colonialism in Carceral Contexts: Implications for Aboriginal Deaths in Custody' (2021) 18 *Bioethical Inquiry* 71; Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *QUT Law & Justice* 1; Lily George, Adele N Norris, Antje Deckert and Juan Tauri (eds), *Neocolonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020).

181 Howard-Wagner and Brown (n 179); 'Corrective Services, Australia', *Australian Bureau of Statistics* (Web Page, 19 September 2024).

182 Thalia Anthony, 'Moral Panics and Misgivings over Indigenous Punishment: Sentencing Cultural Crimes in Australia's Northern Territory' (2011) 42 *Cambrian Law Review* 91, 104.

183 See, e.g: Coroner Simon McGregor, *Inquest Into the Passing of Veronica Nelson* (Coroner's Report, 30 January 2023); Alfred Allan et al, 'An Observational Study of Bail Decision-Making' (2005) 12(2) *Psychiatry, Psychology and the Law* 319; Marilyn McMahon, *No Bail, More Jail? Breaking the Nexus Between Community Protection and Escalating Pre-Trial Detention* (Research Paper No 3, August 2019).

184 'One Year After Inquest Finding, More Must be Done to Honour Veronica Nelson', *Victorian Aboriginal Legal Service* (Factsheet, 30 January 2024).

recommended for two decades'.[185] The Victorian bail laws are a clear example of the role race plays in the operation of the criminal justice system, and of how CRT can assist in thinking differently about the incarceration of a racialised population like First Nations Australians. There is evidently an inherent divergence between the material and psychic interests of the carceral Australian states and the interests of First Nations people, who are disproportionately impacted by the practice of incarceration until the interests of both groups converge. CRT posits that any change that is implemented is likely to be 'hollow', empty promises with nothing more than symbolic significance.

A *Bugmy and Individualised Sentencing*

The 2013 decision of the High Court of Australia in *Bugmy* further demonstrates the 'same but different' effect of race neutrality in judicial decision-marking.[186] *Bugmy* is particularly relevant to this paper, as it demonstrates how race is implicated in the processes of incarceration. After the majority allowed the appeal, finding that a 'background of deprivation' is a relevant factor when determining an offender's sentence,[187] the Court was required, among other things, to determine the relevance of Bugmy's background of deprivation to sentencing factors.[188]

William Bugmy ('Bugmy'), a First Nations man from the remote New South Wales Town of Wilcannia, had achieved only a low level of education and could neither read nor write, was raised in the context of family violence and alcoholism, and began abusing drugs and alcohol himself at age 13; both he and his partner were alcoholics.[189] As a child, Bugmy was witness to extreme family violence, including watching his mother being stabbed on fifteen separate occasions at the hands of his father.[190] Bugmy spent most of his youth and adult years incarcerated. He has a history of suicide attempts, head trauma, and hallucinations.[191] During a period of incarceration, Bugmy became agitated and ultimately assaulted a correctional officer with a series of pool balls, one of which struck the officer in the eye and caused him to lose sight in that eye.[192]

Bugmy subsequently pleaded guilty to two charges of 'assaulting a correctional officer in the execution of his duty, and one charge of causing grievous bodily harm to a person with intent to cause harm of that kind'.[193] In February 2012, he

185 Ibid (emphasis added).

186 *Bugmy* (n 14).

187 Lucky Jackson, 'Casenote: *Bugmy v R* (2013) 302 ALR 192' (2014) 8(1) *Indigenous Law Bulletin* 27, 27.

188 *Bugmy v R* (2013) 302 ALR 192, [5], [25].

189 *New South Wales v Bugmy* [2017] NSWSC 333, [17] (Adams J).

190 Ibid [12].

191 Ibid [11].

192 Ibid.

193 Jackson (n 187) 27.

was sentenced at the District Court of New South Wales to 'a non-parole period of four years and three months, with a balance of term of two years' for all three offences.[194] In reaching this sentence, the District Court took into account the Fernando principles, set down in the 1992 case of *R v Fernando*,[195] and which require the Court to consider 'an offender's background of social disadvantage — whatever his or her ethnicity may be'.[196] On appeal to the New South Wales Court of Criminal Appeal, the Director of Public Prosecutions submitted that the judge at the first instance had given undue weight to Bugmy's subjective circumstances. Accordingly, Hoeben JA stated in his judgment that 'the effects of a background of deprivation diminish with time',[197] and Bugmy was accordingly resentenced to 'a non-parole period of five years, and a balance of two and a half years'. The case was appealed to the High Court of Australia.

In its determination, the High Court considered and applied two cases decided by the Supreme Court of Canada: *R v Gladue* ('*Gladue*'),[198] and *R v Ipeelee* ('*Ipeelee*').[199] Perhaps the most significant of the two for the purpose this paper, the Canadian Supreme Court in *Gladue* held that 'systemic factors unique to Aboriginal offenders' must be considered 'on an individual basis'.[200] This promotes formal equality, but not necessarily substantive equality, because the underlying criminogenic factors affecting a First Nations person is often different, practically and conceptually, to the factors a non-Indigenous person might experience.

The Canadian Supreme Court subsequently confirmed in *Ipeelee* that *Gladue* applies in every case where the offender is of First Nations descent.[201] Ultimately, the High Court held that the effects of a background of deprivation do not diminish over time; however, significantly, the Court also stated:

> Nonetheless, the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.[202]

194 Ibid 28.

195 (1992) 76 A Crim R 58.

196 Jackson (n 187) 28.

197 *R v Bugmy* [2012] NSWCCA 223, [50]; *Bugmy* (n 14) 120–1 [25]; Jackson (n 187) 28.

198 [1999] 1 SCR 688 ('*Gladue*').

199 [2012] 1 SCR 433 ('*Ipeelee*'). Note that the High Court of Australia in *Bugmy* distinguished the Australian case from the Canadian authorities due to a difference in wording within the relevant statutes.

200 *Gladue* (n 198) [66], [80].

201 *Ipeelee* (n 199) [83].

202 *Bugmy* (n 14) 594 [41].

This approach to sentencing under what would become the *Bugmy* principles is perplexing. While the Court does helpfully acknowledge that the effects of deprivation do not diminish, and must be considered in the context of each offence, and the Court accepts that First Nations people are generally subject to deprivation in a range of ways, the Court then goes on to determine that these deprivations cannot say anything about an individual offender, and does not consider elements of 'deprivation' arising from 'discrimination, exclusion and disempowerment'.[203] In some Australian jurisdictions, judges are required to account for Aboriginality. For example, s 3A of the *Bail Act* requires a bail decision maker to consider a person's Aboriginality, including 'historical and ongoing discriminatory systemic factors',[204] 'the risk of harm and trauma' posed by custody,[205] the importance of supporting a person's connection to culture,[206] and any specific factors relating to 'the person's history, culture or circumstances'.[207] However, it is also noted that the onerous bail provisions, which include a reverse-onus test, require the bail decision maker to refuse bail, 'unless satisfied that exceptional circumstances exist'.[208] In applying this test, the bail decision-maker is required to incorporate Aboriginality into their determination of special circumstances.[209] However, the disproportionate increase in First Nations people incarcerated in Victoria indicates that race-neutrality in 'tough on crime' bail laws is a practical reality.[210]

As Anthony observes, 'direction is applied on a case-by-case basis to determine whether Indigenous factors are relevant to reducing a sentence'.[211] While a commendable exercise, this discretion risks underplaying or ignoring the insidiously racialised hierarchies embedded within judicial decision-making, structures which are exposed by the tenets of CRT. This includes sentencing determinations, where racial hierarchy is so deeply entrenched that justice seemingly invisible.[212] This in turn may contribute to the over-incarceration of First Nations people not only in Australia but also in jurisdictions like the US or Canada, where *Gladue* principles

203 Stephen Rothman, *Disadvantage and Crime: The Impact of Bugmy and Munda on Sentencing Aboriginal and Other Offenders* (Public Defenders Criminal Law Conference, 18 March 2018) 8.

204 *Bail Act 1977* (Vic) s 3A(1)(a).

205 Ibid s 3A(1)(b).

206 Ibid s 3A(1)(c).

207 Ibid s 3A(1)(d).

208 Ibid s 4A(1A).

209 Ibid s 4A(3).

210 'Imprisonment Rates for Aboriginal and Torres Strait Islander People in Victoria', *Sentencing Advisory Council* (Web Page, 8 May 2024) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>.

211 Thalia Anthony, 'Indigenising Sentencing? Bugmy v The Queen' (2014) 35(2) *Sydney Law Review* 451, 455.

212 Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6, 6.

originated, because judicial decision-making underscored systemic deprivation specific to First Nations people, divorced from the individual.

X Conclusion

This paper has considered the role of CRT; and, in particular, CRT as an analysis of race embedded in the colonial law. This framework and analysis aids legal theorists in understanding the experiences of First Nations people in the Australian criminal justice system. CRT, a US-centric theoretical lens emerging from the perceived failures of the American civil rights movement and which has gained traction with the resurgence of the Black Lives Matter movement in recent years, works to expose racism within the various structures of our legal system. Two key positions of CRT scholars, being: (1) the existence and operation of white-over-colour ascendency; and (2) Bell's interest-convergence theory, are particularly pertinent to the discussions within this paper, as both assist in explaining how existing power structures appear to accommodate race.

This paper has argued that the confluence of two analyses, that of *Brown* and that of *Mabo*, demonstrates the ways in which race is wielded as a symbolic sword by the Sstate; in particular and in the context of Australia specifically, the settler-colonial state. Its ability to signify the other is inherent to its power; race forms the basis of the justification for, and the perpetuation of power and control. In doing so, analyses of race are imperative to understanding how socially constructed distinctions influence the experience of the racialised other within dominant structures of law and justice. Both *Brown* and *Mabo* represent cases in which the material and psychic interests of the dominant (White) group and the interests of the marginalised (Black) group apparently converged. However, the analyses undertaken in this paper demonstrate that in practice there existed a growing divergence in the law and in public opinion around the granting of practical, or substantive, equality, which resulted in those rights which were afforded being primarily 'sterile symbols' in practice.

While *Brown*, a supposedly 'watershed' moment for race in the American legal system, arguably delivered little but 'hollow' promises and has faded into irrelevance, so too does *Mabo* present only an illusion of advancement and equality. However, these analyses do demonstrate the utility of CRT and its tenets in understanding how legal systems outside the US render race invisible under the guise of individualised equality. In its application specifically to the criminal justice system and sentencing behaviour, the principles of white-over-color ascendency and interest-divergence are demonstrated through the case of *Bugmy*; which in turn helps to think differently about how and why, for racialised people, the law is not necessarily a means to achieve justice.

This paper is concerned primarily with a theoretical application of CRT, but it is worth noting the practical benefits of an understanding of over-incarceration that is, perhaps, different from what is commonly accepted. By gaining an understanding of, and appreciation for, the ways in which race is an operative influence on the

creation of a subjugated other, and the way in which racial distinctions enforce and reinforce the discriminatory operation of the Western legal systems, it is possible to identify areas for change and reform. To take Irene Watson's question of whether decolonisation is possible in the context of colonial control of the state and, in particular, its commitment to a 'one dimensional' system: a CRT analysis such as the one undertaken here might suggest that to decolonise, one must recognise and 'name' the ways in which the settler-colonial state, and its systems of law and justice, do damage to First Nations people's lives, culture, and land. In recognising that supposedly watershed moments like *Mabo* are, in practice, little more than 'hollow pronouncements' which in fact serve to entrench discrimination and racial difference, it may be possible to reimagine decolonial solutions. However, more research and practical considerations are required on this point.

*Helen Stamp**

A MODEL OF PROACTIVE REGULATION FOR AUTONOMOUS DIGITAL SYSTEMS

Abstract

Technology companies developing autonomous digital systems ('ADS'), including autonomous vehicles ('AVs'), have enjoyed significant regulatory leeway as consumers embrace novel technologies and agencies struggle to adapt accountability mechanisms. Public tolerance of companies pushing ADS to market with minimal regulation is now waning as consumer awareness of harms caused by ADS grows.

Regulating ADS is complicated by the significant influence which technology companies have over regulatory agencies. The risk of regulatory capture is increased due to the information asymmetry existing between technology companies and regulators. The scale and pace at which companies are developing ADS means that capture dynamics can expand to capture regulators and the structures and processes of a State.

This paper argues that *ex ante* regulatory measures are likely to be more effective, and reduce the risk of capture, than seeking to hold companies to account after harm is caused. This paper examines the *Automated Vehicles Act 2024* (UK) which establishes a proactive regulatory framework defining the legal responsibilities of the companies developing and selling AVs, and the people using them. The paper argues that this model of liability can be applied to other forms of ADS, including autonomous weapons systems, to rebalance power relations and counter the risk of capture.

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I Introduction

Public tolerance of technology companies pushing forward with the development of innovative digital products, with little regard for the damage they cause, is waning. There is increasing consumer awareness of the potential harms, ranging from privacy concerns[1] and loss of social connection,[2] to physical harm when digital products fail or are misused.[3] This is accompanied by increasing attention from international organisations, privacy regulators and legislators.[4] Technology companies have acknowledged the increasing public concern by openly discussing how they will implement safety measures, such as conducting risk assessments and working towards information sharing and transparency for the technology they develop.[5] The issue of how to effectively address the harms that can be caused by these technologies, while allowing for innovation and economic growth, remains problematic for regulators to resolve.

One form of digital technology, autonomous digital systems ('ADS'), has generated significant debate regarding how it should be developed, used and who is responsible if harm is caused as a result of its use. ADS are systems which can perform certain

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1 See: Lubna Luxmi Dhirani et al, 'Ethical Dilemmas and Privacy Issues in Emerging Technologies: A Review' (2023) 23(3) *Sensors* 1151:1–18; John Alagood, Gayle Prybutok and Victor R Prybutok, 'Navigating Privacy and Data Safety: The Implications of Increased Online Activity Among Older Adults Post-COVID-19 Induced Isolation' (2023) 14(6) *Information* 346:1–14.

2 See generally: Salfin Salfin, Pahar Kurniadi and Erwin Erwin, 'Language Development in the Digital Age: A Literature Review on the Influence of Technology on Human Communication' (2024) 1(1) *Sciences du Nord: Humanities and Social Sciences* 1; Berkley Petersen et al, 'The Association Between Information and Communication Technologies, Loneliness and Social Connectedness: A Scoping Review' (2023) 14(1) *Frontiers in Psychology* 1063146:1–16.

3 See: Deema Almaskati, Sharareh Kermanshach and Apurva Pamidimukkula, 'Autonomous Vehicles and Traffic Accidents' (2023) 73(1) *Transportation Research Procedia* 321; Associated Press, 'Nearly 400 Crashes in 11 Months Involved Automated Tech, Companies Tell Regulators', *NPR* (online, 15 June 2022) <https://www.npr.org/2022/06/15/1105252793/nearly-400-car-crashes-in-11-months-involved-automated-tech-companies-tell-regul>.

4 See: Gabi Schlag, 'European Union's Regulating of Social Media: A Discourse Analysis of the Digital Services Act' (2023) 11(3) *Politics and Governance* 168; Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press, 2023); Susie Alegre, 'Regulators are Finally Catching Up with Big Tech: The Lawless, Wild West Era of AI and Technology is Almost at an End, as Data Protection Authorities Use New and Existing Legislation to Get Tough', *Wired* (online, 12 January 2024) <https://www.wired.com/story/regulators-are-finally-catching-up-with-big-tech/>.

5 The voluntary Frontier AI Safety Commitments have been signed by 20 technology companies including Google, IBM, Meta, Microsoft, Open AI and xAI: Department for Science, Innovation and Technology (UK), 'Frontier AI Safety Commitments: AI Seoul Summit 2024', *GOV.UK* (Web Page, 7 February 2025) <https://www.gov.uk/government/publications/frontier-ai-safety-commitments-ai-seoul-summit-2024/frontier-ai-safety-commitments-ai-seoul-summit-2024>.

tasks with minimal or no human intervention.[6] ADS are now used throughout many societies with autonomous vehicles ('AVs') being a notable example.

The conversation regarding ADS has evolved from an ethical debate as to whether these systems *should* be used,[7] to an acceptance by the public, academics and regulators that these systems *will* be used and a discussion as to how accountability can be determined if harm is caused.[8] The need to ensure the safety of ADS while not stifling the development of these technologies has generated further scholarly

6 See, e.g: David Danks and Alex John London, 'Regulating Autonomous Systems: Beyond Standards' (2017) 32(1) *IEEE Intelligent Systems* 88; Michael Fisher et al, 'Towards a Framework for Certification of Reliable Autonomous Systems' (2021) 35(1) *Autonomous Agents and Multi-Agent Systems* 8:1–65; Neshat Elhami Fard, Rastko R Selmic and Khashayar Khorasani, 'Public Policy Challenges, Regulations, Oversight, Technical, and Ethical Considerations for Autonomous Systems: A Survey' (2023) 42(1) *IEEE Technology and Society Magazine* 45; Andreas Tsamados, Luciano Floridi and Mariarosaria Taddeo, 'Human Control of AI Systems: From Supervision to Teaming' (2024) *AI and Ethics* 1.

7 See, e.g: Noel Sharkey, 'Automated Killers and the Computing Profession' (2007) 40(11) *Computer* 124; Robert Sparrow, 'Killer Robots' (2007) 24(1) *Journal of Applied Philosophy* 62; Michael Robillard, 'No Such Thing as Killer Robots' (2018) 35(4) *Journal of Applied Philosophy* 705; Antonios E Kouroutakis, 'Autonomous Vehicles: Regulatory Challenges and the Response from UK and Germany' (2020) 46(5) *Mitchell Hamline Law Review* 1103; Julian De Freitas et al, 'From Driverless Dilemmas to More Practical Commonsense Tests for Automated Vehicles' (2021) 118(11) *Proceedings of the National Academy of Science*s *of the United States of America* e2010202118:1–9; Vaughan Black and Andrew Fenton, 'Humane Driving' (2021) 34(1) *Canadian Journal of Law and Jurisprudence* 11; Laura Emmons, 'The Reasonable Robot Standard: How the Federal Government Needs to Regulate Ethical Decision Programming in Highly Autonomous Vehicles' (2020) 33(3) *Journal of Civil Rights and Economic Development* 293; Stephen S Wu, 'Autonomous Vehicles, Trolley Problems, and the Law' (2020) 22(1) *Ethics and Information Technology* 1; Veljko Dubljević et al, 'Moral and Social Ramifications of Autonomous Vehicles: A Qualitative Study of the Perceptions of Professional Drivers' (2023) 42(9) *Behaviour and Information Technology* 1271.

8 The increased acceptance of ADS is evidenced by the growing revenue of the AI market and public use of digital technologies such as autonomous vehicles: see Katherine Haan, '22 Top AI Statistics and Trends', *Forbes* (online, 16 October 2024) <https://www.forbes.com/advisor/business/ai-statistics/>. This has resulted in an increased regulatory response to AI use — see, e.g: Mark Fenwick, Erik PM Vermeulen and Marcelo Corrales, 'Business and Regulatory Responses to Artificial Intelligence: Dynamic Regulation, Innovation Ecosystems and the Strategic Management of Disruptive Technology' in Marcelo Corrales, Mark Fenwick and Nikolaus Forgó (eds) *Robotics, AI and the Future of Law* (Springer, 2018) 81; Blair Levin and Larry Downes, 'Who is Going to Regulate AI?', *Harvard Business Review* (online, 19 May 2023) <https://hbr.org/2023/05/who-is-going-to-regulate-ai>; Yong Jin Park and S Mo Jones-Jang, 'Surveillance, Security, and AI as Technological Acceptance' (2023) 38(6) *AI and Society* 2667.

debate and motivated regulators to develop mechanisms to govern the use of ADS.[9] This debate has also generated significant literature considering accountability measures that could be implemented *ex post*, after an incident occurs, using existing legal frameworks.[10] This accountability dilemma for ADS is not limited to AVs; rather, it is an issue which is impacting a broad range of technologies which share the common component of requiring an ADS.[11]

A complicating factor in regulating innovative technologies is the influence of large technology companies, and the likelihood of regulatory capture occurring[12] —

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9 For example, the debate with respect to autonomous vehicles — see, e.g: Mikolaj Firlej and Araz Taeihagh, 'Regulating Human Control Over Autonomous Systems' (2021) 15(4) *Regulation and Governance* 1071; Anat Lior, 'Insuring AI: The Role of Insurance in Artificial Intelligence Regulation' (2021) 35(2) *Harvard Journal of Law and Technology* 467; Julie-Anne Tarr and Anthony A Tarr, 'Autonomous Vehicles: Liability and Insurance' in Anthony A Tarr et al (eds), *The Global Insurance Market and Change: Emerging Technologies, Risks and Legal Challenges* (Routledge, 2024) 157; Amy Dunphy, 'Is the Regulation of Connected and Automated Vehicles (CAVs) a Wicked Problem and Why Does it Matter?' (2024) 52(1) *Computer Law and Security Review* 105944:1–16; James Ng, 'Back in the Driver's Seat: The United States Should Enact a Unified Automated Vehicle Law and Regulation' (2024) 39(1) *Berkeley Technology Law Journal* 1.

10 See, e.g: Alice Giannini and Jonathan Kwik, 'Negligence Failures and Negligence Fixes: A Comparative Analysis of Criminal Regulation of AI and Autonomous Vehicles' (2023) 34(1) *Criminal Law Forum* 43; Damien A Riehl, 'Car Minus Driver: Autonomous Vehicles Driving Regulation, Liability, and Policy' (2018) 35(5) *Computer and Internet Lawyer* 1; Cassandra Cole, Richard Corbett and Lynne McChristian, 'Regulatory Issues Related to Autonomous Vehicles' (2023) 35(7) *Journal of Insurance Regulation* 1; Mark A Geistfeld, 'A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation' (2017) 105(6) *California Law Review* 1611; Tina Sever and Giuseppe Contissa, 'Automated Driving Regulations: Where Are We Now?' (2024) 24(1) *Transportation Research Interdisciplinary Perspectives* 101033:1–19; Sabine Gless and Katalin Ligeti, 'Regulating Driving Automation in the European Union: Criminal Liability on the Road Ahead?' (2024) 15(1) *New Journal of European Criminal Law* 33; Cassandra Burke Robertson, 'Litigating Partial Autonomy' (2024) 109(4) *Iowa Law Review* 1655.

11 See, e.g: Vahid Yazdanpanah et al, 'Reasoning About Responsibility in Autonomous Systems: Challenges and Opportunities' (2023) 38(4) *AI and Society* 1453; Rebecca Williams et al, 'From Transparency to Accountability of Intelligent Systems: Moving Beyond Aspirations' (2022) 4(3) *Data and Policy* e7:1–23; Daniel Omeiza et al, 'Towards Accountability: Providing Intelligible Explanations in Autonomous Driving' (Conference Paper, IEEE Intelligent Vehicles Symposium (IV), July 2021); Simon Burton et al, 'Mind the Gaps: Assuring the Safety of Autonomous Systems from an Engineering, Ethical, and Legal Perspective' (2020) 279(1) *Artificial Intelligence* 103201:1–16.

12 See generally: Swati Srivastava, 'Algorithmic Governance and the International Politics of Big Tech' (2023) 21(3) *Perspectives on Politics* 989; Josh Hawley, *The Tyranny of Big Tech* (Simon and Schuster, 2021); Linda Monsees et al, 'Transversal Politics of Big Tech' (2023) 17(1) *International Political Sociology* olac020:1–23; Juho Lindman, Jukka Makinen and Eero Kasanen, 'Big Tech's Power, Political

where the regulatory agencies are influenced by the very entities that they seek to regulate — in circumstances where States are increasingly reliant on these companies.[13] This is leading not only to the capture of regulatory agencies,[14] but also the capture of multiple areas of government, coined 'State capture'.[15] If accountability measures and regulation only occur *ex post*, then these measures may be less effective as they encounter the dynamics of regulatory capture and State capture.

It is therefore important to explore ways to regulate ADS more effectively using *ex ante*, or proactive, regulation. While commentators have recognised the benefits of *ex ante* regulation of technology generally,[16] this paper will focus specifically on the *Automated Vehicles Act 2024* (UK) ('*AV Act*')[17] because it is a clear example of *ex ante* regulation of an ADS. While several countries, such as Germany and Sweden, rely upon legislation which distributes liability and risk between drivers,

Corporate Social Responsibility and Regulation' (2023) 38(2) *Journal of Information Technology* 144; Nathan Cortez, 'Regulating Disruptive Innovation' (2014) 29(1) *Berkeley Technology Law Journal* 175.

13 See generally: Reijer Hendrikse et al, 'The Big Techification of Everything' (2022) 31(1) *Science as Culture* 59; Araz Taeihagh, M Ramesh and Michael Howlett, 'Assessing the Regulatory Challenges of Emerging Disruptive Technologies' (2021) 15(4) *Regulation and Governance* 1009; Leighton Andrews, *Facebook, the Media and Democracy: Big Tech, Small State?* (Taylor & Francis, 2020); Laura Adler, 'Framing Disruption: How a Regulatory Capture Frame Legitimized the Deregulation of Boston's Ride-for-Hire Industry' (2021) 19(4) *Socio-Economic Review* 1421; Ruth Berins Collier, VB Dubal and Christopher L Carter, 'Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States' (2018) 16(4) *Perspectives on Politics* 919.

14 Taeihagh, Ramesh and Howlett (n 13); Adler (n 13) 1442; Collier, Dubal and Carter (n 13); Ilya Shapiro and David McDonald, 'Regulation Uber Alles: How Governments Hurt Workers and Consumers in the New New Economy' [2017] (1) *University of Chicago Legal Forum* 461.

15 José van Dijck, 'Governing Digital Societies: Private Platforms, Public Values' (2020) 36(1) *Computer Law and Security Review* 105377:1–4; Steven Feldstein, *The Rise of Digital Repression: How Technology is Reshaping Power, Politics, and Resistance* (Oxford University Press, 2021); Meredith Whittaker, 'The Steep Cost of Capture' (2021) 28(6) *Interactions* 51; Helen Stamp, 'Innovative Technologies and the Deepening Capture of Law Enforcement Agencies: The Uber Herzberg Case Study' (2023) 5(1) *Notre Dame Journal on Emerging Technologies* 70 ('Innovative Technologies and the Deepening Capture of Law Enforcement Agencies').

16 See, e.g: Len Palmer, 'Regulating Technology' in Lelia Green and Roger Guinery (eds), *Framing Technology* (Routledge, 2023) 77; Katerina Yordanova and Natalie Bertels, 'Regulating AI: Challenges and the Way Forward through Regulatory Sandboxes' in Henrique Sousa Antunes et al (eds), *Multidisciplinary Perspectives on Artificial Intelligence and the Law* (Springer, 2024) 441; Xukang Wang and Ying Cheng Wu, 'Balancing Innovation and Regulation in the Age of Generative Artificial Intelligence' (2024) 14(1) *Journal of Information Policy* 385.

17 *Automated Vehicles Act 2024* (UK) ('*AV Act*').

owners and manufacturers of vehicles,[18] the *AV Act* is significant as it creates a comprehensive regime of *new* legal actors with legal responsibility depending on which actor is in control of the AV at the relevant time. Australian regulators have also been developing similar liability concepts to those contained in the *AV Act* and are currently drafting legislation to implement these changes.[19] This work by Australian regulators will be examined briefly in this paper to provide a comparison with the *AV Act*.

The *AV Act* was introduced to the United Kingdom ('UK') Parliament in November 2023, in response to regulatory recommendations made by the Law Commission of England and Wales and the Scottish Law Commission (together, 'Commissions') to address the safe deployment of road-based AVs in the UK.[20] It came into force in May 2024.[21] There has been limited analysis of the *AV Act*, during its development and passage through Parliament, presenting an important opportunity for the examination of this regulatory model and its wider application to ADS other than AVs.

The *AV Act* centres on *ex ante* regulation of AV technology rather than only relying on *ex post* accountability measures. This paper will explore the central features of this *ex ante* regulatory model, including: (1) the information which must be provided by technology companies seeking to have their AVs authorised for use on public roads; (2) the safety standards that must be met by these companies; and (3) who is responsible when the AV is in operation.

This kind of proactive regulation has four distinct advantages over *ex post* regulation:

(1) the requirement that the corporations developing and selling the technology must comply with certain legislative requirements *before* their product can be approved for sale to the public. This is a strong motivating factor for these corporations who need to demonstrate to shareholders and investors that the technology developed can be approved by regulators, sold to the public and generate revenue;[22]

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18 *Straßenverkehrsgesetz* [Road Traffic Act] (Germany) 5 March 2003, BGBI I, 2003, 310, ss 7–20; *Produkthaftungsgesetz* [Product Liability Act] (Germany) 15 December 1989, BGBI I, 1989, 2198; *Bürgerliches Gesetzbuch* [German Civil Code] 2 January 2002 BGBI I, 2002, 42, s 823(1); *Skadeståndslag* [Tort Liability Act] (Sweden) 1972, 207, ch 2 s 1; *Produktansvarslag* [Product Liability Act] (Sweden) 1992, 18; *Trafikskadelag* [Traffic Damages Act] (Sweden) 1975, 1410.

19 National Transport Commission, *The Regulatory Framework for Automated Vehicles in Australia* (Policy Paper, February 2022).

20 Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: Joint Report* (Law Commission Report No 404 / Scottish Law Commission Report No 258, 25 January 2022) app 2 ('*Joint Report*').

21 *AV Act* (n 17).

22 See generally: Karen Boll and Michael Tell, 'Proactive Public Disclosure: A New Regulatory Strategy for Creating Tax Compliance?' [2015] (2) *Nordic Tax Journal* 36; Jon Truby, Rafael Brown and Andrew Dahdal, 'Banking on AI: Mandating a

(2) the focus on increasing the safety of the technology (rather than seeking to attribute blame) *and* promoting the development of innovation in the economy is likely to result in increased regulatory compliance by corporations;[23]
(3) the dynamics of regulatory and State capture that would deter regulators from taking measures to hold corporations to account — both in terms of safety requirements and liability for harms caused — are less likely to occur when *ex ante* regulation clearly delineates the responsibilities of individuals, corporations and regulators *before* a technology is used and before an incident occurs;[24] and
(4) *ex ante* regulation also encourages the establishment of independent investigatory bodies with the relevant technical expertise to investigate incidents, countering the influence which technology companies may exercise over regulatory agencies and *ex post* accountability measures.[25]

The model of liability set out in the *AV Act* is significant not only for the novel way in which it governs AVs in the UK, but also for the potential it has for broader application in regulating other forms of ADS. This potential broader application of the *AV Act* model is the motivation for this paper and will be explored as follows. Part II outlines the regulatory context of the automotive industry and the collaborations occurring between vehicle manufacturers and technology companies to develop AVs. It then considers the concepts of regulatory and State capture and how these dynamics can impact the regulatory environment of innovative technologies, including ADS. Part III discusses the background research and consultation process that led to the development of the *AV Act* and examines the main features of this Act. Part IV considers similar work that has been conducted to prepare Australia for the introduction of AVs and contrasts this with corresponding parts of the *AV Act*. Part V then draws on the main features of the *AV Act* to create a generic model of

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Proactive Approach to AI Regulation in the Financial Sector' (2020) 14(2) *Law and Financial Markets Review* 110; R Patriarca et al, 'Safety Intelligence: Incremental Proactive Risk Management for Holistic Aviation Safety Performance' (2019) 118(1) *Safety Science* 551.

23 See generally: Nicole E Wheeler, 'Responsible AI in Biotechnology: Balancing Discovery, Innovation and Biosecurity Risks' (2025) 13(1) *Frontiers in Bioengineering and Biotechnology* 1537471:1–10; Wenda Li et al, 'The Making of Responsible Innovation and Technology: An Overview and Framework' (2023) 6(4) *Smart Cities* 1996.

24 See generally: Imad Antoine Ibrahim and Davide Giacomo Zoppolato, 'Emerging Technologies and the Law: From "Catch Me if You Can" to "Law by Design"' (2024) 13(2) *Global Journal of Comparative Law* 148; Marc A Saner and Gary E Marchant, 'Proactive International Regulatory Cooperation for Governance of Emerging Technologies' (2015) 55(2) *Jurimetrics* 147; Ran Xi, 'On Emerging Technologies: The Old Regime and the Proactivity' (2025) 8(1) *Cardozo International and Comparative Law Review* 75.

25 See generally: Gregory Falco et al, 'Governing AI Safety Through Independent Audits' (2021) 3(7) *Nature Machine Intelligence* 566; Bernd Carsten Stahl et al, 'A European Agency for Artificial Intelligence: Protecting Fundamental Rights and Ethical Values' (2022) 45(1) *Computer Law and Security Review* 105661:1–25.

liability which can be more broadly applied to other forms of ADS. Part VI considers how this model of liability could have been applied to the circumstances of the fatal collision between an Uber AV and a pedestrian in 2018, the different accountability outcomes that may have occurred and how capture dynamics may have changed. A concluding discussion in Part VII examines the potential for broader applications of this model of liability while acknowledging its limitations. Ultimately, this paper will highlight the political influence which technology firms have over their own accountability and showcase the importance of seeking effective ways to address such influence.

II Innovative Technologies and State Capture

A *The Regulatory Context of the Automotive Industry*

The invention of the motor vehicle at the start of the 19th century, and the transport benefits that this provided for individual users, led to the mass production of vehicles, the growth of automotive manufacturing companies, and the opening of global markets.[26] Despite the general excitement regarding this technological development and the increasing use of motor vehicles by the public, concerns grew regarding their safety, both for those using motor vehicles and for others navigating the changed streetscapes.[27] Concerns were also raised with respect to the emissions produced by vehicles and the environmental impact of vehicle use.[28]

From the 1960s, the automotive industry has been subject to increasing government regulation to address these issues.[29] The continued push for increased vehicle safety, coupled with the development of the computer and digital technologies in the 1980s, laid the groundwork for applying innovative technologies to vehicles.[30] This resulted in the growth of technology companies entering the market to

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26 Cameron Elliott Gordon, 'Putting the Car Before the Horse: The Diffusion of the Automobile and the Rise of Technocratic Primacy' (2024) 4(4) *Histories* 487, 490; David Bailey et al, 'Global Restructuring and the Auto Industry' (2010) 3(3) *Cambridge Journal of Regions, Economy and Society* 311.

27 Carol A MacLennan, 'From Accident to Crash: The Auto Industry and the Politics of Injury' (1988) 2(3) *Medical Anthropology Quarterly* 233.

28 Gordon (n 26) 491; Sanya Carley, Natalie Messer Betts and John D Graham, 'Innovation in the Auto Industry: The Role of the US Environmental Protection Agency' (2011) 21(2) *Duke Environmental Law and Policy Forum* 367.

29 See generally: Rob Atkinson and Les Garner, 'Regulation as Industrial Policy: A Case Study of the US Auto Industry' (1987) 1(4) *Economic Development Quarterly* 358, 363; Joan Claybrook and David Bollier, 'The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff' (1985) 3(1) *Yale Journal on Regulation* 87; Ann-Kristin Bergquist and Mattias Näsman, 'Safe Before Green: The Greening of Volvo Cars in the 1970s–1990s' (2023) 24(1) *Enterprise and Society* 59.

30 Motoyuki Akamatsu, Paul Green and Klaus Bengler, 'Automotive Technology and Human Factors Research: Past, Present, and Future' [2013] (1) *International Journal of Vehicular Technology* 526180:1–27, 13–15.

collaborate with existing vehicle manufacturers.[31] Incorporating innovative technologies into vehicles, including AVs, to satisfy consumer demand (especially for technology that can increase safety) is now key to car manufacturers remaining in business.[32]

The AV marketplace is therefore increasingly made up of vehicle manufacturers working collaboratively with technology companies. This is a mutually beneficial arrangement:

> Companies leverage each other's strengths, tech firms contribute AI and software, while automakers provide manufacturing capabilities. These collaborations accelerate time-to-market and help meet regulatory standards by pooling knowledge.[33]

Big Tech continues to be involved in the AV market either directly or indirectly. Direct involvement occurs when a technology company collaborates with a vehicle manufacturer. For example, in 2024 Uber Technologies Inc entered into a partnership with Cruise to use Cruise AVs as an option for consumers on its rideshare platform.[34] Indirect involvement occurs when technology companies invest in AV startups, for example, Waymo which is owned by Alphabet and Zoox which is owned by Amazon.[35] The increasing sophistication of technology being rapidly developed for AVs, the reliance by vehicle manufacturers on technology companies to provide this expertise, and regulatory agencies often lacking this expertise, create conditions where regulatory capture is likely to flourish. The dynamics of regulatory and State capture will be explored in the following section.

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31 Amaan Kazi, 'Combining Strengths: Collaborations Between Automotive Manufacturers and Tech Companies', *Forbe*s (online, 10 December 2024) <https://www.forbes.com/councils/forbesbusinesscouncil/2024/12/10/combining-strengths-collaborations-between-automotive-manufacturers-and-tech-companies>. See also Yuandi Wang et al, 'Dynamic Patterns of Technology Collaboration: A Case Study of the Chinese Automobile Industry 1985–2010 (2014) 101(1) *Scientometrics* 663.

32 See generally: Janell D Townsend and Roger J Calantone, 'Evolution and Transformation of Innovation in the Global Automotive Industry' (2014) 31(1) *Journal of Product Innovation Management* 4; Jerry L Mashaw and David L Harfst, 'From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation' (2017) 34(1) *Yale Journal on Regulation* 167.

33 Global Market Insights, *Autonomous Vehicle Development Platform Market Size: By Component, by Vehicle, by Functionality, by End-Use Analysis, Share, Growth Forecast, 2025–2034* (Summary of Report, November 2024) <https://www.gminsights.com/industry-analysis/autonomous-vehicle-development-platform-market>.

34 Uber Technologies Inc, 'Uber and Cruise to Deploy Autonomous Vehicles on the Uber Platform' (Media Release, 22 August 2024).

35 'About', *Waymo* (Web Page) <https://waymo.com/about/>; Amazon, 'We're Acquiring Zoox to Help Bring Their Vision of Autonomous Ride-Hailing to Reality' (Media Release, 26 June 2020).

B *Regulatory Capture*

This section considers the dynamics of regulatory capture and how this form of influence can also spread more widely — as State capture — to affect the structure and processes of government. Regulatory capture refers to situations where regulatory agencies are influenced by the very entities that they are responsible for regulating.[36] This results in the agency being 'deflect[ed] … from its mandated mission'.[37] Such deflection can take the form of weak enforcement of certain regulations, industry-shaped regulation or repeal of regulation.[38] This influence can be over the agency itself as 'agency capture', or over the actual process of law-making by the agency, known as 'statutory capture'.[39]

Capture is a regulatory dynamic which has been extensively researched, yet the detection of capture remains difficult and efforts to address this form of influence are hampered by a lack of resources and funding for regulators, especially in industries requiring technical expertise.[40] Since 2016, several studies have examined the relationship between the accelerating development of new technologies and capture dynamics.[41] These studies, which focused on technology companies including Uber and Google, have identified three key risk factors for capture: (1) the information

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36 Michelle E Portman, 'Regulatory Capture by Default: Offshore Exploratory Drilling for Oil and Gas' (2014) 65(1) *Energy Policy* 37, 38.

37 Ibid.

38 See also Amitai Etzioni, 'The Capture Theory of Regulations: Revisited' (2009) 46(4) *Society* 319, 320.

39 The study of regulatory capture also includes statutory capture where industry seeks to influence the drafting of regulations and statutes — see generally: Edward Pendleton Herring, *Public Administration and the Public Interest* (McGraw-Hill, 1936); Avery Leiserson, *Administrative Regulation: A Study in the Representation of Interests* (University of Chicago Press, 1942); James William Fesler, *The Independence of State Regulatory Agencies* (Public Administration Service, 1942); Marver H Bernstein, *Regulating Business by Independent Commission* (Princeton Legacy Library, 1955); George J Stigler, 'The Theory of Economic Regulation' (1971) 2(1) *Bell Journal of Economic Management Science* 3; Justin Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (2020) 14(2) *Regulation and Governance* 271; William J Novak, 'A Revisionist History of Regulatory Capture' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013) 25.

40 See generally: Taeihagh, Ramesh and Howlett (n 13); Ernesto Dal Bó, 'Regulatory Capture: A Review' (2006) 22(2) *Oxford Review of Economic Policy* 203; J Jonas Anderson, 'Court Capture' (2018) 59(5) *Boston College Law Review* 1543, 1560; Wendy E Wagner, 'Administrative Law, Filter Failure, and Information Capture' (2010) 59(7) *Duke Law Journal* 1321, 1329–34.

41 Stamp, 'Innovative Technologies and the Deepening Capture of Law Enforcement Agencies' (n 15); Adler (n 13); Collier, Dubal and Carter (n 13); Lisa-Maria Neudert, 'Regulatory Capacity Capture: The United Kingdom's Online Safety Regime' (2023) 12(4) *Internet Policy Review* 1.

advantage held by technology companies over agencies; (2) the disregard shown by technology companies towards existing regulatory regimes; and (3) consumer demand for new technologies.[42]

The significant wealth and power of technology firms, together with the scale and pace at which their products are sold to the public, means that their ability to influence is not limited to regulatory agencies but can affect the working of government more generally.[43] The study of State capture has identified that government structures and processes become vulnerable to capture when a government is over-reliant on corporations which are dominant in a special interest industry.[44] This theory of capture developed in the field of political economics, with an initial focus on how countries transitioned from State-run economies to enterprise-led economies with privatised institutions. The academic literature on State capture has focused on examples of Eastern European countries following the breakup of the Soviet Union, and considered the behaviours exhibited by previously State-owned firms which transitioned to private enterprises.[45] Firms continue to behave as if they are still State-owned, and 'appropriate some parts or functions of the [S]tate and use its resources to the benefit of the group while harming the public good'.[46]

Research conducted by Joel Hellman, Geraint Jones and Daniel Kaufmann indicates that whether firms engage in State capture or have influence on the State, 'both forms of interaction with the [S]tate generate significant gains for the firm'.[47] The main policy conclusion from this work is 'the need to shift the focus of reform strategies to address the way in which firms interact with the [S]tate'.[48] As with regulatory capture, State capture covers a wide range of influence over State processes and is not limited to actions which would constitute the offences of bribery and corruption.

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42 Stamp, 'Innovative Technologies and the Deepening Capture of Law Enforcement Agencies' (n 15); Adler (n 13); Collier, Dubal and Carter (n 13); Neudert (n 41).

43 Juho Lindman, Jukka Makinen and Eero Kasanen, 'Big Tech's Power, Political Corporate Social Responsibility and Regulation' (2023) 38(2) *Journal of Information Technology* 144, 149–50.

44 See, e.g., Elizabeth David-Barrett, 'State Capture and Inequality' (Research Paper, NYU Center on International Cooperation, December 2021) 4–6.

45 See, e.g: Mihály Fazekas and Bence Tóth, 'The Extent and Cost of Corruption in Transport Infrastructure: New Evidence from Europe' (2018) 113(1) *Transportation Research Part A: Policy and Practice* 35; Mihály Fazekas and István János Tóth, 'From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary' (2016) 69(2) *Political Research Quarterly* 320 ('From Corruption to State Capture'); Alexander Stoyanov and Alexander Gerganov, 'State Capture: From Theory to Piloting a Measurement Methodology' [2019] (1) *Yearbook of UNWE* 19.

46 Fazekas and Tóth, 'From Corruption to State Capture' (n 45) 322.

47 Joel S Hellman, Geraint Jones and Daniel Kaufmann, 'Seize the State, Seize the Day: State Capture and Influence in Transition Economies' (2003) 31(4) *Journal of Comparative Economics* 751, 765.

48 Ibid 771.

Both forms of capture can be intertwined and pervasive, with the influence of private actors having a broad impact over agencies and government structures and processes.

C *A Broader Definition of State Capture*

Since 2018, the definition and elements of State capture have broadened in academic literature and its link with regulatory capture has been explored.[49] This approach has recognised that capture dynamics can have an impact on all government processes, with regulatory capture being just one part of this. Pamela McCann, Douglas Spencer and Abby Wood define State capture as

> the degree to which a subset of the public — often an industry — steers government actors' policy agenda and decisions in a way that benefits the industry rather than the broader public, particularly when the industry's dominance is repeated or durable. Implicit in [this] definition is a conflict — or at least some difference — between the ideal policy from an industry's perspective and the ideal policy from the broader public's perspective.[50]

These authors note that there has been a focus on regulatory capture and less focus on other arms of government which can also be subject to capture. Accordingly, they argue that capture should also be thought of in terms of influencing governing structures and governing processes.[51] McCann, Spencer and Wood are of the view that '[a] strong theory of capture must therefore include special interest pressures on all branches of government and account for varying channels of influence'.[52] From this, they also support the view that

> control exercised by the industry or special interest is continuous rather than binary. In other words, whether an agency is captured is a matter of degree, complementary to the durability and control requirements.[53]

McCann, Spencer and Wood further note that 'structure or process — or both — can be captured',[54] and that 'where structure or process are weak or captured, the

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49 See, e.g: Elizabeth David-Barrett, 'State Capture and Development: A Conceptual Framework' (2023) 26(2) *Journal of International Relations and Development* 224 ('State Capture and Development'); Pamela J Clouser McCann, Douglas M Spencer and Abby K Wood, 'Measuring State Capture' [2021] (5) *Wisconsin Law Review* 1141.

50 McCann, Spencer and Wood (n 49) 1158. See also Caroline Devaux, 'Towards a Legal Theory of Capture' (2018) 24(6) *European Law* Journal 458.

51 McCann, Spencer and Wood (n 49) 1145.

52 Ibid 1147.

53 Ibid 1155.

54 Ibid 1164. See also: Dal Bó (n 40); George W Hilton, 'The Basic Behavior of Regulatory Commissions' (1972) 62(2) *The American Economic Review* 47; Randall G Holcombe, 'Rethinking Regulatory Capture' (2022) 37(1) *Journal of Private Enterprise* 39; Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) *Journal of Law*

risk of [S]tate capture rises'.[55] As with regulatory capture, observing State capture is difficult as it 'is often actualized outside of public view'.[56]

What is evident from the literature on State capture (as with regulatory capture) is that the following requirements need to be present for capture to occur:

(1) a *regulated* entity — this being a private corporation involved in some form of regulated industry which is subject to regulation or some form of State decision-making;
(2) the regulated entity has an *intent to influence* (and even control) the regulatory process;[57]
(3) the *regulated industry* has the *resources* that translate into influence on State intervention — 'special interest' or 'industry capture';[58]
(4) the *information problem* usually exists (as with regulatory capture) where 'principals are unable to control agents because they face an asymmetric information problem — they cannot observe their agents' behaviour sufficiently to hold them to account;'[59]
(5) *durability of the bias* toward industry and the fact that when a governmental unit is captured by industry, the industry exercises *some degree of control* over the unit and its decisions, at least as it pertains to the industry's interests;[60] and
(6) cost to the public when capture occurs and regulation is 'directed away from the public interest and *toward the interests* of the regulated industry'.[61]

The substantial resources and technical expertise held by technology companies, especially Big Tech, and the scale and pace at which they develop innovative

and Economics 211; Wagner (n 40); Taeihagh, Ramesh and Howlett (n 13); Selwyn W Becker and Fred O Brownson, 'What Price Ambiguity? Or the Role of Ambiguity in Decision-Making' (1964) 72(1) *Journal of Political Economy* 62; Rachel Ashworth, George A Boyne and Richard M Walker, 'Regulatory Problems in the Public Sector: Theories and Cases' (2002) 30(2) *Policy and Politics* 195; Zheng Wentong, 'The Revolving Door' (2015) 90(3) *Notre Dame Law Review* 1265; Elizabeth David-Barrett, Daniel Kaufmann and Juan Camilo Ceballos, *Measuring State Capture* (Insights Brief No 8, October 2023).

55 McCann, Spencer and Wood (n 49) 1164.

56 Ibid.

57 Ibid 1152. See also: Dal Bó (n 40); David-Barrett, 'State Capture and Development' (n 49) 227.

58 McCann, Spencer and Wood (n 49) 1152–3.

59 David-Barrett, 'State Capture and Development' (n 49) 235.

60 McCann, Spencer and Wood (n 49) 1153; Barry M Mitnick, 'Capturing "Capture": Definitions and Mechanisms' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 34.

61 Daniel Carpenter and David A Moss, 'Introduction' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013) 1, 13 (emphasis added). See also McCann, Spencer and Wood (n 49) 1154.

products for consumers, exposes significant vulnerabilities to capture on the part of regulatory agencies and State processes and structures involved in regulating these technologies.[62]

The following section will consider the proactive regulation which has been enacted in the *AV Act* to govern the use of AVs. This model will be examined also in terms of McCann, Spencer and Wood's definition of State capture to consider how a proactive model of regulation might counter the effects of capture on agencies and the State when regulating technology companies.

III *Automated Vehicles Act 2024* (UK)

In May 2024, the UK enacted legislation to govern the use of AVs on public roads.[63] The legislative process began in 2018, when the Government requested that the Commissions commence a combined process of consultation and feedback from stakeholders to determine the most appropriate way to regulate AVs.[64] By 2018, the development of AV technology was gathering pace globally with significant safety trials of these vehicles being carried out in the United States by Uber, Waymo and Lyft.[65] Other countries, including Singapore and Japan, were also becoming more involved with the development of AV technology.[66] The growth of the AV industry prompted calls to determine how the industry should be regulated.[67]

The process to regulate AVs in the UK commenced because of the policy position that developing a regulatory framework

62 McCann, Spencer and Wood (n 49); David-Barrett, 'State Capture and Development' (n 49).

63 See *AV Act* (n 17).

64 Law Commission of England and Wales, 'Automated Vehicles', *Law Commission: Reforming the Law* (Web Page) <https://lawcom.gov.uk/project/automated-vehicles/>.

65 Biz Carson, 'Uber's Self-Driving Cars Hit 2 Million Miles as Program Regains Momentum', *Forbes* (online, 22 December 2017) <https://www.forbes.com/sites/bizcarson/2017/12/22/ubers-self-driving-cars-2-million-miles/>; Waymo, 'Where the Next 10 Million Miles Will Take Us' (Media Release, 10 October 2018); Contra Costa Transportation Authority, 'Lyft Furthers its Development of Self-Driving Vehicle Technology with GoMentum Station Partnership' (Press Release, 8 March 2018).

66 GlobalData, 'Autonomous Vehicles: Timeline', *Road Traffic: Technology* (online, 14 January 2021) <https://www.roadtraffic-technology.com/comment/autonomous-vehicles-timeline/>, citing GlobalData, *Autonomous Vehicles 2020 Update: Thematic Research* (Report, July 2020).

67 See, e.g., Alex John London and David Danks, 'Regulating Autonomous Vehicles: A Policy Proposal' in *Proceedings of the 2018 AAAI/ACM Conference on AI, Ethics, and Society* (Association for Computing Machinery, 2018) 216.

> reduces uncertainty and provides legal clarity. Legal clarity, in turn, enables development, potentially at a faster pace, and there is the prospect for improved safety, increased mobility and reduced social exclusion.[68]

This policy position had the objective of providing legal clarity for both the companies developing AVs and the people using them, in relation to how liability would be apportioned if an incident occurred. The policy also sought a balance between ensuring the safety of people using AVs and the public, while also encouraging investment by companies into the UK AV industry.[69] Media commentary subsequently suggested that proactive legislation was enacted with the hope that it would 'spark trials [of AVs] akin to those seen in San Francisco and other American cities' in the UK.[70]

The Commissions published three consultation papers between November 2018 and December 2020 which sought responses from stakeholders to questions about the proposed regulatory framework.[71] In its submission, Uber recognised the proposed change in legal responsibilities:

> The Commission's approach … valuably distinguishes between the core competencies of and roles played by developers, operators, and service providers within an AV ecosystem. Moreover, the Commission's proposal reasonably recommends that an actor's duties should derive from such distinctions between roles. For example, Uber agrees that developers play lead roles in AV design and therefore are reasonably subject

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68 Regulatory Policy Committee, *AVs* (Impact Assessment No LAWCOM0075, 26 January 2022) 1 ('*AVs*'). 'The Regulatory Policy Committee ('RPC') is the independent regulatory scrutiny body for the UK Government. The Committee assesses the quality of evidence and analysis used to inform government regulatory proposals': Regulatory Policy Committee, 'About Us', *GOV.UK* (Web Page) <https://www.gov.uk/government/organisations/regulatory-policy-committee/about>.

69 *AVs* (n 68) 1.

70 Nicole Kobie, 'What the UK's Automated Vehicles Act Really Means', *TechFinitive* (online, 24 June 2024) <https://www.techfinitive.com/features/what-the-uks-automated-vehicles-act-really-means>.

71 Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles Consultation Paper 3: Analysis of Responses* (Analysis of Responses to Law Commission Consultation Paper No 252 / Scottish Law Commission Discussion Paper No 171, 26 January 2022) ('*Analysis of Responses*'); Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: A Joint Preliminary Consultation Paper* (Report, Law Commission Consultation Paper No 240 / Scottish Law Commission Discussion Paper No 166, 8 November 2018); Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport* (Report, Law Commission Consultation Paper No 245 / Scottish Law Commission Discussion Paper No 169, 16 October 2019); Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: Consultation Paper 3: A Regulatory Framework for Automated Vehicles* (Report, Law Commission Consultation Paper No 252 / Scottish Law Commission Discussion Paper No 171, 18 December 2020).

> to some subset of design-related responsibilities, and that operators are reasonably subject to responsibility for safe on-road operation … A recognition of these various and distinct roles can and should inform the ultimate regulatory framework governing different actors' responsibilities …[72]

In January 2022, the Commissions issued the *Automated Vehicles: Joint Report*, which identified core changes to the liability framework that should be applied to the use of AVs on public roads in the UK.[73] The Commissions' recommendations subsequently formed the main components of the 2024 legislation.[74] In particular, these components focused on clarifying the meaning of 'self-driving' and implementing a new system of legal accountability, including the introduction of new legal actors and specific criminal offences for companies for non-compliance. These areas will be examined below.

A *A Clear Definition of Self-Driving*

The Commissions identified the need to distinguish clearly between different types of AVs and to distinguish 'driver support' features from self-driving or autonomous driving features.[75] The blurring of this distinction was found to be a significant cause of public confusion.[76] The Commissions stated that 'a vehicle should only be authorised as self-driving if it is safe even if an individual is not monitoring the driving environment, the vehicle or the way that it drives'.[77]

The significance of identifying when a vehicle is self-driving is that 'self-driving' will indicate a new legal threshold — once a vehicle is authorised as having a self-driving feature which is engaged, then 'the human in the driving seat is *no longer responsible* for the dynamic driving task'.[78]

The Commissions recommended that the *AV Act* needs to stipulate a test which a vehicle must satisfy before a self-driving ('ADS') feature on the vehicle is authorised

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72 Uber London Limited, Submission to the Automated Vehicles Team, Law Commission, *Automated Vehicles Consultation Paper 3: A Regulatory Framework for Automated Vehicles* (21 March 2021) 3 <https://webarchive.nationalarchives.gov.uk/ukgwa/20241223105428/https://lawcom.gov.uk/responses-to-automated-vehicles-consultation-paper-3/>.

73 *Joint Report* (n 20).

74 *AV Act* (n 17).

75 *Joint Report* (n 20).

76 Ibid 12-18.

77 Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: Joint Report Overview* (Report, 26 January 2022) 1 ('*Joint Report Overview*').

78 Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: Summary of Joint Report* (Summary of Law Commission Report No 404 / Scottish Law Commission Report No 258, 26 January 2022) 5 ('*Joint Report Summary*') (emphasis added).

for use. This authorisation process would 'distinguish between driver assistance and self-driving for legal purposes'[79] and require that the self-driving ADS feature be able to 'control the vehicle so as to drive safely and legally, even if an individual is not monitoring the driving environment, the vehicle or the way that it drives'.[80]

The Commissions' broader definition of the autonomous capabilities of an AV is less technical than the classifications of autonomous function in vehicles provided by the Society of Automotive Engineers ('SAE') — a classification system which has been relied on extensively by regulators and commentators.[81]

The *AV Act* has incorporated the Commissions' recommendations into its definition of what constitutes a self-driving vehicle, this being:

> (2) A vehicle "satisfies the self-driving test" if —
>
> (a) it is designed or adapted with the intention that a feature of the vehicle will allow it to travel autonomously, and
>
> (b) it is capable of doing so, by means of that feature, safely and legally.[82]
>
> …
>
> (5) A vehicle travels "autonomously" if —
>
> (a) it is being controlled not by an individual but by equipment of the vehicle, and
>
> (b) neither the vehicle nor its surroundings are being monitored by an individual with a view to immediate intervention in the driving of the vehicle.[83]

B *A New System of Legal Accountability*

The Commissions set out that once a vehicle is 'authorised' as having self-driving features and these are engaged, 'the system of legal accountability will change'.[84] The *AV Act* is unique in that it creates new legal actors to correspond with the changes in responsibility which occur when the AV transitions from self-driving to being under the control of a driver.

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79 Ibid.

80 Ibid.

81 Society of Automotive Engineers, *Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*, No J3016 202104 (30 April 2021); Debbie Hopkins and Tim Schwanen, 'Talking About Automated Vehicles: What Do Levels of Automation Do?' (2021) 64(1) *Technology in Society* 101488; Eric R Teoh, 'What's in a Name? Drivers' Perceptions of the Use of Five SAE Level 2 Driving Automation Systems' (2020) 72(1) *Journal of Safety Research* 145; Jianqiang Wang et al, 'Towards the Unified Principles for Level 5 Autonomous Vehicles' (2021) 7(9) *Engineering* 1313.

82 *AV Act* (n 17) s 1(2).

83 *AV Act* (n 17) s 1(5).

84 *Joint Report Summary* (n 78) 2.

The new accountability regime means that a driver will become a 'user-in-charge' ('UIC') and cannot be prosecuted for offences which directly arise from the driving task.[85] They will have immunity from a range of driving offences such as dangerous driving but will remain responsible for duties such as having insurance and ensuring passengers wear seatbelts.[86]

Each vehicle will have a corresponding Authorised Self-Driving Entity ('ASDE')[87] which will usually be the corporate developer or manufacturer of the AV who is seeking to have an AV authorised for use on public roads.

1 *User-In-Charge*

The UIC is defined by the *AV Act* as follows:

> An individual is the "user-in-charge" of a vehicle if —
> (a) the vehicle is an authorised automated vehicle with an authorised user-in-charge feature,
> (b) that feature is engaged, and
> (c) the individual is in, and in position to exercise control of, the vehicle, but is not controlling it.[88]

When a self-driving feature is engaged, the UIC

> cannot be prosecuted for offences relating to the way a vehicle drives, unless they have taken steps to override the system … [They] will reacquire the obligations of a driver when they take control of the vehicle or at the end of the transition period.[89]

The *AV Act* stipulates that the UIC does not commit an offence if the incident is a result of something the vehicle does while the person is a UIC.[90] This immunity does not apply if the incident occurs after a transition demand has been issued in accordance with the legislation and the transition period has ended.[91]

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85 See *AV Act* (n 17) s 47.

86 Ibid ss 48–9.

87 This paper adopts the term 'Authorised Self-Driving Entity' ('ASDE'), which is reflected in the UK *AV Act*, noting the analogous term 'Automated Driving System Entity' ('ADSE') is used throughout some commentary and industry bodies, particularly in Australia.

88 *AV Act* (n 17) s 46.

89 *Joint Report Overview* (n 77). See generally Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: Background Papers* (Background Papers of Law Commission Report No 404 / Scottish Law Commission Report No 258, 26 January 2022) 1–22.

90 *AV Act* (n 17) s 47.

91 Ibid ss 48–9.

The *AV Act* also regulates automated vehicles with no UIC requirement, such as robotaxis, however this form of AV is outside the scope of this paper.[92]

2 *Authorised Self-Driving Entity*

The Commissions recommended that a further legal actor be created — the vehicle manufacturer or software developer who puts the AV forward for authorisation — which would be referred to as an ASDE if authorisation requirements are met.[93] It was also recommended that the ASDE would need to be able to show that the AV meets the tests for self-driving and present a safety case to regulators.[94]

There was some resistance from car developers to the concept of an ASDE during the consultation process. For example, Waymo stressed that each developer 'should be able to document its application of its chosen methodologies'.[95] Edge Case Research were of the view that regulators 'should concentrate on ensuring that manufacturers have a coherent story to tell about safety rather than mandating what that story actually is'.[96]

Against these industry recommendations, the Commissions were of the view that the regulator should set the levels of safety required for AVs and that a safety case would need to be signed off by a nominated person in a senior position of the ASDE.[97] The nominated person could face criminal charges if the information provided is not correct and complete.[98] The regulator would also need to be assured that the vehicle can record and store data which can then be accessed if an incident occurs.[99]

The Commissions concluded that the ASDE should face sanctions if the AV contravenes road rules.[100] An aggravated criminal offence could be applied if a corporation or senior manager did not disclose or misrepresented information about an AV which related to (1) an increased risk of a type of adverse incident, (2) that type of incident occurred, and (3) the incident caused a death or serious injury.[101]

The *AV Act* also puts strict requirements on ASDEs, through regulations and notices to produce, in relation to the information which they provide to the government and

92 Ibid pt 1, ch 2.

93 *Joint Report Summary* (n 78) 20.

94 Ibid 13.

95 *Analysis of Responses* (n 71) 39.

96 Ibid.

97 *Joint Report Summary* (n 78) 13.

98 Ibid.

99 Ibid 31.

100 Ibid 15.

101 Ibid 27.

regulators.[102] It also creates offences for failing to provide information or providing misleading information about the safety of a vehicle.[103]

The *AV Act* further creates an aggravated offence, as recommended by the Commissions, where death or serious injury occurs due to the following circumstances where the ASDE:

> …
> (b) had information been provided in a way that avoided the commission of any such offence, that information would have disclosed a heightened risk that a vehicle in which an authorised automation feature is engaged would be involved in a dangerous incident of a particular kind;
> (c) a vehicle in which that feature is engaged is involved in a dangerous incident of that kind; and
> (d) an individual is killed or seriously injured as a result of that incident.[104]

3 *A Clear Transition between Self-Driving Mode and Human Control*

The Commissions identified the need for AVs to have a clear transition when changing from self-driving mode to the UIC taking control. This transition period needed to incorporate: (1) clear alarms to alert the driver; (2) sufficient time for the driver to gain situational awareness and take control; and (3) the ability for the vehicle to manage the situation safely and mitigate risk of injury or damage if the driver fails to take back control.[105]

These recommendations have been incorporated into the *AV Act*, including the requirement that an alert is given to the driver at the completion of the transition period.[106] Following a completed handover, the UIC becomes the driver and is subject to all the responsibilities of a driver (however, may not be responsible for an event which occurs due to the actions of the ADS prior to handover).[107] At the end of the transition period, the UIC's immunity from dynamic driving offences ceases and the UIC becomes liable.[108] This clear transition period is essential for delineating the new legal actors and where legal responsibility will fall if an incident occurs when the AV is operating.

102 *AV Act* (n 17) ss 14–23.

103 Ibid ss 24–5.

104 Ibid s 25(1). See also s 25(2).

105 *Joint Report Summary* (n 78) 1.

106 *AV Act* (n 17) s 7.

107 Ibid ss 47–8.

108 Ibid s 49.

C *Company Liability*

The Commissions recommended that specific criminal offences be created for the failure by an ASDE or its representative to provide information to the regulator or for providing information to the regulator that is false or misleading in a material particular.[109]

This recommendation had significant support from stakeholders during the consultation process.[110] For example, law firm Burges Salmon LLP explained that

> [o]n balance we consider an offence of this type is necessary for public safety assurance, to reinforce the critical importance of safety transparency and to address the potential information/experience imbalance between ADSEs and regulators (especially at the outset of the technology's deployment).[111]

The Health and Safety Executive noted that ASDEs should not be held responsible through the use of the *Health and Safety at Work etc Act 1974* (UK).[112]

FiveAI were of a differing view stating that

> [a]n ADS is a complex product with many components and the ADS itself is sensitive to small changes. The ADSE will be reliant on information from many different sources inside and outside of the ADSE, and senior managers cannot be expected to have intimate knowledge of all the different parts of the systems.[113]

The Commissions also recommended that liability should be established for senior managers for breaches of the 'duty of candour',[114] and that the term 'senior manager' should be defined as a 'person who plays a significant role in the making of the decisions about how the 'ADSE … is managed or organised, or the management of the safety assurance process'.[115]

These liability provisions for senior managers have been incorporated into the *AV Act* together with extensive investigatory powers, including the use of warrants, to investigate possible offences.[116]

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109 *Joint Report Summary* (n 78) 25.

110 *Analysis of Responses* (n 71) 158.

111 Ibid.

112 Ibid.

113 Ibid 160.

114 *Joint Report Summary* (n 78) 25.

115 Ibid 26.

116 *AV Act* (n 17) s 27, pt 1, ch 4.

D *Incident Investigation*

It was noted by the Commissions that serious, complex and high-profile investigations into incidents involving AVs should be investigated by a specialist independent investigator with a focus on learning lessons rather than allocating fault.[117]

The development of a specialist investigation unit was widely supported in the consultation process. The Royal Society for the Prevention of Accidents noted '[i]f automated cars malfunction, they are likely to do so in ways which are unfamiliar to coroners or police officers. Understanding the causes of such failure will involve new types of expertise'.[118] Similarly, the RAC Foundation noted that the National Transportation Safety Board ('NTSB') in the United States 'investigates near miss collisions of AVs as well as the most serious, complex and/or high-profile collisions, as significant safety learning can come from near-miss collisions'.[119]

Despite these views, the Commissions' recommendations for independent investigation were watered down in the legislation. While the *AV Act* establishes the roles of 'inspectors of automated vehicle accidents', these positions remain very dependent on government, with the terms of these roles determined by the Secretary of State.[120] Ultimately, 'the main purpose of the role of inspector is that of identifying, improving understanding of, and reducing the risks of harm arising from the use of authorised automated vehicles on roads in Great Britain' without any blame or liability to be established.[121]

IV A Similar Proposition in Australia

While the UK enacted legislation in 2024 to regulate the use of AVs, similar regulatory concepts have been developed in Australia since 2016, with the aim of enacting the Automated Vehicle Safety Law ('AVSL') by 2026.[122] The proposed AVSL provides a useful comparison with the *AV Act*. Both the UK and Australia are focusing on corporate accountability by developing legislation for AVs which stipulates that the companies who develop AVs must be ASDEs. This approach requires such ASDEs to satisfy certain requirements and allows them to be held accountable if harm is caused through the use of an AV.[123]

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117 *Joint Report Summary* (n 78) 16.

118 *Analysis of Responses* (n 71) 94.

119 Ibid 95.

120 *AV Act* (n 17) s 60.

121 Ibid s 61.

122 National Transport Commission, *The Regulatory Framework for Automated Vehicles in Australia* (n 19) 8–10.

123 See generally Brittany Eastman et al, 'A Comparative Look at Various Countries' Legal Regimes Governing Automated Vehicles' [2023] *Journal of Law and Mobility* 1.

A *Defining Autonomous/Automated Vehicle*

The Australian approach to defining a self-driving or autonomous vehicle is more complex than the *AV Act.* The Australian proposal provides definitions for 'automated driving system' and 'automated vehicle' and refers to the SAE levels[124] to describe the differing levels of human and ADS control or intervention for AVs at each of these levels.[125] The *AV Act* has deliberately avoided using these technical definitions to delineate responsibility to avoid confusion, instead focusing on one clear definition of when a vehicle is considered to be self-driving and when it is not.

B *Accountability*

The proposed system of accountability under the AVSL for when an AV is operating on a public road is far less clear than the *AV Act*. The Australian proposal requires that human drivers using an AV comply with the state/territory general requirements for drivers — the only AV specific guidance relates to those driving an SAE Level 3 AV. Drivers operating an SAE Level 3 AV will have a legal duty to 'remain sufficiently vigilant to respond to ADS requests, mechanical failure or emergency vehicles and regain control of the vehicle without undue delay when required'.[126]

The Australian approach also creates the requirement for companies manufacturing and developing AVs to be certified as ASDEs, with onerous requirements to be fulfilled by the ASDE. The ASDE will have an overarching 'general safety duty to ensure the safe operation of its automated vehicles, so far as is reasonably practicable'.[127] The ASDE will also need to fulfill multiple prescriptive duties set out in the AVSL to support the general safety duty, including to 'prevent the operation of an ADS when the ASDE is aware the ADS is unsafe, so far as is reasonably practicable'[128] and to 'have appropriate resources, processes, policies and systems in place to identify, manage and minimise known and foreseeable safety risks'.[129] There are also duties on the ASDE to ensure that the ADS operates in a way which will be compliant with Australian road rules, and that the system can continue to operate safely when unexpected events occur.[130] 'Control' is a key concept in the proposed

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124 Society of Automotive Engineers, 'Automated Driving Levels of Driving Automation are Defined in New SAE International Standard J3016' (Media Release) <https://www.sae.org/binaries/content/assets/cm/content/news/press-releases/pathway-to-autonomy/automated_driving.pdf>; National Transport Commission, *What is an Automated Vehicle?* (Research Paper, April 2024).

125 National Transport Commission, *The Regulatory Framework for Automated Vehicles in Australia* (n 19) 11–12; National Transport Commission, *Human User or Occupant Obligations When Using a Vehicle with an ADS* (Research Paper, April 2024).

126 National Transport Commission, *The Regulatory Framework for Automated Vehicles in Australia* (n 19) 43.

127 Ibid 31.

128 Ibid 32.

129 Ibid 76.

130 Ibid 43.

AVSL framework, meaning that 'when an automated vehicle's ADS is engaged, the ADS is in control and the ADSE is responsible for complying with [dynamic driving task] … obligations'.[131]

In addition, the ASDE will need to comply with prescriptive duties in the AVSL to support enforcement such as to 'have appropriate resources, processes, policies and systems in place to identify, manage and minimise known and foreseeable safety risks', and to 'develop and maintain a law enforcement interaction protocol to be shared with the in-service regulator'.[132] The Australian regulation will also require that an ASDE 'be a corporation with suitable structures and capabilities to keep an ADS safe' and will require that an ASDE demonstrate that they have a corporate presence in Australia.[133] The requirement that an ASDE have a corporate presence in Australia demonstrates that Australian regulators are seeking to maintain jurisdictional control over ASDEs, and avoid possible issues relating to the enforcement by regulators of duties for ASDEs under the AVSL when a transnational company is involved.

C *Incident Investigation*

The proposed AVSL creates three key regulators to ensure the safety of AVs: the first-supply regulator, the in-service regulator, and state and territory road transport regulators.[134]

The first-supply regulator will approve AVs for entry into the market and confirm the roles and responsibilities of existing state and territory road transport regulators which will apply to AVs.[135]

The in-service regulator will play a pivotal role under the AVSL. It will regulate ASDEs and ASDE executive officers[136] and its 'key function will be to ensure regulated parties assure the safety of an ADS over its life cycle'.[137] This is a similar role to that of the 'inspectors of automated vehicle incidents' set out in the *AV Act*.[138] The in-service regulator will be required to investigate breaches of road rules 'as

131 Ibid 11.

132 Ibid 33–4.

133 'Making Sure the Automated Driving System is Safe When it Enters the Market', *National Transport Commission* (Web Page) <https://www.ntc.gov.au/making-sure-automated-driving-system-safe-when-it-enters-market>; National Transport Commission, *Requirements When a Vehicle with an ADS is First Provided* (Supporting Paper, April 2024); National Transport Commission, *Automated Driving System Entity Certification* (Supporting Paper, April 2024).

134 National Transport Commission, *The Regulatory Framework for Automated Vehicles in Australia* (n 19) 14–16.

135 Ibid.

136 Ibid 15.

137 Ibid.

138 *AV Act* (n 17) pt 3, ch 2.

a potential breach of the general safety duty where either: the ADS was clearly engaged at the time of the breach[,] the driver considers the ADS was engaged, or control is unclear'.[139] State and territory road transport regulators will retain responsibility for the general management of AVs being used on public roads, including vehicle registration, road worthiness inspections and regulation of the human drivers of AVs.[140]

Public consultation on the safety reforms proposed to govern the use of automated vehicles in Australia closed in June 2024 and the government is currently working to finalise the drafting of the AVSL.[141]

V A Broader Model of Proactive Regulation for Autonomous Digital Technologies

The *AV Act* provides the basis for setting out a more general model which can be applicable not only to AVs but also to other ADS. While some parts of the *AV Act* relate to longstanding regulatory matters for motor vehicles, such as licensing,[142] permits,[143] and representations made by car dealers,[144] it is Part 2 of the *AV Act* which provides the foundation for a broader model.[145] On the above analysis, the main components of this model can be set out as follows:

(1) An ADS is a system which has the capability to operate autonomously for certain functions with minimal human oversight;
(2) A person or company is the *authorised entity* which develops and confirms the technology, provides information about the technology and can be sanctioned if information is not provided or is inaccurate. The authorised entity is responsible for applicable offences when the ADS is operating autonomously;
(3) The UIC is the *person* who uses the ADS and has immunity for offences which occur when the ADS is operating autonomously. The UIC is responsible for applicable offences when the ADS is not operating autonomously;
(4) There is a *clear transition* between the ADS operating in autonomous mode and the UIC regaining control of the ADS;

139 National Transport Commission, *The Regulatory Framework for Automated Vehicles in Australia* (n 19) 59.

140 Ibid 15–16.

141 See 'Automated Vehicle Safety Reforms', *Department of Infrastructure, Transport, Regional Development, Communications and the Arts* (Web Page) <https://www.infrastructure.gov.au/have-your-say/automated-vehicle-safety-reforms>.

142 *AV Act* (n 17) ss 12–13.

143 Ibid ss 82–90.

144 Ibid ss 78–9.

145 Ibid pts 2–3.

(5) This clear transition delineates legal responsibility (civil or criminal) for incidents occurring when the ADS is operating autonomously *and* when the ADS reverts to being controlled by the UIC;
(6) The UIC loses immunity for applicable offences which occur after the transition period has ended and the UIC has regained control of the ADS; and
(7) An independent agency is responsible for investigating incidents which occur when an ADS is being operated.

Legal uncertainty over liability for harms caused by ADS has been a continuing theme in debates on how to regulate autonomous technologies.[146] This model seeks to address this uncertainty by clearly delineating who has legal responsibility and when.

Returning to the issue of capture referred to in Part II, the remainder of this paper will consider how the broad model of proactive regulation can address capture dynamics. The overall argument is that this broad model will actively work to reduce the information advantage held by technology companies seeking regulatory approval for innovative technologies. The features of the model described above will allow regulatory agencies and state governments, which often do not have the technical expertise to adequately interrogate the claims made by technology companies, to better fulfill their regulatory functions. This model places the onus on the technology company to demonstrate that the technology they are seeking approval for is safe. The model also provides an economic incentive for companies to provide the required information in a timely manner, as this information needs to be provided and accepted by the regulator before public sales of the ADS product can start.

It is not contended that this model of liability is the missing panacea which will ensure that technology companies develop safe ADS and comply with regulatory requirements. Capture dynamics across industry continue to be difficult to detect and combat,[147] and this is even more so when large, wealthy technology companies

146 See, e.g: Filippo Santoni de Sio and Jeroen van den Hoven, 'Meaningful Human Control Over Autonomous Systems: A Philosophical Account' (2018) 5(15) *Frontiers in Robotics and AI* 1; Louise Hatherall et al, 'Responsible Agency Through Answerability: Cultivating the Moral Ecology of Trustworthy Autonomous Systems' (Conference Paper, Proceedings of the First International Symposium on Trustworthy Autonomous Systems, 11 July 2023).

147 See: Luigi Zingales, 'Preventing Economists' Capture' (Working Paper No 99 / Booth Working Paper No 13–81, 12 November 2013); David A Moss and Daniel Carpenter, 'Conclusion: A Focus on Evidence and Prevention' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013) 451; Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12(1) *Journal of Public Policy* 61.

are involved.[148] It is contended that the proposed model of liability will begin to address the information asymmetry and influence held by technology companies over regulating entities and, in doing so, work to alter the regulatory environment in which instances of capture can flourish. This model also seeks to encourage technology companies to promote internal corporate cultures of safety and transparency with respect to their ADS with the motivating factor of having their ADS approved for public use and sales.

While the *AV Act* did not proceed with establishing a fully independent investigative agency, having such an independent agency would be recommended for this general model of ADS liability. An independent investigative agency with the relevant technical expertise is essential to reduce the information asymmetry between technology companies and regulators. In particular, the investigative agency needs to have both technical expertise and independence to properly assess any failures of disclosure during the ASDE authorisation process and the effect that such non-disclosure subsequently has on the performance of the vehicle.

This model of liability also recognises that there may be instances when technology companies provide false or misleading information about the safety of the ADS they are seeking approval for, which may not be detected by the regulator prior to the public use of the ADS. While focused on proactive regulation, the model also allows for accountability measures: the delineation of legal responsibility allows for sanctions to be imposed on companies if an incident occurs while the ADS is operating in autonomous mode, and companies can be charged with aggravated criminal offences if the failure to provide accurate information leads to a serious incident.

The following section will consider how the *AV Act* might apply to a situation where a serious incident occurs with an AV using the case study of the fatal collision in Arizona in 2018 in which an Uber AV killed pedestrian Elaine Herzberg. This is a valuable case study as it demonstrates many of the issues that the *AV Act* is now seeking to address.

VI Application to the Uber Herzberg Incident

This paper will approach the analysis of how the *AV Act* could have applied to the circumstances of the Uber collision in two ways. First, the analysis will consider the very different regulatory landscape that would have been in place in Arizona in 2018 if legislation similar to the *AV Act* had been in place. Secondly, the analysis will consider the different accountability outcomes that would have been available for the vehicle operator, Rafaela Vasquez, and for Uber if an equivalent regulatory scheme had existed.

148 Matthew U Scherer, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies' (2016) 29(2) *Harvard Journal of Law and Technology* 353, 377.

A *Regulatory Capture of Agencies in Arizona*

In earlier published work, the author examined the regulatory capture by Uber of the Tempe Police Department and the County Attorneys who were investigating the fatal collision and determining where criminal responsibility should fall.[149] These capture dynamics were supported by the pro-innovation stance of the Arizona government and a failure to seek technical assistance from specialised federal bodies.[150] This capture resulted in Uber evading criminal liability for the safety shortcomings present in both the Uber AV itself, and in the rollout of the Uber AV testing program in Arizona, with only Vasquez being charged for the death of Herzberg.[151]

Consider the altered regulatory landscape that would have been in place if similar legislation to the *AV Act* was in place in Arizona in 2018. Under the *AV Act* framework, Uber would have been required to seek regulatory authorisation to be an ASDE. Based on safety principles specified under the *AV Act*,[152] regulators would need to be satisfied that (1) the AVs that Uber wanted to trial were safe,[153] (2) that Uber could demonstrate that it was 'of good repute' and 'good financial standing', and (3) 'capable of competently discharging any authorisation requirements imposed'.[154] Uber could also have been criminally sanctioned under section 24 of the *AV Act*, if the information that they provided was false or misleading or if they refused to provide information.[155]

As at June 2025, the *AV Act* has not yet defined the applicable safety standards for AVs. The Commissions were of the view that the setting of the safety standard and what is considered to be acceptable risk by the public is a 'political question' to be undertaken by the United Kingdom's government.[156] This process is set out in the *AV Act* with a 'Statement of Safety Principles' to be prepared by the Secretary

149 Stamp, 'Innovative Technologies and the Deepening Capture of Law Enforcement Agencies' (n 15).

150 Ibid 89, 107–8.

151 United States National Transportation Safety Board, *Highway Accident Report: Collision Between Vehicle Controlled by Developmental Automated Driving System and Pedestrian, Tempe Arizona, March 18, 2018* (Accident Report, No NTSB/HAR-19/03, PB2019-101402, 19 November 2019) ('*NTSB Report*'). Vasquez was initially charged with the criminal offence of negligent homicide for the death of Herzberg and later pled guilty to the charge of reckless endangerment in a plea agreement. See Lauren Smiley, 'The Legal Saga of Uber's Fatal Self-Driving Crash is Over', *Wired* (online, 28 July 2023) <https://www.wired.com/story/ubers-fatal-self-driving-car-crash-saga-over-operator-avoids-prison/>.

152 *AV Act* (n 17) s 2.

153 Ibid ss 1–6.

154 Ibid s 6.

155 Ibid ch 3.

156 *Joint Report Summary* (n 78) 9.

of State and provided to Parliament.[157] The UK government has now released an 'open call for evidence' as the first stage of public consultations on how the 'safety principles might be used, how the safety standard might be described and how safety performance can be measured' although the statement of safety principles has not yet been publicly released.[158] Until the scope of such a safety standard is determined, it remains unknown what information would need to be disclosed by technology companies in order to comply with the *AV Act*. What is clear from the case study of the 2018 Uber fatal collision is that to be effective a review of safety would require, at a minimum, an assessment of the AV's ADS features and any *limitations* of the ADS which might affect the AV's capacity to drive safely and legally in autonomous mode on a public road. The review should also consider the general corporate safety policies and standards implemented by the technology company seeking ASDE status when they design and manufacture their AVs.

Theoretically, if the required safety standard was in place in Arizona in 2018, and Uber's management were aware of the information to be disclosed (as required under the *AV Act*), the following actions may have occurred in this altered regulatory landscape. First, Uber may have decided not to trial their AVs in Arizona given the requirements of the AV legislation. Second, Uber may have delayed the rollout of their AV testing until technical flaws had been rectified in the software and safety policies implemented so that they could comply with the legislation and avoid any sanctions. Or, Uber may have chosen to run the gauntlet in order to be first to market and proceed with seeking authorisation to trial its AVs without disclosing information about the AV's technical flaws.

B *Evasion of Accountability*

In subsequent published work, the author tested the theory of Uber's regulatory capture of the Tempe Police and County Attorneys by examining whether the criminal law framework in Arizona in 2018 would have allowed for a corporation to be charged with negligent homicide for the death of Herzberg.[159] This analysis demonstrated that, although there was a relevant legal framework in place at that time which would have allowed for the prosecution of Uber, this was not used due to Tempe Police's lack of AV technical expertise, the prosecution's focus on the

157 *AV Act* (n 17) s 2.

158 Department of Transport Centre for Connected and Autonomous Vehicles (UK), 'Open Call for Evidence: Automated Vehicles: Statement of Safety Principles', *GOV.UK* (Web Page, 10 June 2025) <https://www.gov.uk/government/calls-for-evidence/automated-vehicles-statement-of-safety-principles/automated-vehicles-statement-of-safety-principles#statement-of-safety-principles>.

159 Helen Stamp, 'The Reckless Tolerance of Unsafe Autonomous Vehicle Testing: Uber's Culpability for the Criminal Offense of Negligent Homicide' (2024) 15(1) *Journal of Law, Technology and the Internet* 3 ('The Reckless Tolerance of Unsafe Autonomous Vehicle Testing').

actions of Vasquez, and the overarching influence of Uber on these law enforcement agencies.[160]

Consider the accountability outcome which could have occurred in these circumstances if similar legislation to the *AV Act* was in place in Arizona when the collision occurred.

As discussed above, to trial its AVs on public roads in Arizona, Uber would have needed to satisfy the legislative requirements to become an approved ASDE, including demonstrating that the AV can travel safely and legally when operating autonomously, and that neither the vehicle or its surroundings needs to be monitored by a person who could immediately intervene and take back control of the vehicle if required.[161]

If Uber had satisfied these legislative requirements and was considered an ASDE, then the divisions of legal responsibility set out in the *AV Act*, and examined in Part III of this paper, would have then applied to the collision between the Uber AV and Herzberg.

The police investigation noted that Vasquez reported to police that the Uber AV was travelling in autonomous mode at the time of the collision.[162] This autonomous functioning was also confirmed by the NTSB in its independent investigation.[163] There was also no evidence of any warnings or alerts given by the AV that would have alerted Vasquez to take back control of the vehicle prior to the collision.[164]

In these circumstances, as the AV was operating autonomously, Vasquez would have been considered the UIC until the AV transitioned back to non-autonomous mode. As the UIC, Vasquez would have had immunity from driving offences which occur because of an act by the AV while it is operating autonomously. As per the *AV Act*, when Vasquez was the UIC, she would not have been required to monitor the vehicle or the surroundings. This immunity would have remained until a clear transition demand had been made and the transition period completed with Vasquez taking back control of the vehicle.

Under the *AV Act* regulatory model, it is likely that more attention would have been paid by Tempe Police investigators and County Attorneys to whether the AV was operating autonomously when the collision occurred. It is also likely that these agencies would have paid greater attention to the role that technical flaws in the AV's ADS played in the collision.

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160 Ibid; *NTSB Report* (n 151).

161 *AV Act* (n 17) s 1(2).

162 See: Stamp, 'Innovative Technologies and the Deepening Capture of Law Enforcement Agencies' (n 15); Stamp, 'The Reckless Tolerance of Unsafe Autonomous Vehicle Testing' (n 159).

163 *NTSB Report* (n 151).

164 Ibid.

It would have been very difficult for Vasquez to have been prosecuted for the death of Herzberg under the *AV Act* model. This model of regulation clearly demarcates that either a vehicle can travel safely and legally in autonomous mode without a person monitoring the vehicle and environment or it should not be certified as self-driving and authorised for use on public roads. If the vehicle was travelling autonomously at the time of the collision, then the prosecution would not have been able to argue that Vasquez was a distracted driver, and that this distraction caused the collision (which was a central argument of the criminal case against Vasquez).[165]

The *AV Act* model places greater emphasis on the actions of corporations and the need for corporations to safely develop innovative technologies and to minimise the risk to the public when doing so. If the flaws in Uber's programming of the AV and their lack of safety policies (which were later identified by the NTSB)[166] had been disclosed, then under the *AV Act* model, Uber should not have been deemed an ASDE and not permitted to test their vehicles in Arizona. Alternatively, if Uber failed to disclose flaws and limitations in its AV technology — failures that 'would have disclosed a heightened risk that a vehicle in which an authorised automation feature is engaged would be involved in a dangerous incident of a particular kind'[167] — when applying for ASDE status in Arizona, then Uber could have been charged with an aggravated criminal offence for the death of Herzberg.

The Uber case study also clearly demonstrates the need to have an agency with sufficient technical expertise to competently investigate incidents involving autonomous technologies, such as the NTSB. This is important so that incidents can be properly investigated, and prosecutorial bodies briefed regarding liability issues and whether charges should be preferred. It is vital to have this information symmetry between companies developing this technology and those investigating incidents to reduce the potential for influence and agency capture to occur, as discussed earlier in Part II.

VII Conclusion

The *AV Act* is a leading example of regulation which addresses the issue of determining legal responsibility for harm caused using ADS through the creation of new legal actors which reflect who or what is in control of an AV when an incident occurs.

While further research in this area is required, the *AV Act* creates a model of liability which has the potential to be applied more broadly to other forms of ADS. For example, this model of liability could be applied to the use of ADS in healthcare

165 *State of Arizona v Vasquez,* No 785 GJ 251 (27 August 2020) Case No CR2020-001853-001; Stamp, 'The Reckless Tolerance of Unsafe Autonomous Vehicle Testing' (n 159).

166 *NTSB Report* (n 151).

167 *AV Act* (n 17) s 25.

where robot assisted surgeries ('RAS') are raising similar concerns to those of AVs regarding liability for harm caused.[168] The types of RAS that are available 'primarily revolves around the robot's autonomy level, the degree of assistance provided by robotic systems during the execution of surgical procedures, and the human surgeon's control exercised'.[169] As with AVs, the liability questions surrounding the use of RAS require an examination of who (or what) is in control at a particular time, whether there has been a clear transition from a human performing surgical tasks to a RAS and whether responsibility should fall on a person or a company if harm is caused.

As discussed in Part IV of this paper, the proposed model of liability is a contribution towards a greater understanding of how ADS can be regulated and will not be applicable to all forms of ADS. This model of liability is best suited to the regulation of ADS operating within national legal frameworks where the relevant parties are easily identifiable, national legislation can be enacted or amended and sanctions enforced. The regulation of ADS which are subject to international legal frameworks, such as autonomous ships and autonomous weapons, involves a greater level of complexity which the current model of liability is unable to accommodate.

This model of liability invites an important reconsideration of how many forms of ADS could be regulated using legal frameworks which focus on the concepts of control and responsibility when an ADS is being used. The model discussed avoids fitting ADS into traditional frameworks of liability without acknowledging the control differences which occur when an ADS is operating, or trying to create entirely new legal regimes. Instead, this model draws on all parties involved and attributes responsibility based on who or what is in control when an incident occurs. Responsibility can then fall on the corporation which developed the technology or the person who has manual control of the technology at the relevant time.

It is a model which acknowledges the significant change which autonomous technologies bring for legal systems while also retaining liability for the corporations

168 See generally: Hassan Mohamed, 'The iRobo-Surgeon Conundrum: Comparative Reflections on the Legal Treatment of Intraoperative Errors Committed by Autonomous Surgical Robots' (2024) 16(1) *Law, Innovation and Technology* 194; Satvik N Pai et al, 'In the Hands of a Robot, from the Operating Room to the Courtroom: The Medicolegal Considerations of Robotic Surgery' (2023) 15(8) *Cureus* e43464:1–6.

169 Eduard Fosch-Villaronga et al, 'The Role of Humans in Surgery Automation' (2023) 15(3) *International Journal of Social Robotics* 563, 568, citing Eduard Fosch-Villaronga and Hadassah Drukarch, *On Healthcare Robots: Concepts, Definitions, and Considerations for Healthcare Robot Governance* (Report, May 2021). See also: Mindy Nunez Duffourc, 'Malpractice by the Autonomous AI Physician' [2023] (1) *University of Illinois Journal of Law, Technology and Policy* 1; Frank Pasquale, 'Liability Standards for Medical Robotics and AI' in Larry A DiMatteo, Cristina Poncibò and Michel Cannarsa (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press, 2022) 200.

who develop this technology and for individuals who need to use this technology responsibly. Importantly, by reducing information asymmetry and taking a proactive approach rather than relying exclusively on *ex post* accountability measures, this model also works to address the dynamics of regulatory and state capture which often impact accountability mechanisms used to govern innovative technologies. While this model's focus is on proactive regulation, it also pragmatically acknowledges the need to include some *ex post* accountability measures for companies which circumvent the requirements for providing accurate information which results in a serious incident occurring.

This proactive model of liability for ADS has the potential to encourage the safe development of innovative technologies and to provide a fairer assessment of where responsibility should fall when an incident occurs. It also has the potential to assist in the process of rebalancing power relations between state governments, regulators, and large technology companies, allowing the benefits of autonomous technologies to be realised while prioritising public safety considerations.

Thomas McClure and Riki Theodorakakos***

TO CUT A LONG STORY SHORT: *MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS V MCQUEEN* (2024) 418 ALR 133

I Introduction

In *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* ('*McQueen*'),[1] the High Court of Australia considered whether the Minister for Immigration, Citizenship and Multicultural Affairs ('Minister') was permitted to rely solely upon a departmental summary of representations when personally exercising their power under s 501CA(4) of the *Migration Act 1958* (Cth) ('*Migration Act*'). This provision empowers the Minister or their delegate to revoke the mandatory cancellation of a visa where satisfied that the individual either passes the character test or there exists 'another reason' to do so.

The fundamental question raised by *McQueen* is this: what is required for the Minister to discharge their duty to personally consider representations, where those representations are 'an exercise in persuasion' and 'the odds are already stacked against the individual affected'?[2] On this issue, the High Court's answer was unanimous: exclusive reliance upon a summary prepared by the Minister's department is sufficient for the Minister to lawfully reach the state of satisfaction required by s 501CA(4). In so finding, the High Court reversed the prior decisions of the primary judge (Colvin J)[3] and the Full Court of the Federal Court of Australia.[4]

The approach of the Full Federal Court is, respectfully, preferable to that of the High Court. This is because the unique practical and statutory context of s 501CA(4) necessitates that the Minister's satisfaction be formed by personally and directly considering the representations as made.[5] In finding to the contrary, the High Court seemingly favoured administrative efficiency over apparent legislative intention.

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1 (2024) 418 ALR 133 ('*McQueen*').

2 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595, 616 [80] ('*McQueen* (FCFCA)').

3 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2022] FCA 258 ('*McQueen* (FCA)').

4 *McQueen* (FCFCA) (n 2).

5 Ibid 621 [103].

Part II sets out the legal background to *McQueen*. Part III outlines the facts of the case and Part IV discusses the decisions of the primary judge and the Full Federal Court. Part V outlines the *McQueen* judgment and Part VI comments on such, ultimately arguing that the High Court's construction of s 501CA(4) fails to give proper consideration to the statutory context of that power and the potentially devastating consequences attending its exercise.

II Background

A *The* Migration Act

The *Migration Act* confers significant powers to the Minister. Unless expressly excluded, the Minister may delegate any of these statutory powers to a person in writing.[6]

Section 501(3A) of the *Migration Act* requires that the Minister cancel a visa where satisfied that the visa-holder: (1) does not pass the character test,[7] because they either have a substantial criminal record[8] or have committed a sexually-based offence involving a child;[9] and (2) is serving a sentence of imprisonment on a full-time basis in a custodial institution. This cancellation is mandatory — once satisfied of these objective facts, cancellation must occur. Upon cancellation, the Minister must give the person a written notice and invite them to make representations to the Minister about revocation of the original decision.[10]

By operation of s 501CA(4), the Minister has the power to revoke the original decision if: (1) the person makes representations in accordance with the Minister's invitation; and (2) the Minister is satisfied that the person either passes the character test, or that there is another reason why the original decision should be revoked. Critically, merits review by the Administrative Review Tribunal is only available where this power is exercised by a delegate,[11] not by the Minister personally.[12]

Absent any previous error 'affecting the Minister's state of satisfaction under s 501(3A)(a) that the person did not satisfy the character test', the function of the provision is to provide an opportunity for the affected person to persuade the Minister to revoke the decision.[13] Unlike s 501(3A), s 501CA(4) grants the Minister

6 *Migration Act 1958* (Cth) s 496(1) ('*Migration Act*').

7 Ibid s 501(6).

8 Ibid ss 501(6)(a), (7).

9 Ibid s 501(6)(e).

10 Ibid s 501CA(3).

11 *Migration Act* (n 6) s 500(1)(ba).

12 Ibid s 501CA(7).

13 *McQueen* (n 1) 147 [44] (Jagot and Beech-Jones JJ).

a wide discretion,[14] with the reference to 'another reason' being 'unlimited'.[15] However, the applicant's representations have been interpreted to be a 'mandatory relevant consideration'.[16] The corollary of this is that a failure to consider a 'substantial, clearly articulated argument advanced as demonstrating a reason why a cancellation decision should be revoked' may amount to jurisdictional error.[17] Until *McQueen*, the High Court had not addressed the degree of engagement required with the representations for the lawful ministerial exercise of the s 501CA(4) power.

III The Facts

Mr McQueen was a citizen and former marine of the United States who resided in Australia under a resident return visa.[18] In 2019, Mr McQueen was sentenced to a term of imprisonment for drug related offences.[19] As a consequence, his visa was mandatorily cancelled on 13 November 2019.[20] On 22 November 2019, Mr McQueen made representations to the Minister, which comprised over 200 pages,[21] seeking revocation of the decision to cancel his visa.[22] His failing of the character test was not challenged. Rather, Mr McQueen argued there was 'another reason' for revocation.[23] Mr McQueen's representations highlighted concerns for his family, which he had cultivated during his 22 years in Australia, and in particular a fear that he, his partner, and their children, if relocated to the United States, would face racism and isolation.[24]

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14 *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 383 ALR 194, 201 [36].

15 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, 614 [70] (Edelman J) ('*Plaintiff M1/2021*').

16 *Tran v Minister for Immigration and Border Protection* [2019] FCAFC 126, [121]. See also: *Goundar v Minister for Immigration and Border Protection* (2016) 160 ALD 123, 133 [56]; *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492, 502 [47]; *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643, 649 [18]–[19], 655 [49]. See further *Migration Act* (n 6) s 501CA(4)(a).

17 *Navoto v Minister for Home Affairs* [2019] FCAFC 135, [85], citing *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, 538 [30]. See also: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398, 406 [13]; *Plaintiff M1/2021* (n 15) 598–9 [24].

18 Paul Karp, '"Sign Here": High Court Finds No Requirement for Minister to Read Submissions on Visa Decisions', *The Guardian* (online, 10 April 2024) <https://www.theguardian.com/australia-news/2024/apr/10/alex-hawke-andrew-giles-visa-cancellation-case-details>.

19 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* [2023] HCAASP 44; *McQueen* (FCA) (n 3) [1].

20 *McQueen* (FCA) (n 3) [1].

21 Ibid [75].

22 Ibid [2].

23 *McQueen* (FCFCA) (n 2) 598–9 [4].

24 *McQueen* (FCA) (n 3) [15].

It was not until 11 December 2020 that a senior advisor to the then Minister, Alex Hawke, suggested that a decision on the McQueen matter be made.[25] By this time, Mr McQueen's visa had been cancelled for over a year, and it had been six months since he had completed his prison sentence.[26] As he was a non-citizen in Australia's migration zone without a valid visa, Mr McQueen had been transferred to immigration detention.[27]

The Minister, having chosen to personally exercise the s 501CA(4) power, was provided by the Department of Home Affairs ('Department') with: (1) a 13-page summary of Mr McQueen's representations; (2) a 15-page set of draft reasons; and (3) Mr McQueen's representations themselves.[28] Adopting the Department's draft reasons, the Minister refused to revoke the cancellation decision on 27 April 2021.[29] In what was described by the Full Federal Court as a 'bizarre factual situation',[30] this decision was recorded by way of 'a photograph of a ring binder, resting on the lap of a person and beneath the steering wheel of a car, open at a document headed "Attachment 1", with option (c) circled, and with a signature and a date'.[31] Although there was no apparent need for urgency,[32] the Minister sent this confirmatory photograph a mere 30 hours after receiving the McQueen brief.[33] During this time, the Minister had travelled by car from Canberra to Sydney — roughly a three-hour drive — as well as, presumably, dealing with other parliamentary business and resting.[34] Therefore, the Full Federal Court opined that 'the realistic "window" in which the Minister made a decision was substantially less than 30 hours'.[35] This factual finding was not challenged on appeal.

A *Decision of Colvin J*

Mr McQueen sought judicial review of the Minister's decision on four grounds: (1) the Minister had not made the decision personally, but rather had 'rubber stamped' the Department's draft reasons; (2) the Minister failed to give proper, genuine, and realistic consideration to the merits of Mr McQueen's representations; (3) the Minister failed to respond to a substantial and clearly articulated argument, being Mr McQueen's fear of racial persecution if relocated to the United States; and (4) defects in the Minister's reasoning process rendered it 'legally unreasonable,

25 *McQueen* (FCFCA) (n 2) 598–9 [4].

26 Ibid.

27 Ibid; *Migration Act* (n 6) ss 5, 189.

28 *McQueen* (n 1) 134–5 [1]–[2].

29 Ibid 135 [3]; *McQueen* (FCFCA) (n 2) 601 [19].

30 *McQueen* (FCFCA) (n 2) 614 [72].

31 Ibid 603–4 [23].

32 Ibid 609 [47].

33 Ibid.

34 Ibid 609 [48].

35 Ibid.

illogical or irrational'.[36] The second ground was upheld,[37] while the first,[38] third[39] and fourth[40] were rejected.

In considering the second ground, Colvin J relied upon the principles in *Tickner v Chapman* ('*Tickner*')[41] and subsequent authorities,[42] concluding that

> where the Minister's task requires the consideration of representations made, the Minister must consider the representations personally and in most instances that will require a consideration of the representations themselves (either because the deliberative obligation requires their personal consideration or because the detail and nuance of such representations is apt to be lost through any attempt to summarise them …[43]

Justice Colvin proceeded to make several findings of fact, including that the Minister: (1) made no change to the draft reasons; (2) made no notation on the materials other than circling and signing where indicated; (3) did not request a countervailing set of draft reasons to consider; (4) was directed by 'sign here' stickers; and (5) had 'quite limited time' between receiving the materials and making the decision.[44] Additionally, the nature of the forms indicated that personal consideration by the Minister was not necessary.[45] For these reasons, his Honour found that the Minister did not read Mr McQueen's representations, but instead relied solely on the summary and draft reasons.[46]

Having made these findings, Colvin J considered that it was not possible for the Minister to 'discern the full sense and content of the representations made without

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36 *McQueen* (FCA) (n 3) [15].

37 Ibid [90].

38 Ibid [89].

39 Ibid [98].

40 Ibid [99], [105].

41 (1995) 57 FCR 451 ('*Tickner*').

42 *McQueen* (FCA) (n 3) [48]–[73], referring to: *Tickner* (n 41); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ('*Peko-Wallsend*'); *Bushell v Secretary of State for the Environment* [1981] AC 75; *Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia v Douglas* (1996) 67 FCR 40; *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* (2008) 251 ALR 80; *Williams v Minister for Justice and Customs of the Commonwealth of Australia* (2007) 157 FCR 286; *Tervonen v Minister for Justice and Customs (No 2)* (2007) 98 ALD 589; *ERY19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 170 ALD 83; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352.

43 *McQueen* (FCA) (n 3) [73].

44 Ibid [35]–[36].

45 Ibid [79].

46 Ibid [79]–[80], [84].

regard to the documents in which the representations were expressed'.[47] As such, his Honour held that the state of satisfaction required by s 501CA(4) could only be reached by the Minister 'personally considering and understanding the representations made and that required him to read the attachments to the [Department's] Submission'.[48] Insofar as the Minister had relied solely on departmental summaries, he had 'failed to undertake his deliberative task of forming a personal state of satisfaction by considering and understanding the representations'.[49]

B *The Full Federal Court*

The Minister appealed to the Full Federal Court, raising two grounds of appeal: (1) the trial judge erred in finding the Minister did not read Mr McQueen's representations; and (2) in any event, reliance on the summary and draft reasons constituted a 'proper, genuine and realistic consideration' of Mr McQueen's representations.[50]

The Full Federal Court rejected both grounds of appeal. First, it found that, on the balance of probabilities, the Minister did not read Mr McQueen's representations.[51] Second, and in further agreement with Colvin J, it was held that the statutory scheme required the Minister to 'personally and directly consider the representations made in support of revocation'.[52] The Full Federal Court concluded that 'the reader gains quite a different impression from reading Mr McQueen's narrative as he writes it'[53] vis-à-vis a 'rather bland summary' of this narrative by the Department.[54] Further, there were notable omissions in the summary, chiefly, Mr McQueen's handwritten letter to the Western Australian Prisoners Review Board, which the Court accepted 'had an impact' on the Board.[55] Moreover, because the Minister's decision could not be reviewed, Mr McQueen's representations could not be 'added to, or explained, or emphasised; they stand or fall as they are'.[56] As a result, it was held that the Minister could not rely solely on the summary in making his decision.[57]

Central to the Full Federal Court's reasoning was its distinguishing of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* ('*Peko-Wallsend*'),[58] in which it was held that reliance on a departmental summary is generally permissible in administrative

47 Ibid [85].

48 Ibid [90].

49 Ibid [85].

50 *McQueen* (FCFCA) (n 2) 599–600 [10].

51 Ibid 608–14 [44]–[73].

52 Ibid 626 [130].

53 Ibid 622 [109].

54 Ibid 625 [121].

55 Ibid 623 [113]–[116].

56 Ibid 618 [89].

57 Ibid 626 [128]–[130].

58 *Peko-Wallsend* (n 42).

decision-making. *Peko-Wallsend* was distinguished in three respects. First, the matter in *Peko-Wallsend* only arrived before the Minister after there had been an inquiry and recommendations made by the Land Commissioner. Second, Gibbs CJ's contemplation that a Minister may rely 'entirely on a departmental summary'[59] could not be applied at face value to every statutory power, particularly where the power differs in respect of where a right of merits review is afforded; and third, the profound consequences of s 501CA(4) concern liberty, unlike the power in *Peko-Wallsend*.[60] For these reasons, the power in *Peko-Wallsend* was considered 'quite unlike' s 501CA(4).[61]

The Full Federal Court also restricted the application of Kiefel J's remarks in *Tickner*, where her Honour stated:

> I have earlier said that the Minister may seek the assistance of his staff. A 'consideration' of the representations does not in my view require him to personally read each representation. But it may be as well for him to do so, for if his staff are to convey what is contained within them they must do so in a way which provides a full account of what is in them. If they do not, the Minister will not have considered something he is obliged to, and in this respect the observations of Gibbs CJ in *Peko-Wallsend* at 30 as to what results are apposite. It may vitiate his decision.[62]

The Full Federal Court identified that, in *Tickner*, the relevant power was non-delegable and concerned the public interest, whereas the *McQueen* power was delegable and personal.[63] Further, in *Tickner* the Minister had received 400 representations from the public, while in *McQueen*, the Minister only needed to consider Mr McQueen's representations.[64] Moreover, the Court considered Kiefel J's reasoning to be obiter which went further than the position taken by the other members of the Court. The Court interpreted Kiefel J's remarks to impliedly accept that how much of an applicant's representations the Minister must read is a question of fact and degree.[65] This limited reading of Kiefel J's remarks was also adopted by Colvin J at first instance, his Honour concluding that 'all members of the Court [in *Tickner*] found that the Minister was required to consider the representations personally'.[66]

Taken altogether, the Court held that these distinctions justified its departure from the general permissibility of reliance on summaries provided for by *Peko-Wallsend* and the obiter in *Tickner*, in the context of s 501CA(4). More broadly, the Court's finding was directed at ensuring 'that it is the repository of the power whose mind

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59 Ibid 31 (Gibbs CJ).

60 *McQueen* (FCFCA) (n 2) 618 [90].

61 Ibid 617 [87].

62 *Tickner* (n 41) 497 (Kiefel J).

63 *McQueen* (FCFCA) (n 2) 620 [98].

64 Ibid 620 [98].

65 Ibid 621 [101]–[102], referring to *Tickner* (n 41) 407 (Kiefel J).

66 *McQueen* (FCA) (n 3) [56].

is directed to whether or not they are persuaded by the content of representations … not whether they are persuaded by a third party's summary of the representations'.[67]

IV The High Court's Decision

The Minister was granted special leave to be heard by the High Court as if on appeal. Like the prior decisions of the Federal Court and Full Federal Court, the High Court was not concerned with the merits of the Minister's decision, but rather the process used to reach that decision.[68]

The Minister did not challenge the finding that he relied solely on the Department's summary and draft reasons in making his decision.[69] Rather, it was argued that the courts below erred in concluding that the Minister 'must personally and directly consider the representations made in support of revocation'.[70] The Minister's submissions lamented the Full Court's assurance that its decision 'did not consign the Minister to a legal obligation to read every word on every page of every document' when 'it is difficult to see how this can be avoided if … the Minister cannot rely on a Departmental summary'.[71]

In two separate judgments, the High Court unanimously held that the Minister's necessary consideration of the representations could be achieved by 'relying upon a departmental summary of them, so long as that summary is accurate and contains a full account of the essential content'.[72]

A *The Majority: Gageler CJ, Gordon, Edelman, Steward, and Gleeson JJ*

The majority began by canvassing what they coined the 'orthodox principles' of administrative decision-making.[73] From the authorities, chiefly *Peko-Wallsend*, it was gleaned that '[a] Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts',[74] and that '[r]eliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function'.[75] As such, 'the Minister may personally make a statutory decision while relying on the department's summary, provided the Minister does

67 *McQueen* (FCFCA) (n 2) 621 [103].

68 See *McQueen* (n 1) 135–6 [6].

69 Ibid 135 [4], 137 [7].

70 Ibid 135 [5], quoting *McQueen* (FCFCA) (n 2) 626 [130].

71 Minister for Immigration, Citizenship and Multicultural Affairs, 'Applicant's Submissions', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen*, P2/2023, 29 September 2023, 10 [37].

72 *McQueen* (n 1) 143 [28].

73 Ibid 142 [26].

74 Ibid 140–1 [19], quoting *Peko-Wallsend* (n 42) 65–6.

75 Ibid.

in fact have regard to all relevant considerations that condition the exercise of the power'.[76] The majority seemingly rejected the Full Federal Court's limited reading of Kiefel J's remarks in *Tickner*, quoting her Honour as affirming these orthodox principles from *Peko-Wallsend*.[77]

Having laid this groundwork, the majority moved to consider whether, as a matter of statutory construction, the discretion in s 501CA(4) lay outside these orthodox principles. It was noted from the outset that this section, by necessary implication, 'obliged the decision-maker to consider the representations received in reaching the state of satisfaction'.[78] However, the High Court departed from the lower court rulings as to what this obligation required.

The majority began by identifying that '[t]he breadth of the power conferred by s 501CA of the [Migration] Act renders it impossible, nor … desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation'.[79] Their Honours accepted that it is generally permissible for a minister to place reliance on their department to organise material and prepare summaries.[80] However, they disagreed with the Full Federal Court's divergence from these principles in the context of s 501CA(4) for two reasons.

First, there was nothing in the wording of s 501CA(4) that disturbed the application of these principles. Noting that s 501CA(4) was silent as to the content or method of the Minister forming the required state of satisfaction, the majority held that to imply a mandatory personal consideration of the representations would conflict with the aforementioned principle against formulating absolute rules.[81] Put another way, personally reading all the submissions was not the only way for the Minister to discharge the deliberative function in s 501CA(4) — and to imply this would be erroneous.

Second, in the majority view, the bases upon which *Peko-Wallsend* was distinguished from the s 501CA(4) power had no bearing on how the Minister must reach the required state of satisfaction and therefore did not justify a departure from the foundational principles.[82] Their Honours considered that nothing said by any of the judges in *Tickner* 'contradicts what was said in *Peko-Wallsend*. Nor does it deny the validity of the course of action undertaken here by the Minister.'[83]

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76 *McQueen* (n 1) 140–1 [19], quoting *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 236 [91].

77 See *McQueen* (n 1) 141 [21].

78 Ibid 142 [26].

79 Ibid 135–6 [6], quoting *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398, 407 [15].

80 *McQueen* (n 1) 140–1 [19].

81 Ibid 142–3 [26]–[28].

82 Ibid 143 [30].

83 Ibid 144 [32].

For these reasons, the majority concluded that it was 'not a condition of the valid exercise of the power conferred by s 501CA(4) for the Minister, when exercising the power personally, to personally read and examine the … material received in every case'.[84] Because the courts below had not found the Department's summary omitted 'essential content of the respondent's representations', jurisdictional error was not established.[85]

A *The Minority: Jagot and Beech-Jones JJ*

Justices Jagot and Beech-Jones agreed with the majority's ultimate finding. Like the majority, their Honours implied in s 501CA(4) a requirement that the Minister 'consider the representations'.[86]

Justices Jagot and Beech-Jones confirmed that the onus falls upon the person challenging the decision to identify reasons why reliance upon a summary had the legal consequence that the Minister did not consider the representations. Their Honours considered that this legal conclusion would not be justified merely by identifying: (1) any matter, irrespective of importance, in the representations not included in the summary; (2) 'fine differences of emphasis and degree'; (3) differences in wording and form; or (4) differences in tone or emotional impact.[87]

In the specific context of s 501CA(4), their Honours held that the principle in *Plaintiff M1/2021 v Minister for Home Affairs* — that a delegate exercising this power was required to 'read, identify, understand and evaluate the representations'[88] — could not be taken to mean that 'if it is proved that a decision-maker has not examined the representations themselves, any resulting decision is subject to jurisdictional error by reason of a failure to consider'.[89] Their Honours ultimately reached the same conclusion as the majority: personal and direct consideration of the representations was not the only way for the Minister to discharge the duty of consideration.[90] Therefore, the Minister's reliance upon the summary did not give rise to jurisdictional error.

Mr McQueen sought to raise a further issue regarding the inadequacy of the departmental summary, without filing a notice of contention.[91] Unlike the majority, Jagot and Beech-Jones JJ addressed this argument but concluded it was misconceived for three reasons.[92] First, the characterisation of the Department's summary as

84 Ibid 144 [33].

85 Ibid 145 [37].

86 Ibid 147 [44].

87 Ibid 148 [48].

88 Ibid 607 [50].

89 Ibid.

90 Ibid 148–9 [49].

91 Ibid 144 [35].

92 Ibid 145 [36].

not giving a full sense of the representations was not a finding of fact.[93] Second, summaries necessarily edit and condense representations — so long as this is done in an accurate manner that retains the material information, that summary is not inadequate.[94] Finally, given that no argument had been raised that the summary was incorrect or failed to include any representation, a characterisation of the materials as not giving a 'full account' could not found jurisdictional error.[95]

V Comment

Both the majority and minority in *McQueen* adopted *Peko-Wallsend* and departed from the ratio in *Tickner*. The rationale for this is, respectfully, dubious.

As the Full Federal Court rightly observed, '[t]he power in s 501CA(4) is quite unlike the statutory power in *Peko-Wallsend*'.[96] In that case, the decision-making power was conditional on a full inquiry and report by the Land Commission.[97] In contra-distinction, the Department was not required by s 501CA(4) to produce a summary. It logically follows that the report in *Peko-Wallsend* could more readily be relied upon than the summary in *McQueen* — the former was a statutory requirement; the latter was not. Indeed, Brennan J highlighted that had the statutory scheme in *Peko-Wallsend* not mandated a report by the Land Commission, the Minister would have been required to personally consider the benefits and detriments of their decision on interested parties.[98] Thus, the remarks in *Peko-Wallsend* are particular to the statutory scheme considered there, which manifested 'Parliament's intention that the Minister should have regard to the Commissioner's report'.[99] No such intention arises from the s 501 scheme.

The better analogy appears to be with *Tickner*. Although the High Court was correct that the provision in *Tickner* expressly required the Minister to give 'due consideration to any representations', and no such express words exist in s 501CA(4), both the majority and the minority implied words to this effect into the provision.[100] Having made this implication, the analogy with *Tickner* is strong. Like s 501CA(4), *Tickner* concerned 'a broad power conferred for public purposes',[101] which was 'capable of affecting very seriously the interests of third parties'.[102] The Minister in *Tickner*

93 Ibid.

94 Ibid.

95 Ibid.

96 *McQueen* (FCFCA) (n 2) 617 [87].

97 See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 11(1), 50(1)(a).

98 *Peko-Wallsend* (n 42) 56–7.

99 Ibid 57.

100 *McQueen* (n 1) 142 [26] (Gageler CJ, Gordon, Edelman, Steward, and Gleeson JJ), 147 [44] (Jagot and Beech-Jones JJ).

101 *McQueen* (FCFCA) (n 2) 620 [98].

102 *Tickner* (n 41) 462 (Black CJ).

was required to 'personally consider the report and any representations attached to it'.[103] In light of this, it is strongly arguable that the Minister was similarly required to personally consider Mr McQueen's representations.

These observations demonstrate that the 'orthodox principles' of administrative decision-making 'cannot simply be picked up and applied at face value to every statutory power reposed in a Minister' — rather, the specific statutory context must be the starting point for this analysis.[104] In the present context, it is essential to note that s 501CA(4) is a power of 'last resort' for those who have had their visas mandatorily cancelled.[105] It carries 'the most profound of consequences for an individual' insofar as it affects their ability to remain lawfully within Australia — a factor which the High Court, respectfully, did not afford appropriate weight to.[106] It is within this context that the affected individual engages in the act of persuasion — and in which the concerns regarding ministerial reliance upon summaries must be understood.

A departmental summary may technically provide the material information required to give a full account of the relevant representations. By and large, however, a summary 'is not capable of giving the reader the same sense or understanding of those pleas and the facts to which they refer, as the reader would obtain from reading the source documents'.[107] Indeed, in Mr McQueen's case, the Full Federal Court found that the summaries were 'rather bland'[108] and identified several factors 'lost in the summary but gained from reading the representations'[109] such as the sense of narrative,[110] the emphasis achieved through repetition,[111] the gravity of the Parole Board's reasons,[112] the vivid description of Mr McQueen's family's difficulties[113] and the emotional force of the handwritten materials.[114] The High Court acknowledged that these contextual matters may have been overlooked by the Minister, given Mr McQueen's representations '"may" have given the Minister a "different impression" about the material' than the Department's summary.[115] The Minister appeared to rely on what Allsop CJ called a '[m]echanical formulaic

103 Ibid.

104 *McQueen* (FCFCA) (n 2) 618 [89].

105 Ibid 618 [90].

106 Ibid.

107 Ibid 625 [121].

108 Ibid.

109 Ibid.

110 Ibid 622 [108]–[109], 623 [113].

111 Ibid 625 [120].

112 Ibid 623–4 [113]–[119].

113 Ibid 624 [119], 625 [122].

114 Ibid 625 [124].

115 *McQueen* (n 1) 145 [37].

expression and pre-digested shorthand'[116] of Mr McQueen's representations — this much is clear from the summary's brevity and omissions.[117] This approach risks 'a lack of the necessary reflection upon the whole consideration of the human consequences involved' in exercising this discretion.[118] Given the significant consequences attending s 501CA(4), this approach cannot be accepted. Such practices would impermissibly dilute the Minister's deliberative task.

If the deliberative task is deciding whether the Minister has been persuaded of the existence of 'another reason' to revoke the cancellation of a visa, then the persuasive factors which contribute towards that decision are critical. Where the Minister chooses to personally exercise that power, the Minister ought to be persuaded by the representations as made, rather than 'by a third party's summary of the representations'.[119] Particularly where such summaries run the risk of being overly prescriptive, there is a 'danger' that the decision-maker may be persuaded 'not by the material and the representations made by an individual, but by the reasoning and views of her or his officers responsible for drafting' the materials.[120] Critically, this provision is an occasion where 'Parliament has given the Minister a choice as to whether to exercise the power personally or delegate it, and has attached different consequences — in terms of merits review — depending on the choice made'.[121] While Jagot and Beech-Jones JJ dismissed this as a basis for departure from the orthodox principles,[122] their Honours reasons for doing so are, respectfully, unclear. Indeed, it would seem that the preclusion of an avenue for review would lead to a heightened responsibility upon the Minister to personally consider the representations as made.

VI Conclusion

The Minister and their Department are entrusted with significant decision-making powers under the *Migration Act*. These wide-ranging responsibilities bring about a substantial workload, and the consequences of their decisions can affect individual lives in deeply personal ways.

As a result, when determining the standard required of our executive decision-makers, there is a perennial tension between achieving administrative efficiency and the pursuit of justice. This tension was exemplified in *McQueen*, where the

116 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628, 630 [3] ('*Hands*').

117 See above nn 55–7 and accompanying text.

118 *Hands* (n 116) 630 [3].

119 *McQueen* (FCFCA) (n 2) 621 [103].

120 *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595, 606 [23] (Mortimer J).

121 *McQueen* (FCFCA) (n 2) 617–18 [89].

122 Ibid 603–4 [3].

High Court was tasked with determining the level of engagement with representations required by the Minister when exercising the s 501CA(4) power. While the desire for efficiency is of indubitable importance, the High Court seems to have, respectfully, leaned too heavily in its favour at the cost of justice. This is evident in two key respects: first, the High Court failed to consider better authority in *Tickner*, instead defaulting to the supposed 'orthodoxy' in *Peko-Wallsend*; and second, the Court afforded insufficient weight to the unique statutory context of s 501CA(4) and the gravity of the human consequences attending that context.

Ultimately, where persuasion is the last resort, the repository of the power should be required to personally and directly consider the representations made in support of revocation. This was the finding of the Full Federal Court and was, respectfully, the correct approach. To do otherwise would be to cut a long (and important) story short.

*Netra Ramkumar**

A LONG-OVERDUE LINE IN THE SAND: *LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM*

I Introduction

The rights to self-determination and freedom from racial discrimination, segregation and apartheid lie at the heart of the international legal framework.[1] On 19 July 2024, the International Court of Justice ('ICJ') rendered its Advisory Opinion on the *Legal Consequences of Israel's Policies and Practices in the Occupied Palestinian Territory, including East Jerusalem* ('*Advisory Opinion*').[2] The *Advisory Opinion*, rendered on the request of the United Nations General Assembly,[3] ultimately found the prolonged occupation and settlement policies of Israel in the Occupied Palestinian Territory ('OPT') to contravene international law.[4] As a result, the ICJ identified active obligations for Israel, other States, and international organisations.[5] While they lack the binding force of judgments,[6] advisory

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1 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 19 [53]; International Law Commission, *Report of the International Law Commission*, UN GAOR, 77th sess, Agenda Item 77, Supp No 10, UN Doc A/77/10 (1 January 2022) 16.

2 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 19 July 2024) ('*Advisory Opinion*').

3 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for Advisory Opinion)* (International Court of Justice, General List No 186, 19 January 2023).

4 *Advisory Opinion* (n 2) 68 [245].

5 Ibid 73 [269], 76 [278]–[280].

6 *Statute of the International Court of Justice* art 59; Florencia Montal, 'Does Consent Engender Compliance? Insights from Empirical Research on International Tribunals' (2021) 115 *AJIL Unbound* 160, 162; Edvard Hambro, 'The Authority of the Advisory Opinions of the International Court of Justice' (1954) 3(1) *The International and Comparative Law Quarterly* 2, 5.

opinions have historically been afforded significant weight by international authorities on the basis of the Court's influence.[7]

In Part II, this case note will provide a brief background to the settlement, as well as the circumstances giving rise to the *Advisory Opinion*. Part III will then explore both the conclusion of illegality adopted by the majority, and the dissenting position of Vice-President Sebutinde, who voted against the majority in all findings of the ICJ except the first — that the Court had jurisdiction to provide the requested *Advisory Opinion*. Vice-President Sebutinde raised concerns, inter alia, about the exercise of judicial discretion, and the unilateral, biased nature of the information considered in making the determination. Part IV will discuss potential implications of the *Advisory Opinion* regarding its unenforceability, the circumvention and undermining of established negotiation methods, and the polarity between the Judges' positions. Part V concludes.

II Background

A *Historical Context*

In the wake of World War I, Palestine was one of several Ottoman territories entrusted by the League of Nations to the United Kingdom.[8] Mass Jewish immigration led to conflict between Arab and Jewish communities.[9] In 1947, the United Kingdom expressed its intention to evacuate the mandated territory and referred the matter to the United Nations ('UN').[10] The UN General Assembly adopted a resolution calling for the partition of Palestine into two distinct Arab and Jewish States ('Resolution 181').[11] This proposed partition was accepted by the Jewish population but was rejected by the Arab population and States on the basis, inter alia, that it was unbalanced.[12]

In May 1948, Israel declared its independence as set out in Resolution 181, and conflicts erupted between Israel and the Arab States the following day.[13] By the

7 Hambro (n 6) 6.

8 Avi Shlaim, 'Britain and the Arab-Israeli War of 1948' (1987) 16(4) *Journal of Palestine Studies* 50, 50.

9 Mark Tessler, *A History of the Israeli-Palestinian Conflict* (Indiana University Press, 2nd ed, 2009) 209–11.

10 Shlaim (n 8) 51.

11 Ibid; *Future Government of Palestine*, GA Res 181(II)A-B, UN Doc A/RES/181(II) A-B (29 November 1947).

12 Debra Shushan, 'Palestine and Israel at the United Nations: Partition, Recognition, and Membership' in Ian Shapiro and Joseph Lamber (eds), *Charter of the United Nations: Together with Scholarly Commentaries and Essential Historical Documents* (Yale University Press, 2014) 157, 162.

13 Gideon Biger, 'The Boundaries of Israel-Palestine Past, Present, and Future: A Critical Geographical View' (2008) 13(1) *Israel Studies* 68, 84.

conclusion of the conflict, Israel emerged with control of most of the territory, beyond its allotment under Resolution 181.[14] With a resolution in November 1948, the UN Security Council ordered an armistice to be established in all sectors of Palestine — this was followed by the conclusion of armistice agreements between Israel and its neighbouring States through mediation by the UN, fixing armistice demarcation lines between Israeli and Arab forces which came to be collectively referred to as the 'Green Line'.[15] Later that month, Israel applied for admission to membership of the UN. This was granted by the UN General Assembly in May 1949.[16]

In 1967, an armed conflict known as the 'Six-Day War' commenced between Israel and a coalition of neighbouring Arab States. Upon cessation of the hostilities, Israeli forces occupied 'all the territories of Palestine under British Mandate beyond the Green Line'.[17] Later that year, the UN Security Council adopted a resolution emphasising the 'inadmissibility of acquisition of territory by war', calling for the withdrawal of Israeli armed forces from the occupied territories.[18] From 1967 onwards, Israel established numerous settlements in the occupied territories — encompassing the West Bank, East Jerusalem and the Gaza Strip[19] — and sought to change the status of the City of Jerusalem despite ongoing condemnation from the UN Security Council.[20]

In 1974, the UN General Assembly recognised the Palestinian Liberation Organization ('PLO') as the representative of the Palestinian people following further armed conflict between Israel and neighbouring States.[21] It further recognised the right of the Palestinian people to self-determination under the UN Charter.[22] In 1988, the PLO sought to establish the State of Palestine, in alignment with the principles of Resolution 181,[23] and in the 1990s both Israel and the PLO signed the two Oslo Accords. The first Oslo Accord established guidelines for negotiations, and the second divided the occupied West Bank into three distinct areas

14 Shushan (n 12)163.

15 Biger (n 13) 84.

16 *Admission of Israel to Membership in the United Nations*, GA Res 273, UN Doc A/RES/273 (III) (11 May 1949).

17 *Advisory Opinion* (n 2) 22 [57].

18 SC Res 242, UN Doc S/RES/242 (22 November 1967).

19 *Advisory Opinion* (n 2) 27 [78].

20 SC Res 298, UN Doc S/RES/298 (25 September 1971).

21 *Invitation to the Palestinian Liberation Organization*, GA Res 3210 (XXIX), UN Doc A/RES/3210(XXIX) (14 October 1974).

22 *Question of Palestine*, GA Res 3236 (XXIX), UN Doc A/RES/3236 (XXIX) (22 November 1974).

23 Burns Weston et al, 'International Law and Solutions to the Arab-Israeli Conflict' (1989) 83 *Proceedings of the Annual Meeting (American Society of International Law)* 121, 122–3.

entitled A, B, and C.[24] Area C, covering over 60% of the land, was left exclusively to Israel.[25] The Oslo Accords mandated Israel to transfer certain powers and responsibilities exercised in areas A and B to Palestinian authorities, however these transfers have only occurred to a limited extent.[26]

Conflict endured into the 2000s,[27] and in 2002 Israel commenced construction of a 'wall' separate from the Green Line,[28] expanding settlements in the OPT despite condemnation from the ICJ in a 2004 Advisory Opinion ('*Wall Opinion*').[29] Although Palestine was given non-member observer State status in the UN in 2012,[30] by 2023 almost 700,000 settlers resided in the OPT.[31]

B *The Question Posed to the ICJ*

In January 2023, the UN Secretary-General communicated the General Assembly's decision to submit its questions to the ICJ for an advisory opinion.[32] Two questions were submitted:

> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
> (b) How do the policies and practices of Israel referred to in paragraph 18 *(a)* above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?[33]

The Court rendered the *Advisory Opinion* on 19 July 2024.[34]

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24 *Advisory Opinion* (n 2) 23 [65].

25 Ibid.

26 Ibid.

27 Diana Buttu, 'Behind Israel's Demand for Recognition as a Jewish State' (2014) 43(3) *Journal of Palestine Studies* 42, 44.

28 Ran Greenstein, 'Israel, Palestine, and Apartheid' (2020) 22(1) *Insight Turkey* 73, 78.

29 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (International Court of Justice, General List No 131, 9 July 2004) 168 [80] ('*Wall Opinion*').

30 *Status of Palestine in the United Nations*, GA Res 67/19, UN Doc A/RES/67/19 (4 December 2012, adopted 29 November 2012). See also Amnon Kapeliouk, 'Israel, Terrorism, and the PLO' (1986) 16(1) *Journal of Palestine Studies* 187, 187.

31 *Advisory Opinion* (n 2) 24 [68].

32 *Advisory Opinion* (n 2) 7 [1]; *Israeli Practices and Settlement Activities Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, GA Res 77/247, UN Doc A/RES/77/247 (30 December 2022).

33 *Advisory Opinion* (n 2) 7 [1].

34 Ibid.

III Decision of the ICJ

A *Preliminary Considerations*

Prior to the provision of its opinion, the ICJ first considered several preliminary concerns: jurisdiction, discretion, and the scope and meaning of the questions posed. It found unanimously that it possessed the jurisdiction to provide the requested opinion.[35] While Vice-President Sebutinde voted to exercise the Court's discretion to decline to give an opinion, her vote was outnumbered fourteen to one.[36] In relation to the scope and meaning of the questions, the ICJ first defined the 'policies and practices of Israel' as constituting three types of conduct: (1) the ongoing violation by Israel of the right of the Palestinian people to self-determination; (2) Israel's prolonged occupation, settlement and annexation of the OPT since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem; and (3) Israel's adoption of related discriminatory legislation and measures.[37] In terms of territorial scope, the ICJ also clarified that the OPT, encompassing the West Bank, East Jerusalem and the Gaza Strip, would be treated as a single territorial unit.[38]

It was also noted that in terms of temporal scope, the *Advisory Opinion* would consider Israeli measures in the OPT from 1967, but would not include Israel's conduct in response to the attack in the Gaza Strip by Hamas and other armed groups on 7 October 2023 as this was not an 'ongoing' or 'continuing' policy or practice.[39]

B *Applicable Law*

Premising its discussion on the assumption that Israel is still currently occupying the OPT — as it was in 2004 when the Court's *Wall Opinion* was issued[40] — the ICJ distinguished that the decisive criterion in determining whether a territory remains occupied under international law 'is not whether the occupying Power retains its physical military presence in the territory at all times but rather whether its authority has been established and can be exercised'.[41] As such, the noted withdrawal of

35 Ibid 78 [285].

36 Ibid.

37 Ibid 25 [74].

38 Ibid 27 [78].

39 Ibid 27 [80]–[81].

40 Ibid 28–9 [74].

41 *Convention (IV) Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] ATS 8 (entered into force 26 January 2010) annex ('*Regulations Respecting the Laws and Customs of War on Land*'), art 42 ('*Hague Regulations*').

Israeli military from the Gaza Strip in 2005 did not release Israel of its obligations under the law of occupation, as it maintains effective control over the Gaza Strip.[42]

The ICJ then identified the international laws which would be most relevant to the conduct of Israel in the OPT. Such laws included the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*[43] and the annexed *Hague Regulations*.[44] Despite Israel not being a formal party to the latter, both laws are binding as a matter of customary international law.[45] Also included were a number of legal instruments relating to racial discrimination,[46] economic, social and cultural rights,[47] and civil and political rights[48] which Israel is party to.[49]

C *Policies and Practices of Israel in the OPT*

1 *Prolonged Occupation and Settlement*

The ICJ began its substantive legal analysis by first examining whether Israel's policies and practices affect the right of the Palestinian people to self-determination, and if so, how.[50] In examining the three types of relevant conduct, it first found that Israel's occupation of the OPT, as recognised by the *Wall Opinion*, has already been sufficiently established and remains ongoing.[51]

The Court subsequently examined Israel's settlement policy as carried out in the OPT between 1967 and 2005, limiting this examination to the activity in the West Bank and East Jerusalem due to the withdrawal of settlements from the Gaza Strip in 2005. It noted that this withdrawn policy was not substantially different from those continuing in the West Bank and East Jerusalem.[52] In the *Wall Opinion*, the ICJ found Israel's settlement policy to be 'in breach of the sixth paragraph of Article 49 of the Fourth Geneva Convention' which prohibits the occupying Power

42 *Advisory Opinion* (n 2) 30 [93].

43 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, signed 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Fourth Geneva Convention*').

44 *Hague Regulations* (n 41).

45 *Advisory Opinion* (n 2) 31 [96].

46 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

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

48 *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

49 *Advisory Opinion* (n 2) 31 [97].

50 Ibid 33 [103].

51 Ibid 33–4 [104]–[110].

52 Ibid 35–6 [114].

from deporting or transferring parts of its civilian population into the occupied territory.[53] In the current *Advisory Opinion*, the ICJ noted that there is nothing in the relevant article to suggest this unlawful transfer must be forcible, thus finding Israel's provision of incentives for the relocation of Israeli individuals and businesses into the OPT unlawful under the *Fourth Geneva Convention*.[54]

It also found the expansion of Israel's settlements to be based upon the confiscation or requisitioning of large areas of land, for the benefit of the civilian settler population and to the detriment of the local Palestinian population contrary to Articles 46, 52 and 55 of the *Hague Regulations*.[55]

The Court then scrutinised the use of natural resources, noting that Article 55 of the *Hague Regulations* regards the occupying Power as administrator and usufructuary of natural resources, including forests and agricultural estates.[56] This provision involves an obligation to 'safeguard the capital of these resources',[57] meaning that Israel's use of natural resources must not exceed 'what is necessary for the purposes of the occupation' and must be sustainable.[58] It must also ensure that the local population has an adequate supply of foodstuffs including water.[59] The ICJ found that Israel's mass diversion of natural resources to its own population, including settlers,[60] was a breach of Israel's obligations as an administrator and usufructuary of the OPT.[61] It also found that restricting the access of the Palestinian population to water available in the OPT was inconsistent with its obligations within Article 55 of the *Hague Regulations*.[62]

The next policy considered was the extension of law. The Court, with reference to Article 43 of the *Hague Regulations* and Article 64 of the *Fourth Geneva Convention*, noted an occupying Power's obligation to respect the law in force in the occupied territory unless 'absolutely prevented from doing so'.[63] Since 1967, Israel has expanded its sphere of legal regulation far into the West Bank and instated its own military law in the OPT, replacing the local law to a significant degree. Settler councils have assumed de facto jurisdiction over settlements in the West Bank, and domestic Israeli law has operated to the exclusion of any other domestic law in East

53 *Wall Opinion* (n 29) 183 [120].

54 *Advisory Opinion* (n 2) 37 [119].

55 Ibid 38 [122].

56 Ibid 38 [124].

57 *Hague Regulations* (n 41) art 55.

58 *Advisory Opinion* (n 2) 338 [124].

59 Ibid.

60 Ibid 39 [127].

61 Ibid 41 [133].

62 Ibid.

63 Ibid 41 [134].

Jerusalem since 1967.[64] The ICJ found these practices inconsistent with the rule reflected in the *Hague Regulations* and the *Fourth Geneva Convention*.[65]

The *Advisory Opinion* further explored how the confiscation of land and deprivation of access to natural resources induced the departure of the local population.[66] This was exacerbated by Israeli military measures, with the ICJ holding that the lack of any viable alternative constituted an unlawful 'forcible' transfer under Article 49 of the *Fourth Geneva Convention*.[67]

An issue of particular international contention is the violence used by settlers and the Israeli military against Palestinian people.[68] The Court stated that Israel's systematic failure to prevent or punish attacks by settlers against the life or bodily integrity of Palestinians, and its excessive use of force against Palestinians, is inconsistent with obligations under several treaties. It constitutes a violation of the Palestinian people's right to life,[69] humane treatment, and protection against all threats or acts of violence.[70]

In light of the above contraventions of Israel's international obligations through its practices and policies, the ICJ reaffirmed that the Israeli settlements in the OPT were established and continue to be maintained in violation of international law.[71]

2 *Annexation of the OPT*

The ICJ also considered annexation, defining it as the 'forcible acquisition by the occupying Power of the territory that it occupies, namely its integration into the territory of the occupying Power'.[72] By this characterisation, the Court referred to Israel's policies and practices, including the expansion of settlements, construction of associated infrastructure, exploitation of natural resources, and application of Israeli domestic law in the OPT, as amounting to annexation due to their permanent and irreversible nature.[73]

64 Ibid 42 [137]–[138].

65 Ibid 43 [141].

66 Ibid 43 [143].

67 Ibid 44 [145].

68 Oren Yiftachel, '"Creeping Apartheid" in Israel-Palestine' (2009) (253) *Middle East Report* 7, 15.

69 *Hague Regulations* (n 41) art 46.

70 *Fourth Geneva Convention* (n 43) art 27; *ICCPR* (n 48) arts 6–7.

71 *Advisory Opinion* (n 2) 47 [155].

72 Ibid 47 [158].

73 Ibid 53 [179].

3 *Discriminatory Legislation and Measures*

The final element of Israel's policies and practices to be scrutinised was the potentially discriminatory nature of its legislation and measures. The Court examined the nature of several Israeli measures in the OPT such as residence permit policies, restrictions imposed on the movement of Palestinians, and the demolition of Palestinian properties.[74]

Discrimination is prohibited under international humanitarian law when it relates to 'race, religion or political opinion'.[75] Discrimination on the basis of race or national or social origin is further prohibited in the *International Covenant on Civil and Political Rights*,[76] the *International Covenant on Economic, Social and Cultural Rights*,[77] and the *International Convention on the Elimination of All Forms of Racial Discrimination*.[78] This prohibition now forms part of customary international law.[79]

The ICJ identified that through its comprehensive restrictions on Palestinians in the OPT, Israel's legislation and measures constitute systemic discrimination based on, 'inter alia, race, religion, or ethnic origin in violation of the abovementioned provisions of international law.[80]

4 *Impact on Self-Determination*

Ultimately, the ICJ determined that the settlement policy, acts of annexation, and related discriminatory legislation and measures of Israel are unlawful.[81] It adopted the position that as a consequence of these decades-long policies and practices, the Palestinian population has been deprived of its right to self-determination — that is, the right to determine its own political status and pursue its economic, social, and cultural development.[82]

D *Effects of the Practices and Policies on the Legality of the Occupation*

Upon determining the illegality of Israel's policies and practices in the OPT, the ICJ emphasised the scope for this illegality to affect the legal status of the occupation.[83] The Court adopted the view that Israel's assertion of sovereignty and annexation of certain parts of the OPT constitutes a violation which would directly

74 Ibid 56–64 [192]–[222].

75 *Fourth Geneva Convention* (n 43) art 27.

76 *ICCPR* (n 48) arts 2, 26.

77 *ICESCR* (n 47) art 2.

78 *CERD* (n 46) art 1.

79 *Advisory Opinion* (n 2) 55 [189].

80 Ibid 64 [223].

81 Ibid 65 [230].

82 Ibid 68 [242].

83 Ibid 70 [252].

impact the legality of its continued presence as an occupying Power in the OPT.[84] This, combined with Israel's obstruction of the Palestinian people's right to self-determination, renders the continued presence of Israel in the OPT unlawful.[85]

E *Legal Consequences*

In the latter part of the *Advisory Opinion*, the ICJ explored the legal consequences of the illegality of Israel's continued presence in the OPT. Consequences were categorised as impacting three distinct groups: (1) Israel; (2) other States; and (3) the UN.[86]

For Israel, the Court identified obligations to end its presence in the OPT as rapidly as possible and to put an end to its unlawful policies and practices.[87] It also emphasised the need for Israel to repeal all legislation and measures creating or maintaining the unlawful situation and to provide full reparation for the damage caused by its wrongful acts to all natural or legal persons concerned.[88] Such reparation would include compensation, and restitution such as the returning of land and other immovable property, all seized assets, and all cultural property.[89] In the event that such restitution proves materially impossible, Israel would have an obligation to compensate all natural or legal persons having suffered any form of material damage as a result of its wrongful acts.[90]

For other States, the ICJ primarily identified an obligation not to render aid or assistance in maintaining the situation, and not to recognise the situation arising from the unlawful presence of Israel in the OPT as legal.[91] The Court further asserted that this latter duty of non-recognition also applied to international organisations, including the UN.[92]

F *Dissent of Vice-President Sebutinde*

While the ICJ ultimately voted in the majority for its findings, there were persistent dissenting votes and perspectives advocated by Vice-President Sebutinde on most findings made by the Court. While her Excellency's separate dissent was extensive and complex, several key points emerged.

The first point concerns discretion. Vice-President Sebutinde took the stance that the ICJ should have exercised its discretion to decline to give its opinion. Her Excellency

84 Ibid.

85 Ibid 72 [261].

86 Ibid 73 [266].

87 Ibid 73 [267].

88 Ibid 73–4 [269]–[270].

89 Ibid 74 [270].

90 Ibid 74 [271].

91 Ibid 75–6 [277].

92 Ibid 76 [280].

asserted that the Court lacked accurate, balanced information which would enable it to make a proper decision,[93] and that the questions posed by the General Assembly were inherently one-sided, leading the ICJ to adopt implicit presumptions without analysis of relevant issues such as Israel's own rights and security concerns.[94]

Further, her Excellency asserted that, by only addressing Israel's legal obligations and ignoring its rights and Palestine's obligations, the Court circumvented the already-established negotiation principles set out in the Oslo Accords.[95] It was asserted that the Oslo Accords are binding agreements signed by both Israel and Palestinian representatives with the purpose of serving as a mechanism to reach a compromise acceptable to both parties, while the *Advisory Opinion* purportedly served to oblige Israel to have its disputes be submitted to judicial settlement without its consent.[96]

Vice-President Sebutinde raised several other points of contention, but her Excellency was ultimately outnumbered in all the findings with which she disputed.[97]

IV Comment

Numerous implications arise from the *Advisory Opinion* provided by the ICJ. Some particularly salient implications concern the unenforceability of the *Advisory Opinion* and the circumvention of a mutually negotiated solution as identified by Vice-President Sebutinde.

A *Unenforceability and Associated Inaction*

One concern which has arisen since the delivery of the *Advisory Opinion* is that due to its unenforceability, it may be difficult to prompt the radical change required to remedy — or at least begin to address — the harm caused to Palestinians within the OPT. The enforceability of international decisions is a generally difficult and long-standing issue,[98] ameliorated only by the good faith participation and compliance of involved States. Historically, it has been rare for the 'losing party' to refuse to give effect to an outcome rendered,[99] enabling the international judicial system to, in a sense, self-regulate. However, concerns arise where such a losing party refuses to act in accordance with a determined advisory opinion. Israel has demonstrated

93 Ibid 18 [42] (Vice-President Sebutinde).

94 Ibid 18–19 [42], 26–7 [68] (Vice-President Sebutinde).

95 Ibid 19 [23] (Vice-President Sebutinde).

96 Ibid 20 [46] (Vice-President Sebutinde).

97 Ibid 78–9 [285].

98 Makau Mutua, 'The International Criminal Court: Promise and Politics' (2015) 109 *Proceedings of the Annual Meeting (American Society of International Law)* 269, 272; LeRoy Parker, 'The Enforcement of the Decisions of an International Court' (1900) 62(4) *The Advocate of Peace* 90, 90.

99 Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54(1) *American Journal of International Law* 1, 2.

through its responses — or lack thereof — to previous ICJ criticism an unwillingness to abide by the recommendations of such advisory opinions or take substantive steps to rectify breaches of international law which arise from its conduct.[100] In the face of this inaction, there are no available practical means to compel Israel to comply with the *Advisory Opinion*.

The *Advisory Opinion* calls upon the States to refuse to recognise the legitimacy of Israel's settlement activities and refuse to render to it aid or assistance.[101] Crucial States have not committed to this refusal.[102] As such, the substantive impact of this *Advisory Opinion* remains uncertain at this stage, relying to a significant extent on the compliance of both Israel and other States.

However, the results of a recent UN General Assembly resolution raise the possibility that the *Advisory Opinion* has had at least some influence. In late 2024, 157 UN member States voted in favour of Israel's withdrawal from the OPT, countering eight votes against the resolution and seven abstentions.[103] Australia was positioned in the majority group, taking a definitive stance against the unlawful occupation for the first time in two decades.[104] This shift in attitude may be attributed at least in part to the strong position taken in the *Advisory Opinion*, which was expressly referenced in the recent resolution.[105] It is, nonetheless, impossible to know with certainty how much influence the *Advisory Opinion* actually had on these changes in State policy and resultant action within the UN. While States such as Canada, New Zealand, and the United Kingdom also voted for the resolution, other countries such as the United States of America, Argentina, and Hungary maintained positions of solidarity with Israel.[106] Given the difficulty of obtaining clear evidence of States' motivations and reasoning in such contexts, the wider impact of the *Advisory Opinion* remains unclear.

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100 SC Res 242, UN Doc S/RES/242 (22 November 1967); SC Res 298, UN Doc S/RES/298 (25 September 1971).

101 *Advisory Opinion* (n 2) 75 [277].

102 Sarah Leah Whitson, 'The White House's Defense of Israel is Undermining International Law', *Foreign Policy* (online, 18 September 2024) <https://foreignpolicy.com/2024/09/18/biden-israel-icc-icj-gaza-netanyahu-international-law/>; Reuters, 'Scholz Says Germany Will Supply Israel with Weapons to Defend Itself', *Reuters* (online, 17 October 2024) <https://www.reuters.com/world/middle-east/scholz-says-germany-will-supply-israel-with-weapons-defend-itself-2024-10-17/>.

103 *Peaceful Settlement of the Question of Palestine*, GA Res 79/81, UN GAOR, 79th sess, 46th plen mtg, Agenda Item 35, UN Doc A/79/L.23 (3 December 2024).

104 Edwina Guinan and Alex Anyfantis, 'Australia Reverses 20-Year Old Position in the UN on Israeli Occupation of Palestinian Territories', *SBS News* (online, 4 December 2024) <https://www.sbs.com.au/news/podcast-episode/australia-reverses-20-year-old-position-in-the-un-on-israeli-occupation-of-palestinian-territories/wnxp2akyi>.

105 *Peaceful Settlement of the Question of Palestine*, GA Res 79/81, UN GAOR, 79th sess, 46th plen mtg, Agenda Item 35, UN Doc A/79/L.23 (3 December 2024) 2.

106 United Nations, 'General Assembly Adopts Three Resolutions to Advance Middle East Peace, Two-State Solution' (Media Release GA/12661, 3 December 2024).

B *Undermining of Negotiation*

Another concern, raised in the dissent of Vice-President Sebutinde, is the circumvention of existing negotiation avenues. With the existence of the Oslo Accords, the first of which proposes a mechanism to reach a mutually agreed compromise, there is consideration to be given to the benefit of the *Advisory Opinion*, and whether this outweighs the potential detriment.[107] It is possible that with this determination, the potential for a mutually agreed-upon solution between Israel and Palestine has shifted increasingly further from reach. There is speculation that the provision of a determination without the consent of Israel may serve as a signal to Palestinian communities that engaging in mutual negotiations towards peace is unnecessary as a desirable outcome can be obtained through alternate means.[108]

It is relevant, however, to note that the Oslo Accords have not been effective in facilitating negotiations or resolving conflicts between Israel and Palestine.[109] This historic failure of the Oslo Accords to effectuate any substantive mutual peace negotiations between the two parties renders Vice-President Sebutinde's assertion somewhat specious — in the absence of an effective existing mechanism to resolve the conflict, the current *Advisory Opinion* can be seen to remain necessary.

V Conclusion

In a long-anticipated *Advisory Opinion*, the ICJ held the ongoing policies and practices of Israel in the OPT to be unlawful, rendering its continued occupation illegal as a result. This determination created an expectation for Israel to make reparations for the damage caused, for all States to abstain from rendering aid or assistance in maintaining the situation arising from the unlawful occupation, and for States and international organisations not to recognise this situation as legal. Strong dissent was voiced by Vice-President Sebutinde, who raised concerns as to the accuracy of the information considered and the undermining of the Oslo Accords. The comment examined the implications of this undermining, as well as the futility which may be associated with the unenforceability of such advisory opinions. Ultimately, the *Advisory Opinion* makes great strides in clearly defining the illegality of Israel's continued conduct in the OPT, but its practical impact in ceasing this conduct relies largely on both the willingness of Israel to do so, and the willingness of other States and international organisations to hold Israel accountable until it does.

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107 *Advisory Opinion* (n 2) 23 [65] (Vice-President Sebutinde).

108 Martin Pritikin, 'What the ICJ Got Wrong About the "Occupation" of the West Bank' (LinkedIn, 23 July 2024) <https://www.linkedin.com/pulse/what-icj-got-wrong-occupation-west-bank-martin-pritikin-hfpnc/>.

109 Oren Barak, 'The Failure of the Israeli-Palestinian Peace Process' (2005) 42(6) *Journal of Peace Research* 719, 723.

Cameron Akehurst and Gabrielle Overton***

THE (SETTLEMENT) DEED IS DONE — UNLESS YOU HAD LEGAL REPRESENTATION: *JENS V THE SOCIETY OF JESUS* [2024] VSC 329

I Introduction

In 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') published the 'Redress and Civil Litigation' report, examining the historical and current legal framework surrounding claims of child sexual abuse, as well as the remedial options and barriers for survivors seeking redress.[1] Civil law limitation periods historically prevented survivors from pursuing damages for personal injury against perpetrators or institutions, typically only allowing actions to be commenced within three years from the accrual of the cause of action.[2]

The Royal Commission identified, amongst other things, a systemic failure to protect children across a number of generations, making clear the pressing need for accessible avenues through which survivors could seek redress for historical abuse.[3] Key recommendations advocated for the retrospective removal of limitation periods for personal injury claims related to institutional sexual abuse.[4] These reforms were fundamental in circumstances where, often, the nature and impact of such abuse is not fully realised until decades after its occurrence.[5]

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1 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, September 2015) ('*Royal Commission Redress and Civil Litigation Report*').

2 Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitation for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges' (2020) 14(2) *UNSW Law Journal* 386, 391–2.

3 *Royal Commission Redress and Civil Litigation Report* (n 1) 85–8.

4 *Royal Commission Redress and Civil Litigation Report* (n 1) 52–3. See generally Alex Collie and Bill Madden, 'The Limits of No Limitation: How Prejudice Affects the Removal of Limitation Periods' (2019) 155 *Precedent* 25.

5 See generally Joseph H Beitchman et al, 'A Review of the Long-Term Effects of Child Sexual Abuse' (1992) 16 *Child Abuse and Neglect* 101; Paul E Mullen et al, 'The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life' (1994) 165(1) *British Journal of Psychiatry* 35.

The Royal Commission's recommendations have since been adopted in every Australian state and territory.[6] Given the retrospective operation of the removal of limitations periods, settlements entered into by survivors of child sexual abuse in contemplation of elapsed limitation periods can be reopened where just and reasonable to do so.[7]

Since these reforms, there have been an influx of claims brought by survivors of child sexual abuse against unincorporated associations, with many cases resulting in substantial court-ordered compensation.[8] The recent decision of *Jens v The Society of Jesus*[9] ('*Jens*') follows this trend, though the quantum of damages has not yet been determined. *Jens* concerned two instances of alleged sexual abuse by a priest, Noel Bradford, against the plaintiff, Peter Jens, while he was a boarding student at a Melbourne College in the 1960s.[10] The plaintiff settled his claim in 2011 by way of deed, under which he received $150,000 and tuition for his two sons in full and final satisfaction of his claim.[11] The plaintiff, now aged 69 years old, sought to have the settlement set aside pursuant to ss 27QD and 27QE of the *Limitations of Actions Act 1958* (Vic) ('*Limitations Act*').[12]

This case note first examines the factual background of *Jens* and the substance of the relevant settlement instruments. It then analyses the Supreme Court of Victoria's decision, which considered the relevant factors for determining whether overturning the settlement was 'just and reasonable'. Finally, it considers the judiciary's treatment of knowledge of legal barriers as a factor in its consideration of whether to overturn settlement instruments in child sexual abuse claims executed pre-reforms.

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6 *Limitation Act 1985* (ACT) s 21C; *Limitation Act 1969* (NSW) s 6A; *Limitation Act 1981* (NT) s 5A; *Limitation of Actions Act 1974* (Qld) s 11A; *Limitation of Actions Act 1936* (SA) s 3A; *Limitation Act 1974* (Tas) s 5B; *Limitation of Actions Act 1958* (Vic) s 27P; *Limitation Act 2005* (WA) s 6A.

7 *Limitation of Actions Act 1958* (Vic) s 27QA ('*Limitation Act*'); *Civil Liability Act 1936* (SA) pt 7B ('*Civil Liability Act*'); *Civil Liability Act 2002* (NSW) pt 1C; *Civil Law (Wrongs) Act 2002* (ACT) pt 8A.3; *Limitation of Actions Act 1974* (Qld) s 48; *Limitation Act 2005* (WA) s 92; *Limitation Act 1981* (NT) s 54; *Limitation Act 1974* (Tas) s 5C. See generally Hassan Ehsan, 'Setting Aside Settlement Deeds: Historical Child Sexual Abuse Claims' (2019) 155 *Precedent* 30.

8 See e.g: *Erlich v Leifer* [2015] VSC 499; *Hand v Morris* [2017] VSC 437; *MC v Morris* [2019] NSWSC 1326; *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27; *O'Connor v Comensoli* [2022] VSC 313; *S, M v S, RK* [2019] SADC 184; *TJ (A Pseudonym) v Bishop of Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704; *SR v Trustees of De La Salle Brothers* [2023] NSWSC 66.

9 [2024] VSC 329 ('*Jens*').

10 Ibid [17]–[19].

11 Ibid [1], [10].

12 Ibid [3]. See also *Limitation Act* s 27QA; *Civil Liability Act 1936* (SA) pt 7B ('*Civil Liability Act*'); *Civil Liability Act 2002* (NSW) pt 1C; *Civil Law (Wrongs) Act 2002* (ACT) pt 8A.3; *Limitation of Actions Act 1974* (Qld) s 48; *Limitation Act 2005* (WA) s 92; *Limitation Act 1981* (NT) s 54; *Limitation Act 1974* (Tas) s 5C.

II Facts

In 2008, Jens disclosed the abuse he had suffered to a friend, who suggested he consult a lawyer. That lawyer then referred Jens to Mr Lombard, a personal injury lawyer. Neither practitioner had significant experience working on historical abuse claims.[13] Mr Lombard provided only 'basic advice' as to the barriers imposed by the statute of limitations and the '*Ellis* defence'[14] arising out of *Trustees of the Roman Catholic Church v Ellis* ('*Ellis*').[15] *Ellis* concerned allegations of child sexual abuse by a priest, where difficulties arose in identifying an appropriate defendant to the claim. This was due to the unincorporated nature of the Roman Catholic Church and because church trustees did not manage the appointment and removal of priests.[16] Consequently, there was no legal entity to be sued in respect of misconduct, apart from the perpetrator themselves. Until the reforms were enacted, this decision remained a significant legal barrier for claimants, particularly in cases where perpetrators were deceased or otherwise lacked the resources to satisfy a monetary judgment.[17] Following Mr Lombard's advice, Jens did not pursue further legal action.[18]

Jens had an initial conversation with Father Peter Hosking, on behalf of the defendant, in July 2008. Later, Father Michael Head, responsible for the College's professional standards, met with Jens to discuss his complaint and suggested he engage with Towards Healing — a pastoral response group established in 1996 to address clergy sexual abuse complaints.[19] Jens did not contact the school again until 2011, when he met with Fathers Curtin and Head, requesting an opportunity to speak with Bradford, who admitted the abuse but cited his own personal struggles at the time.[20]

Subsequently, Jens met with Father Head again and discussed compensation.[21] Father Head suggested Jens consult his brother, a barrister of senior counsel, about drafting a deed of release.[22] Jens' brother provided some basic terms typically featured in settlement agreements, but did not discuss Jens' legal entitlements or attempt to

13 *Jens* (n 9) [23].

14 Ibid [23]–[24].

15 (2007) 70 NSWLR 565 ('*Ellis*').

16 Ibid 587 [94]. See also Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse are Less Helpful than they Appear' (2020) 43(2) *UNSW Law Journal* 452, 454.

17 Ibid 603 [194].

18 *Jens* (n 9) [25].

19 Ibid [27]–[29]. See also Timothy Matthews, 'Evaluating Towards Healing as an Alternative to Litigation as Redress for Survivors of Clerical Child Sexual Abuse' (2015) 26(3) *Current Issues in Criminal Justice* 333.

20 *Jens* (n 9) [29]–[30], [36].

21 Ibid [40].

22 Ibid.

formulate his claim.[23] In August 2011, Jens executed a settlement deed, receiving $150,000 and boarding positions for his two sons with all related fees covered.[24]

In 2013, Jens contacted the College again, requesting financial support for his sons' school fees at another institution, including uniform and textbook costs as well as an additional $50,000 and funds for counselling.[25] Following mediation, the Society of Jesus ('the Society') agreed to reimburse Jens for nine counselling sessions, subject to receipt of invoices.[26] Jens informed the Society he no longer wished for his sons to attend the College, estimating the value of the deed covering their tuition and boarding at approximately $500,000. Jens further expressed that the $150,000 settlement was inadequate compensation for the abuse and its lasting impact.[27] At mediation, Jens was represented by his brother and other counsel who advised of the risks of instituting proceedings.[28] The Society maintained that the nature of the abuse did not warrant a higher payout, relying on the settlement deed as a binding agreement and rejecting Jens' request for further compensation.[29] The Society agreed to continue funding his counselling,[30] and approved the further provision for tuition, but stipulated it was to be paid directly to Jens' sons' school.[31]

In 2016, further settlement discussions resulted in the execution of a variation deed under which the defendant paid to Jens approximately $260,000, comprising the original $150,000 settlement sum, $3,500 for counselling, and $107,000 for school expenses.[32] Importantly, the settlement deed was executed prior to legislative reforms. Meanwhile, the variation deeds were executed after legislative amendments removing the limitation defence in Victoria, but before the removal of the *Ellis* defence which occurred in 2018.[33]

III Decision

Sections 27QA, 27QD, and 27QE of the *Limitations Act* allow a plaintiff to apply to the Court for an order setting aside a settlement agreement concerning a previously settled cause of action on the basis that it is 'just and reasonable' to do so.[34] The Court

23 Ibid [41].
24 Ibid [42].
25 Ibid [45].
26 Ibid [47].
27 Ibid [50].
28 Ibid [56].
29 Ibid [54], [59].
30 Ibid [61].
31 Ibid [62]–[63].
32 Ibid [75]–[76].
33 Ibid [91].
34 Ibid [92]–[93].

in *Jens* followed the decision of *Trustees of the Christian Brothers v DZY*,[35] which restated the criteria of which the Court must be satisfied to set aside a settlement agreement. These factors comprised, generally:

- the centrality of the actual influence of the time and legal barriers;[36]
- that one of those barriers, in an ordinary case, would play some part in explaining why the claimant entered into the settlement agreement;[37] and
- if a finding is made that one or more legal barriers had some material impact on the claimant's decision to settle their claim, a cogent ground exists to conclude that it is just and reasonable to set aside the settlement. This is subject to the balancing of any prejudice to the respondent in setting aside the deed.[38]

The Court was satisfied that legal barriers materially impacted Jens' decision to enter into the settlement deed and ruled it just and reasonable to set aside the settlement instruments.[39]

A *Central Factor*

Associate Justice Ierodiaconou primarily considered the central question of whether legal barriers materially impacted Jens' decision to enter into the deeds. It was accepted that Jens had knowledge of the legal barriers, including an elapsed statutory time limit, which influenced his decision to seek compensation directly from the defendant and accept settlement.[40]

Jens' evidence was corroborated by Mr Lombard, who believed he would have, at some stage, advised Jens of those legal barriers. No available evidence refuted Jens' belief that legal barriers existed at the time of the settlement.[41] Her Honour noted Jens gave evidence that 'seeking compensation was his only option and he believed he was engaged in a glorified begging process'.[42] In addition to this central factor, several other findings supported her Honour's decision.

B *Supporting Factors*

1 *Imbalance of Bargaining Power*

It was accepted that the plaintiff received legal advice from Mr Lombard regarding legal barriers before negotiating the settlement deed, but not during negotiations

35 [2024] VSCA 73 ('*Trustees of the Christian Brothers*').

36 *Jens* (n 9) [94]; Ibid [109].

37 *Jens* (n 9) [94]; *Trustees of the Christian Brothers* (n 35) [110].

38 *Jens* (n 9) [94]; *Trustees of the Christian Brothers* (n 35) [110].

39 *Jens* (n 9) [120], [131].

40 Ibid [121].

41 Ibid [125].

42 Ibid [127]. See also [102].

or in regard to the quantum of settlement.[43] Conversely, while the defendant knew Jens had obtained legal advice, it did not clarify whether that advice accounted for the defendant's public undertaking to no longer rely on legal barriers.[44] Her Honour found Jens had significantly less bargaining power than the defendant in negotiating the settlement deed and was even more disadvantaged when negotiating the variation deed, despite having legal representation.[45]

2 *Prospects of Success*

When Jens entered into the settlement in 2011, he had strong prospects of success at trial, absent the legal barriers.[46] The defendant admitted the abuse allegations in part and acknowledged that the abuse was reported in July 2008. Additionally, there were multiple other credible complaints against Bradford connected to his tenure at the College.[47] Her Honour found the settlement amounts of $150,000 and later $261,000 under the variation deed to be 'modest' sums compared to what Jens would have received had the matter proceeded to trial in 2011.[48] The compensation paid was 'heavily discounted' relative to the damages Jens could now potentially be awarded.[49]

3 *Conduct of the Defendant*

Her Honour acknowledged that the defendant provided pastoral care to Jens and afforded him some agency through the settlement deed, arranging the meeting with Bradford, and negotiating the variation deed.[50] However, her Honour found the defendant failed to adequately support or inform Jens while negotiating the settlement deed.[51]

4 *Unfair Prejudice*

While her Honour acknowledged that the general passage of time had caused some prejudice, the defendant failed to identify any material prejudice so as to render setting aside the settlement deed unjust or unreasonable.[52] The defendant had been on notice since 2008 of the plaintiff's allegations of sexual abuse by Bradford (who admitted to the abuse), yet there was no evidence that the defendant investigated Bradford's conduct.[53]

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43 Ibid [150].

44 Ibid [151]–[153].

45 Ibid [153], [155], [160].

46 Ibid [184].

47 Ibid [187].

48 Ibid [196].

49 Ibid [199].

50 Ibid [214].

51 Ibid [213].

52 Ibid [242].

53 Ibid [237].

5 *Findings*

Her Honour concluded that the limitation period materially influenced Jens' decision to enter into the settlement deed, and, upon 'synthesising' the supporting factors, deemed it just and reasonable to set aside both the settlement and variation deeds.[54]

IV Comment

This discussion examines the assessment undertaken by the courts in determining whether settled historical child abuse claims impacted by limitation periods should be reopened in favour of judicial assessment. *Jens* illustrates a key factor in determining whether it is 'just and reasonable' to overturn a settlement deed — whether the claimant received legal advice or was represented during negotiations and, as such, was aware of legal barriers to their claim.[55]

A *Legislative Intent*

A key consideration in both the assessment of damages and any decision to overturn settlement instruments lies in the enduring and severe impact of abuse-related injuries.[56] Conditions such as post-traumatic stress disorder, depression, and anxiety are recognised as lifelong afflictions for many survivors, who often do not fully comprehend the trauma's effects until decades later.[57] An understanding of the latency in the disclosure of sexual abuse has underscored the need to abolish limitation periods and scrutinise settlements formed where barriers prevented fair recourse.[58]

The legislatures' intent in removing limitation periods is clear.[59] Settlements should not be set aside merely because a claimant perceives the terms as unfavourable compared to potential judicial awards.[60] Where access to justice has been compromised by unfairness in the operation of the law, reforms have sought to balance

54 Ibid [266].

55 Ibid [262].

56 See generally Heather Y Swanston et al, 'Statutory Compensation for Victims of Child Sexual Assault: Examining the Efficacy of a Discretionary System' (2001) 8(1) *International Review of Victimology* 37.

57 Australian Institute of Family Studies, 'The Long Term Effects of Child Sexual Abuse' (Child Family Community Australia Paper No 11, 2013) 23; *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 3, 11.

58 See Judy Cashmore et al, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases* (Report, August 2016).

59 South Australia, *Parliamentary Debates*, Legislative Council, 24 August 2021, 3955 (Rob Lucas, Treasurer).

60 Ibid 3952.

the principle of finality with the need for recourse for survivors. This is done so as to not broadly allow any settlement to be reopened.[61]

In South Australia, reforms abolishing limitation periods were not intended to create mechanisms for claimants to revisit settlements that, with the benefit of hindsight, may appear disadvantageous.[62] In some instances, settlements should not be reopened for litigation. This is particularly so when claimants have willingly settled and consciously opted not to litigate despite their awareness that litigation may have been viable. In such cases, the principle of finality prevents claimants, who expressly and 'justly' forego their opportunity to litigate, from seeking greater remuneration.[63] Permitting all settlements to be overturned on the basis that a greater award of damages could have been made by the courts would be inconsistent with the principle of finality and could place a significant burden on institutions.[64]

In any event, claimants inevitably, and to their detriment, face an uphill battle in bringing historical sexual abuse claims. Institutions can seek to rely on the inability to have a fair trial, pointing to a lack of evidence, particularly where persons involved in the offending are no longer accessible.[65] In any event, the legal right to a fair trial is fundamental and remains an important consideration in balancing the rights of the claimant and the defendant.[66]

The value of finality and certainty in historical settlements must be balanced against the imperative of affording child sexual abuse survivors their rightful day in court and just compensation.[67]

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61 Ibid.

62 Ibid.

63 Ibid 3955. See generally: Mayo Moran, 'Cardinal Sins: How the Catholic Sexual Abuse Crisis Changed Private Law' (2019) 21(1) *Georgetown Journal of Gender and the Law* 95; Kathleen Daly and Juliet Davis, 'Civil Justice and Redress Scheme Outcomes for Child Sexual Abuse by the Catholic Church' (2021) 33(4) *Current Issues in Criminal Justice* 438.

64 See generally: George Spencer Bower, *The Doctrine of Res Judicata*, ed Kenneth Handley (Butterworths, 3rd ed, 1996); Michael Legg and Samuel J Hickey, 'Finality and Fairness in Australian Class Action Settlements' (2019) 41(2) *Sydney Law Review* 185.

65 *Royal Commission Redress and Civil Litigation Report* (n 1) 52; Louise Milligan, Mary Fallon and Jessica Longbottom, *The Extraordinary Legal Tactics Institutions are Using to Fight Compensation Claims by Abuse Victims* (Online, ABC News, 12 February 2025) <https://www.abc.net.au/news/2023-05-29/legal-tactics-to-fight-abuse-compensation-claims-four-corners/102392184>.

66 Tom Bingham, *The Rule of Law* (Penguin Books, 2010) ch 9; Mathews and Dallaston (n 2) 387.

67 Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12(1) *Canadian Journal of Women and the Law* 66, 112–13.

The Victorian legislature has acknowledged that historically, by the time survivors were prepared to pursue legal action, expired limitation periods were prohibitive, forcing survivors to seek judicial discretion to even have their claims considered.[68] Additionally, during settlement negotiations, institutions could respond questionably, including in some instances, by leveraging expired limitation periods to secure lower settlements.[69]

B *Test*

Given this legislative intent, the court retains broad discretion in deciding whether it is 'just and reasonable' to set aside settlements — a vital discretion when adjudicating complex and fact-intensive complaints.[70]

1 *Relevant Considerations*

Parliament has refrained from exhaustively defining the relevant considerations for this determination, though relevant statutes provide guidance.[71] The *Civil Liability Act 1936* (SA), for example, lists relevant factors for assessing the fairness of an agreement, including: (1) whether there was a power imbalance in negotiations; (2) whether the applicant was legally represented; and (3) whether the defendant engaged in oppressive or unfair conduct.[72] As *Jens* demonstrates, courts can consider the factor of legal representation together with the claimant's awareness of legal barriers, to find that limitation periods affected the settlement. This standard may be supported by evidence of legal advice obtained, assuming the hurdle of the limitation period would have been explored in its provision.[73]

2 *Application in Jens*

In *Jens*, the Court closely considered whether the time limitation barrier was adequately conveyed to Jens in the legal advice he received.[74] Jens' claim to cast aside the settlement was supported by evidence that he had received legal advice before settling. However, the consideration of this factor raises questions about the status of survivors who, unable to access legal services, settled without an

68 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 February 2015 (Martin Pakula, Attorney-General) 404.

69 Ibid. See also: Milligan, Fallon and Longbottom (n 65); *Jens* (n 9) [213].

70 See Julie Somerville and Kerry Hogan-Ross, 'Historical Child Abuse Claims: Setting Aside Past Settlements' (2020) (December) *Australian Alternative Dispute Resolution Bulletin* 36.

71 See generally: Allison Silink and Pamela Stewart, 'Tort Law Reform to Improve Access to Compensation for Survivors of Institutional Child Sexual Abuse' (2016) 39(2) *UNSW Law Journal* 553; Michelle James, 'Legislative Responses to Royal Commission Recommendations: Where are We at?' (2019) 69 *Precedent* 14.

72 *Civil Liability Act* (n 12) s 50W(3)(b).

73 See e.g., *Jens* (n 9) [113].

74 Ibid.

awareness of time limitations.[75] If knowledge was strictly required, such a case, theoretically, may not be reopened. Alongside this, a claimant's decision to settle may be induced by an imbalance of power or other circumstances producing unjust outcomes.[76] Although the courts, importantly, must retain and exercise discretion, the varying applications of this test warrants caution. From one perspective, courts should ensure that a plaintiff's lack of understanding of time barriers, or previous failure or inability to engage counsel, does not unjustly impede their right to retrospectively litigate.

3 *Judicial Divergence*

While maintaining judicial discretion is integral, with limited legislative guidance regarding the scope or application of the 'just and reasonable' standard, diverging judicial approaches could prove problematic — a difficult balance must be struck in contemplation of the legislative intention and public interests. An overly narrow interpretation could undermine the legislative intent, while an overly broad application risks unfairness to defendants, subjecting institutions to unpredictable liabilities.[77]

The first judicial consideration regarding the revival of settled claims was by the Western Australia District Court in *JAS v Trustees of the Christian Brothers* ('*JAS*').[78] In that case, the Court held that it was just and reasonable to set aside the settlement agreement.[79] The deed purported to extinguish all claims against the defendant in exchange for the settlement sum of $100,000.[80] Chief Judge Sleight emphasised that the primary focus should be on the parties' circumstances when the settlement was reached, not merely on evidence of the claim itself.[81] At the time, the plaintiff's claim was statute-barred, severely undermining his bargaining position and leaving him with little choice but to accept the settlement offered.[82] The Court also noted that the plaintiff's claim had not been assessed on its merits and allowed him to proceed, in line with the legislative intent to remove legal barriers and enable claims to be heard on their merits.[83]

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75 See generally Mathews and Dallaston (n 2).

76 See generally Katie Wright, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse and Neglect* 10.

77 Matthews and Dallaston (n 2) 406.

78 (2018) 96 SR (WA) 77

79 Ibid 84–5 [27].

80 Ibid 81–2 [12].

81 Ibid 83 [21].

82 Ibid 84–5 [27].

83 Ibid.

Later, the Queensland Supreme Court addressed similar issues in *TRG v The Board of Trustees of the Brisbane Grammar School* ('*TRG*'),[84] involving alleged repeat abuse between 1986 and 1987.[85] The plaintiff filed a personal injury claim in 2001 which settled for $47,000.[86] Notably, the plaintiff received legal advice during settlement negotiations, and the Court found that limitation issues did not materially impact the settlement's value.[87] Justice Davies considered that the 'just and reasonable' standard must be assessed from the standpoint of both affected parties.[88] His Honour held that the settlement was a product of fair, arms-length negotiations between parties on equal footing, both 'appropriately represented' by counsel.[89] His Honour considered that when settlement negotiations were underway, the plaintiff appreciated he would need to prove liability under the law as it stood.[90] Although the plaintiff might have recovered more by court award, like the Court in *Jens*, Davies J considered the fact that both parties had legal representation,[91] a factor not considered by Chief Judge Sleight in *JAS*. However, unlike in *Jens*, the fact the parties were both represented in *TRG* supported the finding that the parties were on equal footing in negotiations, which was construed in the defendant's favour.[92] Justice Davies also examined factors like potential insurance loss to the defendant, which had not been discussed in *Jens*.[93] This decision was subsequently upheld on appeal by the Court of Appeal[94] and special leave to appeal to the High Court was refused.[95]

It is clear that there is no single judicial approach to the question of whether it is just and reasonable to reopen a settlement. Justice Davies found that the limitation period did not materially affect the quantum of settlement, whereas Chief Judge Sleight did not consider this issue and afforded significant weight to the disadvantage imposed by time barring generally. In *Jens*, the Court engaged in lengthy consideration as to whether the claimant obtained meaningful legal advice to infer that the limitation period materially affected the settlement. To an extent, the different approaches in the case law in determining when it is 'just and reasonable' reflects varying judicial perspectives across Australian jurisdictions. It highlights the difficulties with which the courts must grapple in striking such a balance.

84 [2019] QSC 157 ('*TRG*'), discussed in Matthews and Dallaston (n 2).

85 Ibid [2].

86 Ibid [57].

87 Ibid [229]–[230].

88 Ibid [96].

89 Ibid [278].

90 Ibid [184], [220].

91 See *EXV v Uniting Church in Australia Property Trust (NSW)* [2024] NSWSC 490.

92 *TRG* (n 84) [278].

93 Ibid [261]–[262].

94 *TRG v Board of Trustees of the Brisbane Grammar School* [2020] QCA 190, discussed in Matthews and Dallaston (n 2).

95 Transcript of Proceedings, *TRG v Board of Trustees of the Brisbane Grammar School* [2021] HCATrans 085.

Putting this difficulty to one side, the close focus of the court in *Jens* on the provision of legal advice appears to indicate that knowledge of limitation periods is necessary to show that a limitation period had a material impact on settlement. This seems to be reliant upon whether the claimant received legal advice. If this approach were to be closely followed, it could become more difficult for applicants to demonstrate just and reasonable cause for settlements to be set aside, prejudicing lesser-resourced survivors. This is particularly relevant in the context of the broader issues surrounding access to justice generally.[96]

C *The Court's Exercise of Discretion*

Cases following reforms, including *Jens*, can be generally construed as being beneficial to survivors of child sexual abuse, enabling claimants to seek justice even where the harmful effects of the offending are not experienced for some time after its occurrence.[97] Consistent with this, a claimant's lack of knowledge regarding the expiration of a limitation period should not immediately preclude the setting aside of historical settlements. In many cases, decisions to settle and the amount agreed upon would have inevitably been influenced by the legal barriers at the time. As the Royal Commission highlighted, conventional limitation periods unjustly prevented claims from being heard on their merits,[98] and statutory reforms aimed to address these injustices by enabling previously barred or settled claims to be adjudicated.[99] In doing so, it is important that the courts exercise their discretion and assess every case on its individual merits.

It is widely understood that survivors often face immense personal barriers in coming forward to disclose their abuse and undoubtedly face considerable difficulties in seeking legal counsel.[100] The long-term effects of child sexual abuse on survivors — particularly in terms of their economic capacity and mental well-being — hinders their ability to pursue justice.[101]

In *Jens*, her Honour noted the importance of considering the nature of the power being exercised and the specific mischief it ought to remedy.[102] In this context, the

96 Australian Government Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, No 72, 5 September 2014).

97 See generally Dafna Tener and Sharon B Murphy, 'Adult Disclosure of Child Sexual Abuse: A Literature Review' (2014) 16(4) *Trauma, Violence and Abuse* 391.

98 *Royal Commission Redress and Civil Litigation Report* (n 1) 85–8.

99 Mathews and Dallaston (n 2) 387.

100 See: Wright (n 76); Ben Mathews, 'Optimising Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia's Royal Commission' (2017) 74 *Child Abuse and Neglect* 86.

101 See generally Simona Ghetti, Kristen Weede Alexander and Gail S Goodman, 'Legal Involvement in Child Sexual Abuse Cases: Consequences and Interventions' (2002) 25(3) *International Journal of Law and Psychiatry* 235.

102 *Jens* (n 9) [95], citing *Trustees of the Christian Brothers v DZY* [2024] VSCA 73.

'mischief' is the unfairness to claimants who were subject to judgments or settlements where their legal rights or bargaining power were unduly constrained by legal barriers.[103] The court must also assess the claimant's prospects of success. This analysis involves: (1) evaluating whether a court award might surpass the settlement figure; (2) examining the conduct of the respondent during settlement negotiations; (3) considering any imbalance in bargaining power; (4) the claimant's potential guilt or shame; and (5) any prejudice to the respondent.[104] These reforms acknowledge that, in the pre-reform era, claimants often lacked the opportunity to have their claims fairly adjudicated due to limitation periods and power imbalances between individuals and institutions, frequently causing claimants to accept inadequate settlements. The reforms further recognise that claimants may have been pressured into accepting settlements in cases where liability was clear, but the expiration of time forced the acceptance of nominal compensation to avoid the complete dismissal of their claims. The policy underpinning the 'just and reasonable' standard allows for more equitable compensation, free from the influence of unjust reliance on the expiry of time or power imbalances.

V Conclusion

Jens serves as a reminder of how the consideration of legal advice can influence judicial decisions regarding whether a settlement should be overturned. So long as courts continue to diverge in the weight attributed to various aspects of settlement negotiations, the outcomes for claimants standing in similar positions to Jens may become inconsistent. If legal advice is one of these factors, disadvantaged claimants with fewer resources or facing other barriers might suffer disproportionately, limiting the benefit of uniform reforms. To assert that a limitation period or other legal barrier has no material effect on a claimant's decision to accept an offer due to a failure to obtain legal advice would not be just. It would risk discouraging survivors from bringing claims, while asserting that their inability or failure to obtain legal counsel early in the process of a claim is detrimental to their cause.

Jens also serves as a reminder of the difficult balance which the court is asked to strike. Courts must weigh the interests of a survivor of historical sexual abuse with legal principles including finality and a defendant's right to a fair trial. As the court in *TRG* identified, the discharge of this duty becomes more difficult as time goes on.[105] Courts should maintain broad discretion in determining when it is just and reasonable to overturn settlements and this should not be unduly constrained by knowledge of legal barriers. While evidence of legal advice may still inform a court's finding, it should not be viewed as a strict requirement. Such evidence should support, rather than limit, a claimant's potential for reconsideration, particularly in cases where mental health or resource constraints have hindered the claimant's capacity to engage meaningfully with the legal process.

103 Ibid.

104 Ibid.

105 *TRG* (n 94) [149].

From a broader perspective, while the Australian case law demonstrates positive outcomes for claimants, in many instances, these remedies come too little, too late.[106] Mr Jens endured a lifetime of drug dependency and significant difficulties in both family and work life. This reflects the experience of many survivors and demonstrates the need for continued recognition of such issues and ongoing support for survivors.[107]

106 Elizabeth A Wilson, 'Child Sexual Abuse, the Delayed Discovery Rules, and the Problem of Finding Justice for Adult-Survivors of Child Abuse' (2003) 12(2) *UCLA Women's Law Journal* 145, 214.

107 *Jens* (n 9) [50], [110]. See: Shanta Dube et al, 'Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim' (2005) 28(5) *American Journal of Preventative Medicine* 430; Mullen et al (n 5).

*Ruby Haines**

A WOLF IN SHEEP'S CLOTHING? CROWN IMMUNITY IN *CHIEF EXECUTIVE OFFICER, ABORIGINAL AREAS PROTECTION AUTHORITY V DIRECTOR OF NATIONAL PARKS* (2024) 418 ALR 202

> 'The king has two bodies. The first exists within the limits of his physical being; you measure it, and Henry often does, his waist, his calf, his other parts. The second is his princely double, free-floating, untethered, weightless, which may be in more than one place at a time. Henry may be hunting in the forest, while his princely double makes laws. One fights, one prays for peace. One is wreathed in the mystery of his kingship: one is eating a duckling with sweet green peas.'[1]

I Introduction

The Crown occupies a unique and contentious position in Australian law,[2] wielding considerable authority while being shielded by principles of immunity that shape its position within statutory regimes. As government functions expand and become more complex, the residual prerogative powers of the Crown and its instrumentalities become increasingly difficult to justify.[3] The High Court's decision in *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* ('*AAPA v DNP*')[4] highlights this ongoing tension. Across five judgments, the Court considered the question of whether the Director of National Parks ('DNP') — a body corporate and an instrumentality of the Commonwealth Crown — could be found criminally liable for offending at Gunlom Falls in Kakadu National Park.[5] The Court ultimately held that, as a matter of statutory

* LLB, BIntR (Adel); Student Editor, *Adelaide Law Review* (2024).

1 Hilary Mantel, *Wolf Hall* (4th Estate, 2019) 480.

2 See generally: Nick Seddon, 'The Crown' (2000) 28(2) *Federal Law Review* 245; Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell, 4th ed, 2011); Steven Churches, 'The Shield of the Crown in England and Australia: The Need for Statutory Interpretation that Applies the Principle of Legality' (2011) 22(3) *Public Law Review* 182.

3 See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No 92, 25 October 2001) 512 [26.38]–[26.39].

4 (2024) 418 ALR 202 ('*AAPA v DNP*').

5 Ibid 204–5 [1] (Gageler CJ and Beech-Jones J), 211 [33] (Gordon and Gleeson JJ), 234 [125]–[126] (Edelman J).

construction, the body corporate was liable and could not rely on any immunity otherwise afforded to the Crown under the common law.[6]

The case presented an opportunity for the Court to rethink the orthodoxy of the notion of 'the Crown' and its associated immunities. Despite reaching a unanimous conclusion which held accountable a government instrumentality, the Court was apprehensive to revise the English constitutional tradition of the Crown and its associated immunities. Part II of this case note outlines the factual and procedural background of the case, the relevant statutory context, as well as the broader position of the Crown within Australia's federal system. Part III sets out the Court's decision, in particular, its approach to statutory construction and the application of the presumptions of Crown immunity. Part IV comments on the implications of the decision and considers whether more substantial revision of the presumptions is required to clarify the position of the Crown and reconcile its incongruencies in Australia's federal system. It ultimately concludes that the decision in *AAPA v DNP* represents an opportunity missed.

II The Case

A *Factual and Procedural Background*

The decision in *AAPA v DNP* arose from an offence which transpired at Gunlom Falls in Kakadu National Park in the Northern Territory, a site sacred to the Jawoyn people.[7] In 2019, the respondent, the DNP, engaged a contractor to carry out construction works on a walking track near Gunlom Falls, inadvertently damaging the site.[8] The DNP did so without seeking the necessary authorisation from the Aboriginal Areas Protection Authority ('AAPA'), or a certificate granted by the relevant Minister under s 4(2) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ('*Sacred Sites Act*').[9] On 11 September 2020, the appellant, the Chief Executive Officer ('CEO') of the AAPA, charged the DNP with an offence under s 34(1) of the *Sacred Sites Act*, which prohibits a 'person' from carrying out work on or using a sacred site without a certificate issued under the Act.[10]

At first instance before the Northern Territory Local Court, the Commonwealth Attorney-General ('Attorney-General') intervened,[11] contending that the DNP was

6 Ibid 205 [2], 211 [31]–[32] (Gageler CJ and Beech-Jones J), 211 [33], 221 [77], 231 [114] (Gordon and Gleeson JJ), 234 [125]–[126], 263–4 [240] (Edelman J), 264–5 [246] (Steward J), 283 [323]–[324] (Jagot J).

7 See *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 3 (definition of 'sacred site') ('*Sacred Sites Act*').

8 *AAPA v DNP* (n 4) 212 [36] (Gordon and Gleeson JJ), 235 [130] (Edelman J).

9 Ibid.

10 Ibid 235 [131] (Edelman J).

11 *Judiciary Act 1903* (Cth) s 78A.

not liable to prosecution under the *Sacred Sites Act*.[12] Consequently, the Local Court referred the matter, as a special case, to the Full Court of the Supreme Court.[13] In those proceedings, the DNP conceded that the facts presented amounted to an offence under s 34(1) of the *Sacred Sites Act*. However, it pleaded not guilty, asserting that the presumption against criminal liability for the Crown prevented conviction.[14] The Full Court agreed, holding that s 34(1) of the *Sacred Sites Act* did not apply to the DNP as it enjoyed the Crown's privileges and immunities in the right of the Commonwealth, including immunity from criminal liability.[15] The CEO of the AAPA was granted special leave to appeal that decision to the High Court.[16]

B *Legal Context*

At the core of this decision are two 'overlapping' common law presumptions.[17] The first presumption is that established in *Cain v Doyle*.[18] In that case, Dixon J, with whom Rich J agreed,[19] held that a statute should be presumed not to impose criminal liability on the Crown in the absence of 'quite certain indications that the legislature had adverted to the matter and had … resolved upon so important and serious a course'.[20] In establishing this rule, Dixon J noted that '[t]he principle that the Crown cannot be criminally liable for a supposed wrong, therefore, provides a rule of interpretation which must prevail over anything but the clearest expression of intention'.[21] The operation of this presumption is 'strong but narrow', in that it applies to bodies politic and their emanations but not to natural persons or bodies corporate.[22]

The second of the two presumptions was outlined in *Bropho v Western Australia* ('*Bropho*').[23] It stands for the general proposition that statutes do not bind the Crown unless a legislative intent to bind the Crown is found 'in the provisions of the statute — including its subject matter and disclosed purpose and policy — when

12 *AAPA v DNP* (n 4) 205 [6] (Gageler CJ and Beech-Jones J).

13 Ibid 212 [37] (Gordon and Gleeson JJ), 682 [131] (Edelman J). See also *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1, [2]–[3] (Grant CJ, Southwood and Barr JJ).

14 *AAPA v DNP* (n 4) 212 [37] (Gordon and Gleeson JJ).

15 *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1, [81] (Grant CJ, Southwood and Barr JJ).

16 *AAPA v DNP* (n 4) 212 [39] (Gordon and Gleeson JJ).

17 Ibid 205 [6] (Gageler CJ and Beech-Jones J).

18 (1946) 72 CLR 409.

19 Ibid 419.

20 Ibid 424.

21 Ibid 425.

22 *AAPA v DNP* (n 4) 211 [30] (Gordon and Gleeson JJ).

23 (1990) 171 CLR 1 ('*Bropho*').

construed in a context which includes permissible extrinsic aids'.[24] The presumption is comparatively more 'flexible' than the *Cain v Doyle* presumption.[25]

C *Issue and Applicable Legislation*

On appeal, the question before the Court was a 'narrow' one:[26] can the DNP — a statutory corporation and therefore an instrumentality of the Commonwealth — be criminally liable under s 34(1) of the *Sacred Sites Act*? The answer to the question turned on the proper construction of that provision, set out in the following terms:[27]

> **34 Work on sacred site**
>
> (1) A person shall not carry out work on or use a sacred site.
> Maximum penalty: In the case of a natural person — 400 penalty units or imprisonment for 2 years.
> In the case of a body corporate — 2 000 penalty units.

Under s 514E(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the DNP is established as a body corporate and may sue and be sued in its corporate name. Further, under ss 17 and 24AA of the *Interpretation Act 1978* (NT), reference to a 'person' includes 'a body politic and a body corporate'.

Accordingly, the more intricate issue to be resolved by the Court was whether s 34(1) of the *Sacred Sites Act* should be interpreted as having 'no penal application' to the DNP as a Crown instrumentality.[28] Section 4 of the *Sacred Sites Act* provides:

> **4 Act binds Crown**
>
> (1) This Act binds the Territory Crown and, *to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities*.
> (2) If the Territory Crown in any of its capacities commits an offence against this Act, the Territory Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate.
> (3) This section does not affect any liability of an officer, employee or agent of the Territory Crown to be prosecuted for an offence.

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24 Ibid 21–4 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), 28 (Brennan J).

25 *AAPA v DNP* (n 4) 276 [290] (Edelman J).

26 Ibid 212–3 [40] (Gordon and Gleeson JJ).

27 *Sacred Sites Act* (n 7) s 34.

28 *AAPA v DNP* (n 4) 205 [6] (Gageler CJ and Beech-Jones J).

> (4) In this section:
> ***Territory Crown*** means the Crown in right of the Territory and includes:
> (a) an Agency; and
> (b) an authority or instrumentality of the Territory Crown.[29]

Relying on the presumptions in *Cain v Doyle* and *Bropho*, the Attorney-General argued that s 4 contained a negative implication that 'immunised from criminal liability both the body politic of the Commonwealth and … [entities] … treated as having the same status' under the law.[30] It was therefore submitted that s 34(1) ought to be read down so as to not bind or make liable the DNP.[31]

III The Decision

Despite handing down its decision in five separate judgments,[32] all seven members of the Court reached the same conclusion: the appeal was allowed, the Full Court's determination on the question of law was set aside, and the DNP was held liable under s 34(1) of the *Sacred Sites Act* as a matter of statutory construction.[33] In light of the unanimous conclusion reached, for the purposes of this case note, the separate judgments will be addressed collectively.

A *Proper Statutory Construction*

In determining how s 34(1) of the *Sacred Sites Act* ought to be construed, Gageler CJ and Beech-Jones J observed there was 'no room for doubt' that the provision operated to bind bodies corporate.[34] The legislative intent to do so was made clear from the provision's differing penalties for natural persons and bodies corporate.[35] However, the question remained as to whether ss 4(2) and (4) of the *Sacred Sites Act* created a negative implication excluding instrumentalities of the Commonwealth from liability under s 34(1). Justices Gordon and Gleeson observed that both parties accepted this inference from the sub-sections' text, noting that there was 'a deliberate choice by the Legislative Assembly to apply those sub-sections only to the Territory Crown, not the Crown in all its capacities'.[36]

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29 *Sacred Sites Act* (n 7) s 4 (emphasis added).

30 *AAPA v DNP* (n 4) 261 [228] (Edelman J).

31 Ibid 205 [6] (Gageler CJ and Beech-Jones J), 262 [232] (Edelman J).

32 Joint reasons were published by Gageler CJ and Beech-Jones J, and Gordon and Gleeson JJ respectively. Single judgments were published by Edelman, Steward, and Jagot JJ.

33 *AAPA v DNP* (n 4) 211 [31]–[32] (Gageler CJ and Beech-Jones J), 232 [118] (Gordon and Gleeson JJ), 263 [240] (Edelman J), 265 [248] (Steward J), 283 [324] (Jagot J).

34 Ibid 205 [4].

35 Ibid.

36 Ibid 220 [72].

The majority of the Court rejected the Attorney-General's submission that the text, context and history of ss 4(2)–(4) evinced legislative intention to exclude from liability Commonwealth statutory corporations.[37] Three of the judgments referenced the second reading speech of the Northern Territory Aboriginal Sacred Sites Amendment Bill 2005 (NT) ('Amendment Bill'), where intentions to enhance 'the protection of sacred sites and the desire for wider accountability' were clearly laid out.[38] While debate on the Amendment Bill ultimately led to the narrowing of ss 4(2) and (4), the wording of s 4(3) made it clear that officers, employees and agents of the Crown could be subject to criminal prosecution under the *Sacred Sites Act*.[39]

As such, for at least four of the Justices, it was clear from the text, context and history of ss 4(2) to (4) of the *Sacred Sites Act* that the legislative intent was not to exclude incorporated bodies of the Commonwealth, States and Australian Capital Territory from liability under the Act.[40] Consequently, there was no basis under s 4 to allow the Court to read down the application of s 34(1) as excluding the DNP from criminal liability for their breach of the provision. The residual question before the Court, therefore, was whether either of the presumptions set out in *Cain v Doyle* and *Bropho* afforded the DNP immunity as an instrumentality of the Crown.

B *The Presumptions*

A majority of the Court treated the presumptions as distinct, though Gordon and Gleeson JJ observed that they 'are sometimes described as part of one presumption existing on a continuum'.[41] Conversely, Edelman J characterised the *Bropho* presumption as a restatement of the *Cain v Doyle* presumption.[42]

Regarding the application of the *Bropho* presumption in *AAPA v DNP*, a majority of the Court concluded that it was expressly rebutted by the text of s 4 of the *Sacred Sites Act*, which was reinforced by the context of the Amendment Bill.[43] The *Bropho* presumption was confirmed to be the 'weaker' of the two presumptions, in that it applies 'unless a contrary intention can be discerned from all the relevant circumstances'.[44] In the context of *AAPA v DNP*, s 4 evinced a clear intention to bind the Crown in right of the Commonwealth. There was no negative implication

37 Ibid 221 [75]–[76] (Gordon and Gleeson JJ), 261–2 [228]–[230] (Edelman J), 282–3 [320]–[322] (Jagot J).

38 Ibid 219–20 [69]–[71] (Gordon and Gleeson JJ), 259–61 [219]–[229], 263 [238] (Edelman J), 281–282 [313]–[316] (Jagot J).

39 Ibid 259–60 [219]–[221] (Edelman J).

40 Ibid 221 [76] (Gordon and Gleeson JJ), 263 [239] (Edelman J), 282 [316]–[317] (Jagot J).

41 Ibid 214 [43] (Gordon and Gleeson JJ).

42 Ibid 246–8 [168]–[175] (Edelman J).

43 Ibid 207 [13] (Gageler CJ and Beech-Jones J), 218 [61]–[62] (Gordon and Gleeson JJ), 282 [318] (Jagot J).

44 Ibid 206–7 [11] (Gageler CJ and Beech-Jones J).

under ss 4(2) to (4) that excluded liability of bodies corporate, employees and agents acting in the course of their official functions or duties, irrespective of their status as instrumentalities of the Crown.[45]

As to the *Cain v Doyle* presumption, the Court unanimously held that the presumption's application was confined to a body politic, not to its agents or corporate entities.[46] Accordingly, the DNP — being a statutory corporation with a legal personality distinct from the body politic of the Commonwealth — could not enjoy immunity under the presumption, and was therefore liable under s 34(1).

In considering the presumption, Jagot J examined its historical evolution, which stemmed from the maxim 'the king can do no wrong'. Her Honour clarified that it applies not only to the Crown of the enacting jurisdiction, but also to the Crown of other jurisdictions within the Federation.[47] Justice Edelman, alternatively, went much further in criticising Dixon J's dicta in *Cain v Doyle*, arguing that its foundations were 'or [are] now, based on a mistaken understanding of the law or a misconceived attempt bluntly to apply English constitutional concepts to Australian law after 1901'.[48]

C *Outcome*

Upon the case returning to the Local Court, the DNP was ultimately found guilty of an offence under s 34(1) in of the *Sacred Sites Act* and was fined $200,000. While this outcome marks a step forward in upholding statutory accountability, the decision in *AAPA v DNP* arguably falls short of offering a more principled solution to the conceptual issues surrounding Crown immunity.

IV Comment

In *AAPA v DNP*, Gageler CJ and Beech-Jones J expressly denied the need to reverse or substantially revise the orthodox position regarding Crown immunity.[49] It was suggested that doing so 'would destabilise well-entrenched legislative

45 Ibid 215 [47] (Gordon and Gleeson JJ). Chief Justice Gageler and Beech-Jones J seemed to agree at 206–7 [11]. Justice Jagot observed that immunity for servants and agents of the Crown had to be expressly stated in statute: at 279 [301]. Justice Edelman commented that the inference of immunity from liability will rarely be drawn where the subject of the immunity is officers, employees, or other agents (including statutory corporations) of the Crown: at 250 [181].

46 Ibid 210–1 [26]–[30] (Gageler CJ and Beech-Jones J), 212 [39], 221 [77], 223 [83], 227–9 [102]–[105] (Gordon and Gleeson JJ), 263 [237] (Edelman J), 264 [244] (Steward J), 279 [303], 283 [322] (Jagot J).

47 Ibid 267 [261]–[262], 267–8 [264], 279 [303] (Jagot J). See also 207–8 [15] (Gageler CJ and Beech-Jones J).

48 Ibid 242–3 [155].

49 Ibid 209–10 [24].

assumptions'.[50] However, as noted by Edelman J, the presumption set out in *Cain v Doyle* represents an 'anachronism' — its application to a modern, post-Federation Australia has become incongruous and confusing.

A *An Inapt Inheritance?*

Australia inherited the British constitutional tradition of 'the Crown', with the term initially referring simply to the Monarch, effectively symbolising the United Kingdom.[51] Even in its British origins, the notion of 'the Crown' and associated prerogative powers attracted criticism, once described as a 'convenient cover for ignorance [that] saves us from asking difficult questions', obscuring the true nature of state power.[52] Following Australia's Federation in 1901, the term's use invited further critique for its vagueness, inequities, and questionable practical relevance.[53]

Over time, 'the Crown' has increasingly been used to denote the executive branch of government, including Ministers and their agents. However, in Australia's federal system, the continued use of the terminology is complex. In *Sue v Hill*, 'the Crown' was identified as having no fewer than five meanings,[54] with the Court expressing doubt as to some of their relevance in Australia. In *AAPA v DNP*, Edelman J described the term as 'slippery' and 'capable of various meanings'.[55]

As observed by Steven Churches, '[t]he concept of "the Crown" is not a term of art' in the *Constitution*.[56] In *Bass v Permanent Trustee Co Ltd*, the majority of the Court observed that Australia's federal structure rendered expressions such as 'binding the Crown' or 'binding the Crown in right of the Commonwealth' as 'inappropriate and potentially misleading when the issue is whether the legislation of one polity in the federation applies to another'.[57] This was similarly recognised by Gageler CJ and Beech-Jones J in *AAPA v DNP*; their Honours noted that while it 'might have been expected at federation that each body politic would be referred to in legislation simply as "the Commonwealth" or "a State"', the tradition of referring to 'the Crown' has endured.[58]

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50 Ibid.

51 Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873, 884–5.

52 F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 418.

53 See Pitt Cobbett, 'The Crown as Representing the State' (1904) 1(4) *Commonwealth Law Review* 145, 146–7.

54 (1999) 199 CLR 462, 497–503 (Gleeson CJ, Gummow and Hayne JJ).

55 *AAPA v DNP* (n 4) 237 [140] (Edelman J).

56 Churches (n 2) 191.

57 (1999) 198 CLR 334, 347 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

58 *AAPA v DNP* (n 4) 661 [9] (Gageler CJ and Beech-Jones JJ).

B *Reimagining the Body Politic*

The presumption of Crown immunity is not merely an inapt relic of British constitutional tradition, but a significant obstacle to the rule of law and equality before the law. At the time the various Crown immunities were developed, 'governments engaged in only a narrow range of activities' which rarely extended to commercial enterprise.[59] The immunities were therefore accepted then because of their modest impact.[60] However, government activities became increasingly driven by economic and political pressures to commercialise and privatise government-owned business and infrastructure.[61] Within this context, the foundations of the concept become questionable.

1 *Parity*

The *Constitution* is framed upon the assumption of the rule of law.[62] It is expected 'that Government should be under law, that the law should apply to and be observed by Government and its agencies … just as it applies to the ordinary citizen',[63] including criminal law.[64] The presumption in *Cain v Doyle* is at odds with these principles. As Gibbs CJ observed in *Townsville Hospitals Board v Council of the City of Townsville*, '[a]ll persons should prima facie be regarded as equal before the law'.[65] In *AAPA v DNP*, the Court declined to reconsider the two presumptions despite their ostensible lack of parity. That approach was implicitly justified by the Court on the basis that the application of one rule was 'narrow'[66] and the other 'flexible'.[67]

2 *Practicality*

In contemporary Australia, the activities of the Crown extend to 'multifarious functions',[68] including various governmental, commercial, industrial and developmental

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59 Australian Law Reform Commission (n 3) 409 [22.39].

60 Ibid.

61 See generally Darrell Barnett, 'Statutory Corporations and "the Crown"' (2005) 28(1) *UNSW Law Journal* 186.

62 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

63 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 540 [91] (Gordon and Steward JJ), citing Sir Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Dialogue* 8, 8.

64 *A v Hayden (No 2)* (1984) 156 CLR 532, 580 (Brennan J); *Ridgeway v The Queen* (1995) 184 CLR 19, 29 (Mason CJ, Deane and Dawson JJ), 54 (Brennan J), 59 (Toohey J), 73 (Gaudron J), 81 (McHugh J).

65 (1982) 149 CLR 282, 291.

66 *AAPA v DNP* (n 4) 211 [30] (Gordon and Gleeson JJ).

67 Ibid 276 [290] (Edelman J).

68 *Jacobsen v Rogers* (1995) 182 CLR 572, 587 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

activities. In *AAPA v DNP*, the Court accepted the diversity of the functions of the Crown, but emphasised that it is unlikely Parliament would intend to grant immunity from prosecution to employees or agents engaged in these functions if they act unlawfully.[69] This was an issue central to the decision in *Bropho*, and therefore the position adopted in this case is the prevailing position in relation to the interpretation legislation enacted or amended subsequent to *Bropho* (including the *Sacred Sites Act*). However, as the presumption in *Bropho* is often regarded as distinct from the presumption in *Cain v Doyle*, rather than a reformulation as Edelman J suggested,[70] the issue of whether to overturn or restate the latter presumption was dealt with in surprising brevity in many of the judgments. Despite canvassing the various problematic aspects of the principles established in *Cain v Doyle*, in response to the CEO of the AAPA's calls to revise the presumption, the issue was rejected on arguably limited reasons.[71] For instance, Gageler CJ and Beech-Jones J explained their rejection on the basis that the *Cain v Doyle* presumption 'has been repeatedly acknowledged in this Court in the years since *Bropho*', and to overturn it would 'destabilise well-entrenched legislative assumptions'.[72]

V Conclusion

In Australia's federal structure, a reconsideration or simplification of Crown immunity — and perhaps even the terminology of 'the Crown' itself — would lead to greater certainty and parity in the law, in addition to better reflecting Australia's constitutional setting. While this opportunity was presented in *AAPA v DNP*, the decision reflects the Court's overall apprehension to depart from orthodoxy. By rejecting the DNP's claim for immunity, the Court underscored the primacy of legislative intent in determining liability, while also providing a reminder that the Crown cannot remain an enigmatic entity in modern governance. However, the decision also leaves unresolved tensions. The persistence of outdated legal principles like those in *Cain v Doyle* continue to muddy the waters. As such, resolving the ambiguities and incongruences of Crown immunity at common law may be an issue best left to legislative intervention, for example, through reversing the presumption while retaining judicial discretion to determine when a statute exempts the Crown.[73]

69 *AAPA v DNP* (n 4) 250 [182]–[183], 251 [185] (Edelman J), 275 [288] (Jagot J).

70 Ibid 242 [154] (Edelman J).

71 Ibid 209–10 [20]–[24] (Gageler CJ and Beech-Jones J), 211 [30] (Gordon and Gleeson JJ).

72 Ibid 209–10 [24] (Gageler CJ and Beech-Jones J).

73 Australian Law Reform Commission (n 3) 509–15 [26.27]–[26.41].

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QUEERING INTERNATIONAL LAW 2.0

QUEER ENCOUNTERS WITH INTERNATIONAL LAW: LIVES, COMMUNITIES, SUBJECTIVITIES EDITED BY TAMSIN PHILLIPA PAIGE AND CLAERWEN O'HARA (ROUTLEDGE, 2025) 304 PAGES. ISBN: 9781032643045

QUEER ENGAGEMENTS WITH INTERNATIONAL LAW: TIMES, SPACES, IMAGININGS EDITED BY CLAERWEN O'HARA AND TAMSIN PHILLIPA PAIGE (ROUTLEDGE, 2025) 238 PAGES. ISBN: 9781032643229

In times of immense global unrest and upheaval, new ways of thinking about international law inspire hope that the future holds promise of something better. Queer theory emerged as an academic field in the 1990s[1] as a way to critique, problematise, and expose 'the mechanisms of power and discourse'.[2] The first edited collection on queer theory and international law[3] was published by Dianne Otto in 2018. Otto's collection pushed the boundaries of law and legal thinking in its consideration of the implications of queer theory for international law and became 'field-defining'.[4] Two new sibling edited collections, *Queer Encounters with*

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1 See e.g.: Teresa de Lauretis, 'Queer Theory: Lesbian and Gay Sexualities: An Introduction' (1991) 3 *Differences* iii, v–vii; Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 1990); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990).

2 Odette Mazel, 'The Textures of "Lives Lived with Law": Methods for Queering International Law' (2023) 49(1) *Australian Feminist Law Journal* 71, 71 ('The Textures of "Lives Lived with Law"'). See also Butler (n 1).

3 Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge, 2018) ('*Queering International Law*').

4 Teemu Ruskola, 'Review: Queering International Law: Possibilities, Alliances, Complicities, Risks by Dianne Otto' (2018) 112(3) *American Journal of International Law* 540, 540.

International Law: Lives, Communities, Subjectivities (*'Queer Encounters'*)[5] and *Queer Engagements with International Law: Times, Spaces, Imaginings* (*'Queer Engagements'*)[6] take up the challenge of continuing the groundbreaking work started by Otto. Both collections originate from the aptly named 'Queering International Law 2.0' workshop held over two days in November 2022, jointly hosted by Deakin Law School, the Institute for International Law and the Humanities at Melbourne Law School, and La Trobe Law School. Many of the chapters in the two collections were first presented at the workshop and then refined and restructured before reaching their final published form.

The collections bring together chapters applying a queer lens to different and diverse areas of international law. Following the lead set by Otto, the collections do not seek, nor claim, to present a complete vision of 'queer international law' — indeed, doing so would not be very queer[7] — instead the chapters traverse a wide range of topics and perspectives, responding to Otto's call for 'queer curiosity'[8] as a way of approaching international law. The collections are highly heterogenous, with contributing authors from different geographical locations and from different stages in their academic careers, ranging from PhD students to senior professors. Indeed, one of the greatest strengths of these collections is the numerous insightful contributions from PhD students and early career researchers. Contributing authors come from across Australia, Brazil, France, India, Italy, the Philippines, Singapore, Switzerland, Thailand, the United Kingdom, and the United States of America, adding geographically diverse perspectives to the engagements and encounters with the diverse areas of international law discussed in the collections.

Law as a discourse of power enshrines heterosexual and cis-gendered practices and binary divisions.[9] The first collection, *Queer Encounters,* explores the interactions of queer people with international law and seeks to navigate the risk that queer engagement with human rights may take 'the radicality out of queer rather than resulting in the queering of international human rights'.[10] In this way, the queer theory in this collection is less about the method of analysing international law and more concerned with the 'expansion and enforcement of sexual rights and the legal recognition of sexual minorities more generally'.[11] In her foreword, Otto sets the scene for the chapters that follow, observing that

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5 Tamsin Phillipa Paige and Claerwen O'Hara (eds), *Queer Encounters with International Law: Lives, Communities, Subjectivities* (Routledge, 2025) ('*Queer Encounters*').

6 Claerwen O'Hara and Tamsin Phillipa Paige (eds), *Queer Engagements with International Law: Times, Spaces, Imaginings* (Routledge, 2025) ('*Queer Engagements*').

7 Ruskola (n 4) 540.

8 Otto (ed), *Queering International Law* (n 3).

9 Mazel, 'The Textures of "Lives Lived with Law"' (n 2) 73.

10 See generally Paige and O'Hara (eds), *Queer Encounters* (n 5); Ratna Kapur, 'The (Im)Possibility of Queering International Human Rights Law' in Otto (ed), *Queering International Law* (n 3) 132.

11 Ruskola (n 4) 541.

> [p]ersonal histories and experiences of both pleasure and danger inform all our journeys with law, providing dynamic tools for exposing the dangers of law's claims to universality while also offering hope that law might yet play a role in creating a world that values all human and non-human life, rather than being part of the problem.[12]

Queer Encounters is divided into four parts, each containing chapters addressing a different aspect of the theme chosen for each part. Part 1, 'Queer Critiques of International and Regional Human Rights Law', examines the limitations of international human rights movements and international human rights law from a queer perspective.[13] Matteo Bassetto's chapter explores the pathologisation of trans people and asks readers to reflect on the implications of trans suicidality as a human rights violation.[14] Manon Beury's chapter interrogates the reluctance of the European Court of Human Rights to use the prohibition on discrimination found in the *European Convention on Human Rights* to provide relief for trans people, concluding that protection from discrimination will require radical societal change.[15] The final chapter in Part 1, by Karen Engle, considers a queer abolitionist approach to the treatment of hate crimes.[16]

Part 2, '(Re)queering Human Rights Law: New and Alternative Directions', explores new ways of engaging with international human rights law from a queer perspective. Daryl WJ Yang's chapter explores the potential for international consumer protection laws to be applied to conversion practices because of their inability to make the queer subject straight.[17] Warisa Ongsupankul's chapter explores the right to human rights education in the *Convention on the Rights of the Child* to promote queer visibility in children's education, allowing queer children to thrive.[18] Part 2 concludes with Alexandra C Grolimund's chapter exploring the public/private divide through the lens of sadomasochism, examining how the European Court of Human Rights has engaged with this topic.[19]

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12 Dianne Otto, 'Foreword' in Paige and O'Hara (eds), *Queer Encounters* (n 5) xiv, xvi.

13 See generally 'Queer Critiques of International and Regional Human Rights Law' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 13.

14 Matteo Bassetto, 'The Precarity of Trans Survival: Suicidality and the Right to Life' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 15.

15 Manon Beury, 'Vague Comparisons and Unstable Grounds: The European Court of Human Rights and the Prohibition of Discrimination Against Trans Persons' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 39.

16 Karen Engle, 'Abolitionist Human Rights: Queering LGBT Human Rights Advocacy and Law' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 60.

17 Daryl WJ Yang, '"Nothing was Changing": Queering the Role of International Law in the Global Campaign Against Conversion Practices' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 87.

18 Warisa Ongsupankul, 'Childhood as a Site of Struggle: a Queer Perspective on International Human Rights Law Concerning the Child-Protective Rationale and School Education' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 108.

19 Alexandra C Grolimund, 'Sadomasochism at the European Court of Human Rights: Rights to Sex and Drawing the Line between Privacy and Public Interest' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 127.

Part 3, 'Queer Battlegrounds: 'Gender' in International Law', turns to the question of 'gender' — this topic has become more controversial due to the rise of 'gender critical' and other anti-queer movements in recent times.[20] Giovanna Gilleri's chapter calls for international human rights law to move away from dualistic constructions of 'femininity' and 'masculinity' and to instead recognise the infinite intersections of subordinate and dominative gendered subjects.[21] Sandra Duffy's chapter dissects how conservative campaigners have reframed 'gender' as an ideological framework resembling neo-fascism and implores human rights lawyers to be vigilant for, and to combat, anti-gender tactics wherever they encounter them.[22] Duffy's call for vigilance is even more important now than when the chapter was written. Juliana Santos de Carvalho's chapter draws on the definition of 'gender' in the *Rome Statute* and the draft *Convention on Crimes Against Humanity* as a vehicle for exploring how bio-essentialist feminist interpretations continue to have a hold on international law.[23]

Finally, Part 4, 'The Shifting Nature of Queer Encounters with International Law: Journeys Towards Hope', includes a series of contributions finding hope in the face of international law's oppression of the queer subject. Odette Mazel's chapter reads the work of three queer activists in international law through Foucault's notions of 'care of the self' and the 'art of living', arguing for hope and optimism, for the 'glitter' in projects of respectability, and for doing things 'fabulously' in international law.[24] Loveday Hodson's chapter takes a slightly less optimistic tone, observing that fluctuating between hope and despair is an inherent part of queer encounters with international law.[25] Finally, Edoardo Stoppioni's chapter concludes that a better understanding of the genealogical epistemologies of queer theory could provide a freer and more colourful toolbox for (re)queering international law.[26] The chapters in this collection draw from, and build on, Otto's approach to the critique

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20 See e.g.: Ruth Pearce, Sonja Erikainen, and Ben Vincent, 'TERF Wars: An Introduction' (2020) 68(4) *Sociological Review* 677; Fran Amery, '"Gender Critical" Feminisms as Biopolitical Project' (2025) 28(3) *Sexualities* 1239.

21 Giovanna Gilleri, 'Human Rights' Harmful and Harmless Gendered Laws' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 153.

22 Sandra Duffy, '"Ideological Colonising": the Influence of Anti-Gender Movements on Domestic and International Human Rights Law' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 175.

23 Juliana Santos de Carvalho, 'Fear of a Queer Law: Sex/Gender and the Exclusion of Queer Thinking in International Law' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 200.

24 Odette Mazel, 'The "Art of Living": LGBTQIA+ Activism and International Law' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 222 ('The "Art of Living"').

25 Loveday Hodson, 'Queer Edens: Visions of Living with Human Rights' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 244.

26 Edoardo Stoppioni, 'Epistemologies Out of the Closet: Thinking Through Queer Theory's Intellectual Shifts in International Law' in Paige and O'Hara (eds), *Queer Encounters* (n 5) 262.

of international law, searching for opportunities for change and holding out hope for the 'emancipatory potential of the law'.[27]

While the contributions to *Queer Encounters* expose international law's complicity in practices of inequality and 'how sexuality and sexual and gender norms are constituted and deployed by the law as organizing principles',[28] *Queer Engagements with International Law* applies queer theory to international law topics not directly related to gender and sexuality, including the environment, oceans, outer space, and cultural heritage. As Otto notes in her foreword, the chapters in *Queer Engagements* 'shake the foundations of several bodies of settled law'.[29] Of the two sibling collections, it is *Queer Engagements* that will be of most interest to those interested in critical approaches to international law and international relations, as the chapters in this collection provide new perspectives and ways of thinking about diverse areas of international law. Indeed, as the editors themselves note, this collection demonstrates that 'queering constitutes a methodological approach with an inbuilt freedom that can be used to question and unpack a range of topics beyond queer theory's site of origin',[30] embracing Otto's call to approach international law with 'queer curiosity'.[31]

Matching its sibling collection, *Queer Engagements* is divided into four parts, each containing chapters which provide insights into a range of international law issues. Part 1, 'Queering New Spaces in International Law: The Environment, Oceans, and Outer Space', applies insights from queer theory to previously un-queered areas of international law. Emily Jones' chapter applies queer theories of the nonhuman and kinship to propose an alternative vision of the subject in international environmental law, arguing that such a paradigm shift is required if we are to adequately tackle the core environmental challenges of our time.[32] Gina Heathcote's chapter focuses on the oceans and explores how 'Ghost Ships' and humans-out-of-the-loop naval technology can become a means to see the ocean as agential, challenging the heteronormative desire of conquest and ownership.[33] Claerwen O'Hara and Cris van Eijk then look to the stars and examine the gendered, extractive, and militarised logics

27 Hilary Charlesworth, 'Celebrating Di Otto' (2017) 18(2) *Melbourne Journal of International Law* 118, 119.

28 Louise Arimatsu, 'Book Review: Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks*' (2018) 29(3) *European Journal of International Law* 1023, 1023.

29 Dianne Otto, 'Foreword' in O'Hara and Paige (eds), *Queer Engagements* (n 6) xii, xii.

30 Claerwen O'Hara and Tamsin Phillipa Paige, 'Reaching Out Towards the Horizon: Queer Engagements with International Law Beyond Queer Theory's Site of Origin' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 1, 8.

31 Otto (ed), *Queering International Law* (n 3).

32 Emily Jones, 'Challenging International Environmental Law's Hetereonormativity and Anthropocentrism: Towards Queer Kinship' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 17.

33 Gina Heathcote, 'Oceans versus Ghost Fleets' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 39.

in international space law, while observing 'cosmic hope' and the 'capacity of outer space to inspire in us a belief that things could be different'.[34]

Part 2, 'Queer Encounters with Temporality and Coloniality in International Law', begins with a chapter by Vanja Hamzić drawing on the example of 18th century Senegambia and the gender-nonconforming Mande griots (jeliw) to advocate for international law to focus on the local.[35] This is followed by Lucas Lixinski's chapter queerly re-imagining international cultural heritage law by understanding heritage as an affective relationship, which matters to communities, recognising that intangible practices simultaneously are heritage and keep heritage alive.[36] Ruby Rosselle L Tugade's chapter examines Philippine court decisions concerning violence against women and queer people by United States' military officers, highlighting the gendered and sexual nature of (neo)colonialism.[37]

Part 3, 'Queering International Law's Imaginaries: Reflections on Legal Myths and Methods', explores the myths and methods of international law. Caitlin Biddolph's chapter exposes the myth of 'certainty' in international criminal law through a queer reading of the International Criminal Tribunal for the former Yugoslavia, considering what new possibilities for justice arise when we understand international law as a practice in uncertainty.[38] Similarly exploring the possibilities that may come from accepting uncertainty, Cris van Eijk's chapter, his second contribution to this collection, observes that ambiguity in interpretation 'makes international lawyers uncomfortable'[39] and argues that the messy fluidity in *travaux préparatoires* should be embraced in interpreting treaties. Joanne Stagg's chapter explores what queer judging in international law might look like through an exploration of consensus and dissensus models of judging, reflecting that queer judging 'requires the interrogation of normative statements about social hierarchies, gender roles, family formation, and social norms'[40] and the prioritisation of humanity and empathy.

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34 Claerwen O'Hara and Cris van Eijk, 'On Straightening and Subversion: A Queer Feminist Exploration of International Space Law and Politics' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 60.

35 Vanja Hamzić, 'International Law, Coloniality, and the Temporal Otherwise' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 85.

36 Lucas Lixinski, 'Rewriting Queer Markers of Identity: International Cultural Heritage Law, Criminalisation, and the Other' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 99.

37 Ruby Roselle L Tugade, 'The Filipina in the Shadows of International Law: A Case Study of Philippine Court Decisions' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 120.

38 Caitlin Biddolph, 'Queering (Un)Certainty in International Criminal Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 141.

39 Cris van Eijk, 'Uncloseting *Travaux*' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 161, 161.

40 Joanne Stagg, 'Queer Judging, Straight Up: The Queer Judge and Judicial Systems' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 185, 193.

Finally, Part 4, 'Queering Ourselves: Experimenting with Genre in Legal Academia' contains a single chapter exploring how genre experiments with academic forms, such as theatre, could help build and nurture a more collegial scholarly community.[41] In this chapter, Danish Sheikh reflects on how the reading of his play, 'Contempt', during the 'Queering International Law 2.0' workshop was an instance of queering the workshop format, allowing emotions and vulnerability into the academic space.

While some chapters in these collections offer a critique of international law's violent and exclusionary tendencies, others seek to re-imagine international law and contribute to a broader reading of international law more generally, one that respects difference and allows for new possibilities. These collections, particularly *Queer Engagements*, demonstrate that for the ongoing vitality of international law, it is important to recognise and address 'law's complicities in perpetuating inequalities',[42] imagine new possibilities, and take intellectual risks 'in spite, or because, of the perils that lie ahead'.[43] In expanding beyond the narrow confines of issues of gender and sexuality to explore previously un-queered areas of international law, these collections build on the groundbreaking work commenced by Otto and leave the reader with a sense of hope that things can be done differently (even, 'fabulously')[44] in international law.

41 Danish Sheikh, 'Repairing (the) International Law (Conference): The Affordances of Theatre' in O'Hara and Paige (eds), *Queer Engagements* (n 6) 209.

42 Arimatsu (n 28) 1028.

43 Ibid.

44 Mazel, 'The "Art of Living"' (n 24) 243.

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