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## ABSORBING SOUTH AUSTRALIA'S WILLS ACT DISPENSING POWER IN THE UNITED STATES: EMULATION, RESISTANCE, EXPANSION†

### I INTRODUCTION

Since 1975, South Australia has been the epicentre of a notable development in the law of wills. In that year, the State Parliament passed the *Wills Act Amendment Act (No 2) 1975* (SA), which amended s 12(2) of the *Wills Act 1936* (SA) ('*Wills Act*').<sup>1</sup> Section 12(2) allows the Supreme Court to validate a will in which there has been some failure to comply with the formal requirements of the *Wills Act*, if the evidence in the case persuades the Court that the decedent intended the document to be his or her will. Section 12(2), widely known in the scholarly literature as the dispensing power, has had a shaping influence elsewhere in the common law world. Other Australian states and territories have enacted comparable legislation,<sup>2</sup> as have most Canadian provinces.<sup>3</sup> In the United States, the South Australian legislation and its case law have been the subject of sustained scholarly study, law revision activity, legislation, and case law. My main focus in this lecture will be to review the American experience, concluding with the most recent chapter, still being written, which is the story of how our absorption of the South Australian reform has led us to confront a completely unforeseen development — the enforcement of so-called digital or electronic wills.

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† This article originated as the Honourable Christopher Legoe QC AO Lecture, presented in Adelaide on 10 March 2017 at the 2017 Trusts Symposium of the South Australian Branch of the Society of Trust and Estate Practitioners (STEP) and the Law Society of South Australia.

<sup>1</sup> *Wills Act Amendment Act (No 2) 1975* (SA) s 9, amending *Wills Act 1936* (SA) s 12(2).

<sup>2</sup> *Wills Act 1968* (ACT) s 11A; *Succession Act 2006* (NSW) s 8; *Wills Act 2000* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 2008* (Tas) s 10; *Wills Act 1997* (Vic) s 9; *Wills Act 1970* (WA) s 32. See generally Stephanie Lester, 'Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule' (2007) 42 *Real Property, Probate and Trust Journal* 577. Queensland, which initially enacted excusing legislation of a different sort, adopted dispensing power legislation in 2006. See Ben McEniery, 'Succession Law Keeping Pace with Changes in Technology and Community Expectations — Informal Wills' (2014) 12 *Journal of New Business Ideas & Trends* 1, 4.

<sup>3</sup> Citations to the statutes are collected in Albert H Oosterhoff et al, *Oosterhoff on Wills*, 317 (Thomson Reuters, 8th ed, 2016).

II THE WILLS ACT FORMAL REQUIREMENTS<sup>4</sup>

I should begin with a word of background about the Wills Act formalities and the rule of strict compliance with those formalities that gave rise to the reform movement. All common law jurisdictions have a Wills Act that prescribes certain formalities for making a valid will. These statutes trace back to the *Wills Act 1837*<sup>5</sup> and the *Statute of Frauds 1677*.<sup>6</sup> The English tradition recognises only one mode of testation, called the attested will.<sup>7</sup> The essentials are writing, signature, and attestation. The terms of the will must be in writing, the testator must sign the document, and at least two witnesses must attest by their signatures that they saw the testator sign it. A variety of further requirements can be found in the Wills Acts of various jurisdictions: rules governing the acknowledgment of a signature already in place, rules calling for the testator and the witnesses to sign in each other's presence, requirements about the positioning of signatures on the document, and others.

These Wills Act formalities are addressed to the distinctive feature of a testamentary transfer — that when it comes time to ascertain and enforce the testator's wishes, the testator will be dead and thus unable to inform the court. The Wills Act requirement of written terms forces the testator to leave permanent evidence of the substance of his or her wishes. Signature and attestation provide evidence of the genuineness of the instrument, and they caution the testator about the seriousness and potential finality of the instrument. The requirement that the will be attested by disinterested witnesses is also supposed to protect the testator from persons bent on deceiving or coercing the testator into making a disposition that does not represent his or her true intention. Thus, the Wills Act formalities serve purposes that are evidentiary, cautionary, and protective.

There is every reason to think that the Wills Act formalities are a success story, at least when the testator complies with them. Compliance effectively assures that the estate is distributed in accordance with the testator's intent. The trouble arises in cases in which the testator fails to comply with one or more of the formal requirements. Until the 1975 South Australian legislation, courts in common law jurisdictions have mostly required strict compliance with the formalities, with the result that quite innocuous errors have been held to invalidate the will.

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<sup>4</sup> Some of the discussion in this unit derives from John H Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87 *Columbia Law Review* 1.

<sup>5</sup> 1 Vict, c 26.

<sup>6</sup> 29 Car 2, c 3.

<sup>7</sup> The Wills Acts in many United States and Canadian jurisdictions also allow European-derived holographic testation, in which attestation is excused when the will is in the testator's handwriting. See, eg, National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code (1969)* (amended 2010) § 2-502(b) ('UPC').

A good example of the strict compliance rule at work is the 1969 English case, *Re Groffman (Deceased); Groffman v Groffman*.<sup>8</sup> Each of the two attesting witnesses, who were attending a social gathering at the testator's home, took his turn signing the will in the dining room while the other witness was in the living room. The court held that they had violated the requirement that the testator sign or acknowledge in the presence of two witnesses present at the same time. The judge invalidated the will, even while declaring himself 'perfectly satisfied' that the decedent intended the document to be his will 'and that its contents represent[ed] his testamentary intentions'.<sup>9</sup> What happens in such a case is that the Wills Act formalities, although meant to implement the decedent's intent, have the effect of defeating that intent.

### III VALIDATING DEFECTIVELY EXECUTED WILLS: THE SOUTH AUSTRALIAN ACT

The South Australian reform provides relief against this rule of automatic invalidity by empowering the court to excuse noncompliance with one of the formalities in cases in which the court determines that the decedent 'intended the document to constitute his or her will'.<sup>10</sup>

In the years since its enactment, the South Australian statute has given rise to a thoughtful case law, which supplies guidance on how the statute should be applied.<sup>11</sup> In the earliest reported case, *Re Estate of Graham (Deceased)*,<sup>12</sup> decided in 1978, Jacobs J developed a purposive constructional principle that has been widely followed. He reasoned that 'the greater the departure from the ... [required Wills Act formality] ... the harder will it be for the Court' to validate the will under the dispensing power.<sup>13</sup> Thus, the South Australian courts have routinely excused presence defects like the one in *Groffman*, reflecting the reality that the presence requirement is peripheral to the main evidentiary, cautionary, and protective policies of the Wills Act.

Most of the reported South Australian cases concern violations of the attestation rules, for example presence defects such as those in *Groffman*, and cases in which one or both of the required witness signatures are missing. More consequential violations — for example, failure of the testator to sign the will — are more likely to have impaired the Wills Act policies, and are correspondingly more difficult to excuse. The South Australian case law has produced an implicit ranking of the Wills

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<sup>8</sup> [1969] 2 All ER 108 ('*Groffman*').

<sup>9</sup> *Ibid* 109 (Simon P).

<sup>10</sup> *Wills Act* s 12(2)(b).

<sup>11</sup> The cases are discussed in Langbein, 'Excusing Harmless Errors in the Execution of Wills' above n 4; Lester, above n 2.

<sup>12</sup> (1978) 20 SASR 198.

<sup>13</sup> *Ibid* 205.

Act formalities.<sup>14</sup> Of the three main formalities — writing, signature, and attestation — writing has until lately remained indispensable. The *Wills Act* requires a ‘document’,<sup>15</sup> and in no case has any litigant sought to use the dispensing power to enforce an oral will.

The signature requirement has ranked next in importance. A testator who leaves his or her will unsigned raises a grievous doubt about the finality, and in some cases the genuineness, of that instrument. An unsigned will is presumptively only a draft,<sup>16</sup> but the South Australian courts have rightly overcome that presumption in compelling circumstances such as the ‘switched wills’ cases, those recurrent situations in which husband and wife, participating in a common execution ceremony, each mistakenly executes the will drafted for the other spouse, thus leaving unsigned the will that each spouse had intended to sign.<sup>17</sup> I might mention that there is another path to fixing a switched will case, which is not to treat it as an execution error, but as a case of mistaken content in a will otherwise validly executed, and then to apply the equitable remedy of rectification (reformation) of writings to conform the terms of each will to reflect the content that the testator who signed it had intended. This was the approach of the New York Court of Appeals in a case decided in 1981.<sup>18</sup> Taking this path requires the court to abandon the longstanding rule that rectification of instruments is unavailable when the instrument is a will. In 1999 the American Law Institute’s *Restatement (Third) of Property: Wills and Other Donative Transfers* expressly abrogated that rule.<sup>19</sup>

Compared with writing and signature, the attestation requirement makes a more modest contribution, primarily of a protective character, to the Wills Act policies. But the truth is that most people do not need protecting, and there is usually strong evidence that an attestation defect did not result in imposition. Accordingly, the South Australian courts have routinely excused attestation blunders.

#### IV EMULATION IN THE UNITED STATES

I turn now to the American adventure with the South Australian dispensing power. Unlike the Australian and Canadian enactments, which mostly resulted from recommendations of the state and provincial law reform commissions, in the United States

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<sup>14</sup> Langbein, ‘Excusing Harmless Errors in the Execution of Wills’ above n 4, at 17–18, 52.

<sup>15</sup> *Wills Act* s 12(2).

<sup>16</sup> See *Baumanis v Praulin* (1980) 25 SASR 423.

<sup>17</sup> *Re Estate of Blakely (Deceased)* (1983) 32 SASR 473; *Estate of Pudney* (Unreported, Supreme Court of South Australia, Olsson J, 11 June 1985).

<sup>18</sup> *Re Snide*, 418 NE 2d 656 (NY, 1981).

<sup>19</sup> American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) § 12.1. The Uniform Law Commission codified the change in 2008, adding UPC § 2-805 (amended 2010).

state-level law revision commissions are uncommon.<sup>20</sup> Thus, even in state law areas such as wills and trusts, the main work of law revision is done by two national-level institutions, the Uniform Law Commission ('ULC') and the American Law Institute ('ALI'). When the South Australian dispensing power legislation and its case law attracted attention in the American scholarly literature, it fell to these two organisations to study the development and recommend comparable legislation to the American states.

The ULC acted first. The Commission is best understood as a consortium of state governments with the purpose of drafting legislation in fields of law in which it is desirable to have common solutions to common problems. In the late 1980s the Commission was engaged in preparing a comprehensive revision of the Uniform Probate Code, which is a model act that governs, in the twenty or so states that have chosen to enact it,<sup>21</sup> both probate procedure and the substantive law of wills and intestacy. The drafters of the revised Code, officially promulgated in 1990, determined to include a version of the dispensing power, which became new Code § 2-503.

Although the American drafters expressly modelled<sup>22</sup> their dispensing power on the South Australian statute, they made three important changes.

First, they cured an oversight in the original South Australian statute, by extending the dispensing power to defects in compliance with revocation formalities as well as execution formalities.<sup>23</sup>

Second, the American drafters declined to adopt the standard of proof found in the original South Australian statute. The original s 12(2), in a provision since repealed, had required the court to find 'no reasonable doubt' that the decedent intended the document to be his or her will.<sup>24</sup> The Americans followed the South Australians in concluding that the dispensing power should require a standard of proof higher than the normal preponderance standard for ordinary civil matters, but rather than resort to the beyond-reasonable-doubt standard of the criminal law, the Americans required 'clear and convincing evidence'.<sup>25</sup> The clear and convincing evidence standard is one that has become familiar in a variety of circumstances, for example, the rectification of deeds, in which it has been thought important to impose a heightened standard of proof for a very consequential question of fact.

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<sup>20</sup> California is a notable exception. See California Law Revision Commission, *Information* <<http://www.clrc.ca.gov/>>.

<sup>21</sup> See the enactment status map: Uniform Law Commission, *Acts: Probate Code* <<http://www.uniformlaws.org/Act.aspx?title=Probate%20Code>>.

<sup>22</sup> UPC § 2-503, comment (amended 2010).

<sup>23</sup> UPC § 2-503(2) (amended 2010).

<sup>24</sup> *Wills Act* s 12(2), as amended by *Wills Act Amendment Act 1975* (SA) s 9, later amended by *Wills (Miscellaneous) Amendment Act 1994* (SA) s 7.

<sup>25</sup> UPC § 2-503 (amended 2010).

The third departure in the ULC's version of the dispensing power was to change its name, essentially as a sales tool. The American drafters called their measure 'the harmless error rule',<sup>26</sup> once again borrowing a phrase already used in other fields of law.<sup>27</sup>

In 1995, five years after the ULC promulgated its model dispensing power legislation, the ALI endorsed the principle. The ALI was then at work on a general revision of its *Restatement of Property: Wills and Other Donative Transfers* ('*Restatement*'),<sup>28</sup> and the *Restatement* drafters took the occasion to approve as a principle of American law that '[a] harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.'<sup>29</sup> This provision, although manifestly tracking the language of Uniform Probate Code § 2-503, constitutes a potentially important extension of the Code provision, because, unlike the Code, the *Restatement* does not presuppose or depend upon legislative authority. The *Restatement* treats the dispensing power as an intrinsic power of the court. The rationale is that since the purpose of the Wills Act formalities is to implement the decedent's testamentary intent, the court's function includes the power to apply the statute in a manner that serves the statutory purpose.

## V RESISTANCE

Uniform Acts such as § 2-503 of the Probate Code are models, recommended to the states for adoption. Some are widely and rapidly enacted, especially when there is an interest group or constituency supporting them. But proposed uniform acts that lack such support often languish, not because of opposition, but simply on account of inertia, and that has been the fate of the § 2-503 dispensing power. A quarter century after the Commission promulgated the measure, it has been adopted in only 11 of the 50 states, among them the populous states of California, Michigan, New Jersey, Ohio, and Virginia.<sup>30</sup> Moreover, in some of the 11 states, the measure has been subjected to non-uniform modifications. California's statute provides that the dispensing power may not be used to excuse a testator's missing signature; Colorado and Virginia have similar provisions, but with the exception that the court may grant relief in 'switched will' cases.

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<sup>26</sup> Ibid.

<sup>27</sup> See, eg, Supreme Court of the United States, *Federal Rules of Civil Procedure* (at 1 December 2007) r 61.

<sup>28</sup> American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) vol 1.

<sup>29</sup> Ibid § 3.3, 217.

<sup>30</sup> Cal Prob Code § 6110(c)(2) (West 2016); Colo Rev Stat § 15-11-503 (West 2016); Haw Rev Stat Ann § 560:2-503 (West 2016); Mich Comp Laws § 700.2503 (West 2016); Mont Code Ann § 72-2-523 (West 2016); NJ Stat Ann § 3B:3-3 (West 2012); Ohio Rev Code Ann § 2107.24 (West 2016); Or Rev Stat § 112.238 (West 2016); SD Codified Laws § 29A-2-503 (West 2016); Utah Code Ann § 75-2-503 (West 2013); Va Code Ann § 64.2-404 (West 2016).

What accounts for the seeming disinterest in enacting the reform in so many American jurisdictions? The main explanation is that in fields such as probate and trust law in which the legal profession plays a dominant role in practice, state legislatures tend to defer to the agenda of the legal professional organisations in the jurisdiction.<sup>31</sup> The professionals, who know what the relevant Wills Act requires and who know how to ensure compliance for their clients, do not have any incentive to encourage the legislature to enact a measure such as the dispensing power, which is prevailingly brought to bear in cases involving ‘kitchen table wills’ — that is, wills in the drafting of which the testator did not seek legal counsel.

More than inertia is responsible for the reluctance of the American legal establishment to embrace the dispensing power. As the name announces, the dispensing power enhances judicial power. Such enhancement presupposes an able and trustworthy probate bench, of the sort that has developed the South Australian s 12(2) case law. In some American states, we do not have such a bench.<sup>32</sup> In my state of Connecticut, for example, the probate judges are chosen by popular election, and until lately were not required to be legally trained. We have had a cocktail waitress as the judge in one district, and a pig farmer in another. Some years ago the voters of a New Mexico district elected an 18 year old student as the probate judge.<sup>33</sup> Distrust of the probate bench is a main reason why the Americans have never been willing to emulate Australian family provision legislation, which gives the probate judge such vast discretion to alter the decedent’s estate plan if the judge thinks it unfair. Years ago the late Frank Hutley of the New South Wales bench remarked to me, not completely in jest, that in consequence of the family provision legislation, the only thing that a testator can assure by will in New South Wales is the choice of an executor. If you don’t trust your judges, you’re not going to give them that sort of power.

Yet another reason for the reluctance of American legislatures to enact the dispensing power has been the fear that it might unleash a litigation boom. The rule of strict compliance with the Wills Act functions as a conclusive presumption of invalidity of a defectively executed instrument. The dispensing power reduces that presumption from conclusive to rebuttable, thereby allowing litigation that the rule of strict compliance has suppressed. In the United States, policymakers tend to worry about litigation effects somewhat more than elsewhere, in part because the American

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<sup>31</sup> Regarding the role and influence of the organised legal profession in the drafting and enactment of uniform trust and estate acts, see John H Langbein, ‘Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers’ (2012) 38 *ACTEC Law Journal* 1, 5–7; regarding the trend toward statute in the field, see John H Langbein, ‘Why Did Trust Law Become Statute Law in the United States?’ (2007) 58 *Alabama Law Review* 1069.

<sup>32</sup> Regarding the imperious misbehaviour of the New York City probate judge, Surrogate Marie Lambert, who presided over a celebrated will contest in 1986, see David Margolick, *Undue Influence: The Epic Battle for the Johnson & Johnson Fortune* (William Morrow, 1993).

<sup>33</sup> Brian Noyd, ‘A Judge Who’s Thinking about Law School’ *National Law Journal*, 24 December 1984, 39; ‘Lookout’, *People* (online) 15 April 1985, <<http://people.com/archive/lookoutvol23no15/>>.

civil procedure system does not follow the loser pays principle, that is, the rule that requires the losing litigant to pay the winner's litigation costs.<sup>34</sup> The loser pays rule is thought to deter adventurous litigation in other legal systems.<sup>35</sup> In recommending the dispensing power, both the ALI and the ULC felt constrained to emphasise their belief that experience elsewhere showed that the dispensing power did not breed litigation. Both groups pointed to the report of an Israeli judge, prepared in response to an inquiry from the Law Reform Commission of British Columbia, which explained that excusing power legislation in effect in Israel from the late 1950s had had the effect of reducing litigation, by discouraging disputes about whether some innocuous error in Wills Act compliance had occurred. Potential contestants learned not to bring such suits, the judge explained, because the courts would use the excusing power to validate the will anyhow.<sup>36</sup>

I remain optimistic that as time goes on, more American jurisdictions will enact the dispensing power provision of the Uniform Probate Code, and that in states in which such legislation is not in force, more courts will follow the logic of the *Restatement* and act without legislation.<sup>37</sup> Uniform acts have a long shelf life. States sometimes enact a uniform act decades after the Commission promulgated it.<sup>38</sup> In law school trusts and estates courses, the casebooks<sup>39</sup> have been directing attention to the dispensing power and its case law,<sup>40</sup> thereby familiarising the new generation of practitioners with the question.

<sup>34</sup> American Law Institute and UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press, 2006) 7, citing James W Hughes and Edward A Snyder, 'Litigation and Settlement under the English and American Rules: Theory and Evidence' (1995) 38 *Journal of Law and Economics* 225; Alan Tomkins and Thomas Willging, *Taxation of Attorney's Fees: Practices in English, Alaskan and Federal Courts* (Federal Judicial Center, 1986); A Ehrenzweig, 'Reimbursement of Counsel Fees and the Great Society' (1966) 54 *California Law Review* 792; Thomas D Rowe, 'The Legal Theory of Attorney Fee Shifting: A Critical Overview' [1982] *Duke Law Journal* 651: 'In almost all ... countries [other than the US], except Japan and China, the winning party, whether plaintiff or defendant, recovers at least a substantial portion of litigation costs.'

<sup>35</sup> See J Robert S Prichard, 'A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law' (1988) 17 *Journal of Legal Studies* 451.

<sup>36</sup> UPC § 2-503, comment (amended 2010); American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) vol 1 § 3.3, 225.

<sup>37</sup> As was done in a prominent New Jersey case, *Re Probate of the Alleged Will of Ranney*, 589 A 2d 1339 (NJ, 1991), before that state enacted UPC § 2-503 (amended 2010) in NJ Stat Ann § 3B:3-3 (West 2012).

<sup>38</sup> In 2008, Massachusetts enacted a version of the Uniform Probate Code, including procedure provisions initially promulgated in 1969. See Mass Gen Laws ch 190B (2017).

<sup>39</sup> See, eg, Jesse Dukeminier and Robert H Sitkoff, *Wills, Trusts and Estates* (Wolters Kluwer, 9th ed, 2013) 178–96.

<sup>40</sup> The reported American case law is broadly comparable to the South Australian cases, but smaller — in part, I think, because only a few American jurisdictions make routine provision for reporting first instance cases.

## VI ELECTRONIC WILLS

We are about to get a new round of attention to the dispensing power in the United States on account of quite recent developments in the practice of testation. Both in Australia and the United States, there is a growing trend toward persons attempting to use electronic technology, notably computer or video devices, to make wills. The probate courts in both countries have begun to issue decisions wrestling with the validity of such wills, and recently in the United States the ULC has ordered the creation of a drafting committee to propose a legislative response to this phenomenon of digital or electronic testation.<sup>41</sup> I want to conclude this lecture by reviewing a few of the cases that have occurred and by examining the legislative choices that are emerging. I should preface this discussion by saying that many of us in the estate planning world are unhappy that this development is happening, but the spread and pervasiveness of the underlying technologies make it inevitable. Many people in the younger generation are so acclimated to digital and electronic forms of communication that they seldom encounter sheets of paper in their daily lives. Experience to date already shows their expectation that the law will let them conduct paperless testation.

One variety of these cases concerns persons who attempt to make wills by recording oral instructions on video or audio devices. We had an early instance in a case decided by the Wyoming Supreme Court in 1983.<sup>42</sup> The decedent had created a tape recording expressing his testamentary wishes, which he left in a sealed envelope. On the envelope, which he signed, he wrote: ‘To be played in the event of my death only!’<sup>43</sup> The appellate court sustained the probate court’s refusal to treat the electronic voice record as the equivalent of handwriting. Lacking any dispensing power statute, the court refused to enforce the attempted will. The court declared that the decedent’s testamentary ‘[i]ntent is immaterial here, because there is no valid will.’<sup>44</sup>

Although one can argue that an electronic recording is an oral will and hence void for want of writing, the oral content in such a case is recorded and preserved at the time spoken. In the 2015 South Australian case, *Re Estate of Wilden*,<sup>45</sup> the court was confronted with a purported will recorded on a DVD disc. Relying on the dispensing power, the court concluded that ‘the range of possible documents constituting wills [includes] ... a recording in the form of a DVD ... consistent with the liberal construction that is to be accorded to remedial legislation, such as section 12(2)’ of the Wills

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<sup>41</sup> See Uniform Law Commission, *Committees: Electronic Wills* <[http://www.uniformlaws.org/Committee.aspx?title=Electronic Wills](http://www.uniformlaws.org/Committee.aspx?title=Electronic+Wills)>.

<sup>42</sup> *Re Estate of Reed; Buckley v Holstedt*, 672 P 2d 829 (Wyo, 1983) (‘*Reed*’). Wyoming, like many American jurisdictions, recognises so-called holographic wills, in which attestation is not required when the will is in the testator’s handwriting. The proponents of the recording in *Reed* were arguing that the testator’s recorded voice served the function of the handwriting requirement for a holographic will.

<sup>43</sup> *Ibid* 830.

<sup>44</sup> *Ibid* 833.

<sup>45</sup> (2015) 121 SASR 516.

Act.<sup>46</sup> Other DVD wills have been sustained in reported cases from Queensland in 2013<sup>47</sup> and New South Wales in 2015.<sup>48</sup>

In 2013, a Queensland court sustained under the State's dispensing power an attempted will created on an iPhone, emphasising that the electronic record 'commenced with the words, "This is the last Will and Testament ..." of the deceased'.<sup>49</sup> The Court relied in part on a 2012 New South Wales case, *Yazbek v Yazbek*,<sup>50</sup> validating under that State's dispensing power a 'Microsoft Word document ... found in the deceased's ... laptop computer'.<sup>51</sup> In 2013, an Ohio court used that state's version of the Uniform Probate Code dispensing power to validate a will found on a Samsung Galaxy tablet device.<sup>52</sup> A 2015 New South Wales case used the dispensing power to sustain a computer generated will found on a thumb drive or USB stick, a small portable memory storage device.<sup>53</sup>

It was sheer fortuity that the dispensing power statutes were in force before these cases of attempted digital wills began occurring. Going forward, the legislative question that is emerging is whether or not to revise the Wills Act formalities to regulate the spread of digital wills. That is the task that the ULC has assigned to its newly formed drafting committee on digital wills. On one view of the matter, the dispensing power has already done the job, so the drafting committee can declare victory and go home. But especially in the United States, where only 11 of our 50-plus jurisdictions have the dispensing power, inaction does not seem a promising solution. In one of our states, Nevada, the legislature has acted to prescribe conditions for validating a so-called electronic will, which the statute defines as a will that is 'written, created and stored in an electronic record'.<sup>54</sup> The statute imposes new formal requirements for such a will, insisting that the will contain 'the date and the electronic signature of the testator'.<sup>55</sup> The term 'electronic signature' has been in use for commercial transactions and has been defined to mean 'an electronic symbol, sound, or process' intended by its maker to serve as a signature.<sup>56</sup> The Nevada statute further requires

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<sup>46</sup> Ibid 519 [12] (Gray J). The opinion cites earlier cases from New South Wales and Queensland in which recordings were construed to constitute documents for Wills Act purposes without reliance on dispensing power authority: *Mellino v Wnuk* [2013] QSC 336 (27 November 2013); *Cassie v Koumans*; *Estate of Cassie* [2007] NSWSC 481 (9 May 2007).

<sup>47</sup> *Mellino v Wnuk* [2013] QSC 336 (27 November 2013).

<sup>48</sup> *Re Estate of Chan (Deceased)* [2015] NSWSC 1107 (7 August 2015).

<sup>49</sup> *Re Yu* (2013) 11 ASTLR 490.

<sup>50</sup> [2012] NSWSC 594 (1 June 2012).

<sup>51</sup> Ibid [155].

<sup>52</sup> *Re Estate of Javier Castro* (Ohio Ct Com Pl, No 2013ES00140, 19 June 2013).

<sup>53</sup> *Estate of Currie* (2015) ASTLR 361.

<sup>54</sup> Nev Rev Stat § 133.085(1)(a) (2017).

<sup>55</sup> Ibid § 133.085(1)(b) (2017).

<sup>56</sup> Uniform Law Commission, 'Drafting Rules' (2012) § 304(a). Both federal legislation and a widely enacted uniform act governing state law validate electronic signatures in commercial transactions, but both acts exclude wills: *Electronic Signatures in Global*

that the electronic will be ‘created and stored in such a manner that ... [o]nly one authoritative copy exists [and that that] ... copy [be] maintained and controlled by the testator or a custodian designated by the testator in the electronic will’.<sup>57</sup>

The Nevada statute also insists that such a will contain what it calls ‘at least one authentication characteristic of the testator’.<sup>58</sup> ‘Authentication characteristic’ is defined to mean

a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.<sup>59</sup>

You can see at once the danger in statutory terms of this sort. The Nevada legislation imposes new formal requirements intended to generate evidence of the genuineness of the purported will. But these new hurdles are likely to be ones that many testators, especially those unaided by counsel, will fail to master. It is particularly ironic that the dispensing power, which has opened the way to enforcing digital wills by excusing noncompliance with the traditional Wills Act formalities, is begetting new formalities. These new formalities will extend the sphere of application of the dispensing power ever more, as testators flunk compliance with them.

I should also mention that any comprehensive effort to legislate in this area needs to confront a fundamental aspect of wills law, which is how the testator who creates a digital will can go about revoking it. The Wills Acts of all the common law jurisdictions provide two modes of revocation, either by executing a subsequent revoking instrument with Wills Act formality, or by so-called ‘physical act revocation’ (burning, tearing, obliterating, destroying) with intent to revoke. Suppose that the testator who has drafted a computer will erases it, but a software expert is able to recover the text from the hard drive? Or suppose that the testator who left his or her will on a thumb drive decides to destroy the thumb drive by stamping on it or crushing it with a hammer?

Let me conclude by repeating that I am of the generation that is not very comfortable with the new information technologies. I would be quite content if this intrusion into the accustomed patterns of testation were not happening. But it is, the cat is out of the bag, and the legal systems must respond. Should we try to devise specific Wills Act criteria for electronic testation, and if so, what dimensions of the process should we seek to govern and how?

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*and National Commerce Act* 15 USC §§ 7001–7031 (2000); Uniform Electronic Transactions Act (1999). See generally Steven Domanowski, ‘ESign: Paperless Transactions in the New Millennium’ (2001) 51 *DePaul Law Review* 619.

<sup>57</sup> Nev Rev Stat §§ 133.085(1)(c)–133.085(1)(c)(2) (2017).

<sup>58</sup> *Ibid* § 133.085(1)(b) (2017).

<sup>59</sup> *Ibid* § 133.085(6)(a) (2017).



## A COLONIAL HISTORY OF THE RIVER MURRAY DISPUTE

### ABSTRACT

This article examines the history of the dispute over the sharing of the waters of the River Murray between the colonies, with particular emphasis on the period from the mid-1880s to the mid-1890s. The article shows that the change in water use by the colonies during this period had a significant impact on the question of how the water should be shared between the colonies. The article examines the early legal arguments regarding the ‘rights’ of the colonies to the waters of the River Murray and argues that these early legal analyses influenced the drafting of the *Australian Constitution*, which in turn has influenced the way similar disputes between the states are resolved today.

### I INTRODUCTION

Talk of reducing the flow of the waters of the River Murray evokes strong emotions in South Australians, and especially in their members of parliament.<sup>1</sup> This is not a recent phenomenon and has been the case since colonial times.<sup>2</sup> This article examines the history of the dispute over the sharing of the waters of the River Murray between the colonies, with particular emphasis on the period from the mid-1880s to the mid-1890s. I argue that this period, in the lead up to the Australasian Federal Conventions of the 1890s, shaped the Convention debates, which in turn influenced the drafting of the *Australian Constitution* and the way in which the issue of the sharing of the waters of the River Murray between the states has been dealt with since Federation.

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<sup>1</sup> See, eg, ‘SA MP Reined in after “F\*\*\* You All” Comments Over Murray-Darling Basin Plan’, *ABC News* (online), 19 November 2016 <<http://www.abc.net.au/news/2016-11-19/sa-minister-reined-in-over-expletive-laden-outburst/8039798>>. Premiers Weatherill, Rann and Olsen have all threatened legal action against the upstream states at one point or another: see respectively Lucille Keen, ‘SA Mulls Legal Redress’, *The Australian Financial Review* (Sydney), 29 May 2012, 11; Michael Owen and John Ferguson, ‘Rann’s Murray Warning to States’, *The Australian* (Sydney), 15 June 2011, 10; Greg Kelton, ‘Olsen’s Warning at Interstate Plans to Divert Murray Water’, *The Advertiser* (Adelaide), 10 January 2000, 5.

<sup>2</sup> See, eg, below n 54 and accompanying text.

During the second half of the 19<sup>th</sup> century the utilisation of the River Murray became an increasingly important issue for the Australian colonies. In the 1850s the River was seen merely as a boundary separating the colonies of New South Wales and Victoria. Over the next 50 years, the way in which the colonial governments viewed the River changed; it became a highway for trade and later a water source for irrigation. As the extraction of water from the River for irrigation increased in all three colonies, the question arose as to how the waters of the River should be shared between the colonies. This article examines how the colonies approached this question and how these approaches have in turn influenced the way in which similar disputes between states are dealt with in modern day.

This article is divided into three parts. The first part of the article sets out the development (and subsequent decline) of the River Murray as a vital trade route from the 1850s to the 1880s. The second part of the article explains the development of irrigation schemes along the Murray during the 1880s and the investigations that all three colonies undertook as to how best to utilise the River's water. These first two parts detail the changes in water use along the River before federation and explain how these changes in use affected the debate between the representatives of the colonies with respect to the sharing of water from the River Murray between the colonies. In this article I show that as river navigation declined in favour of the railways as the preferred method of transporting goods to and from inland south-eastern Australia, South Australia's negotiating position weakened from a *practical* perspective; the other colonies were no longer reliant on South Australian boats and ports. I argue (with the benefit of hindsight) that if there was an opportunity for the colonies to resolve the question of how to share the water between the colonies during this period it needed to be done while irrigation schemes were still in their infancy.

The final part of the article considers the early legal analysis during the colonial period of the sharing of the water from the River Murray in the absence of an inter-governmental agreement. In this final part of the article I also explain that prior to federation there was no court capable of hearing and adjudicating a dispute regarding the 'rights' of the colonies with respect to the River Murray without the consent of the colonies involved. This left South Australia in a weak position, with no *practical* or *legal* incentives for the other colonies to reach agreement with the downstream colony.

Understanding this period in the history of the River Murray dispute is important in explaining the position representatives from each colony later took when drafting the *Australian Constitution* at the Australasian Federal Conventions in the 1890s. When the attitudes that the Federal Convention delegates took into the Conventions are understood, it is hardly surprising that the delegates were unable to reach agreement as to how the waters of the River Murray should be shared between the colonies (and how this should be expressed in the *Australian Constitution*).<sup>3</sup>

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<sup>3</sup> For a discussion of the debates at the Australasian Federal Conventions and the history of the drafting of s 100 of the *Australian Constitution* — the only section of the *Australian Constitution* to mention 'waters of rivers' — see John M Williams

## II 1850–1880: NAVIGATION AND RIVER TRADE

*A Steamboats Navigate the Murray*

Navigation along the River Murray commenced during the 1850s. The South Australian Government was keen to encourage trade along the River and offered the payment of a bonus to the first steamboats to travel from Goolwa at the mouth of the Murray to the junction of the Murray and Darling Rivers. In August 1850 the South Australian Colonial Secretary, Charles Sturt, declared a bonus

of £4,000 to be equally divided between the first two Iron steamers of not less than 40-horse power, and not exceeding two feet draft of water when loaded, as shall successfully navigate the waters of the River Murray from the Goolwa to (at least) the junction of the Darling, computed to be about 551 miles.<sup>4</sup>

In 1853 two South Australians, William Randell and Francis Cadell, took up the challenge and set off separately from Goolwa to navigate the River Murray. On 3 September 1853 Randell's steamer, the *Mary Ann*, was first to reach the Darling River Junction.<sup>5</sup> Cadell's steamer, the *Lady Augusta*, caught up to Randell and overtook the *Mary Ann* just upstream of Euston; Cadell was the first of the two to reach Swan Hill on 17 September 1853.<sup>6</sup> During the next 10 years the upper reaches of the Murray, the Darling and the Murrumbidgee were navigated and cleared, and the river trade increased. By the 1860s there were almost 20 steamers transporting goods up and down the river.<sup>7</sup> During the 1870s the river trade grew and there were hundreds of steamers travelling along the river.<sup>8</sup> By 1882 the trade along the rivers within the Murray-Darling Basin was estimated to be worth in excess of £1 million.<sup>9</sup> The growth in river trade was largely due to an increase in sheep numbers across inland Australia and the transportation of the wool clip from inland rural settlements

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and Adam Webster, 'Section 100 and State Water Rights' (2010) 21 *Public Law Review* 267. For an explanation of the legal arguments raised during the Australasian Federal Conventions see Adam Lyall Webster, *Defining Rights, Powers and Limits in Transboundary River Disputes: A Legal Analysis of the River Murray* (PhD Thesis, University of Adelaide, 2014) 90–102.

<sup>4</sup> Gwenda Painter, *The River Trade: Wool and Steamers* (Turton & Armstrong with Pioneer Settlement Press, 1979) 9. See also Ian Mudie, *Riverboats* (Rigby, 1961) 15.

<sup>5</sup> Mudie, above n 4, 21. Each of Randell and Cadell was ineligible for the Government bonus as each steamer did not meet the specifications required: at 25.

<sup>6</sup> Peter Phillips, *River Boat Days on the Murray, Darling, Murrumbidgee* (Lansdowne, 1972) 15.

<sup>7</sup> *Ibid* 7. See also South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 15: 'In 1857 ten steamers, with barges, were trading between Albury and South Australia'.

<sup>8</sup> Phillips, above n 6, 7.

<sup>9</sup> Patrick Glynn estimated total river trade to be worth £1 207 978 in 1882 and £517 717 in 1881: see P McM Glynn, *A Review of the River Murray Question, Riparian Rights, &c* (W K Thomas, 1891) 8. However, the value of the trade has been estimated to be as much as £5 million: see Painter, above n 4, 87.

to port formed a significant proportion of the river trade.<sup>10</sup> As the downstream colony in control of the sea ports South Australia had the most to gain from the river trade.

### *B Riverboats Compete with the Railways*

With the development of the railways, the South Australian steamers had to compete with their Victorian counterparts. The Victorian steamers, based at Echuca, utilised the railway which had been extended to that town from Bendigo in 1864. The wool clip was brought by steamer to Echuca where it would then be transported by rail down to Melbourne for export.<sup>11</sup> The South Australian vessels would bring wool back to Goolwa near the mouth of the Murray where it would be sent along the tramway to Port Elliot or Victor Harbor to be loaded on to boats for export to London.<sup>12</sup>

The South Australian Government was eager to ensure that it maintained — or even increased — its share of the river trade. While the South Australian boats controlled much of the Darling trade, the South Australian Government was concerned that trade from the Murrumbidgee River would pass through Echuca and on to Melbourne by rail rather than down the Murray to the South Australian ports. As a consequence, in 1870, the South Australian Parliament established a Select Committee to report on the river traffic along the Murray.<sup>13</sup> The protectionist Victorian Government offered discounted haulage rates to farmers sending wool from the Riverina region in New South Wales to Melbourne and South Australia was concerned that this would affect its share of the river trade.<sup>14</sup> Despite these fears, South Australia maintained its dominance in the river trade through the early 1880s, especially along the Darling River.<sup>15</sup>

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<sup>10</sup> Painter, above n 4, 59, 95; Phillips, above n 6, 50. Trade between the colonies was subject to tariffs and customs duties. On occasions the tariffs became a source of tension between the colonies: from W G McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 98.

<sup>11</sup> Phillips, above n 6, 51, 62; Painter, above n 4, 42.

<sup>12</sup> Painter, above n 4, 41; see also, Phillips, above n 6, 54.

<sup>13</sup> South Australia, *Report of the Select Committee of the House of Assembly on the River Murray Trade*, Parl Paper No 86 (1870).

<sup>14</sup> The discounted rate meant it was cheaper for farmers from NSW to send their wool to Melbourne than for the Victorian farmers on the other side of the river: see McMinn, above n 10, 98. The Select Committee concluded:

Victoria has gradually, by the construction of the Echuca Railway, and the presentation of every possible inducement to attract the trade through her territory, obtained almost the whole of the traffic of the Murrumbidgee, although her natural position, even with regard to the districts through which that river flows, was vastly inferior to that of South Australia.

South Australia, *Report of the Select Committee of the House of Assembly on the River Murray Trade*, Parl Paper No 86 (1870) v.

<sup>15</sup> In 1882, over 50 000 bales of wool were transported by river steamers to South Australian ports, compared with the Victorian steamers that transported fewer than 8 000 bales that same year: South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 18.

The lack of rail infrastructure in New South Wales had initially allowed the South Australian steamers to transport wool from that colony down the Darling to the South Australian ports. However, that changed when New South Wales expanded its rail network inland during the 1880s and 1890s.<sup>16</sup> As a consequence, by the end of the 19<sup>th</sup> century much of inland south-eastern Australia was easily accessible by rail and the expansion of the rail network ultimately led to a decline in the river trade. South Australia was no longer needed for its ports for export; having the mouth of the River within its territory was no longer a competitive advantage when it came to trade to and from inland Australia.

### *C Drought Hampers River Navigation*

The steamers were not only competing against each other and the expanding rail network, but also against the harsh Australian climate. South-eastern Australia was affected by droughts in 1864–6, 1880–6 and 1895–1903.<sup>17</sup> During these periods river levels dropped significantly and sections of the rivers became impossible to navigate. In particular, upper sections of the Darling River became nothing more than a series of watering holes for a number of months of the year.<sup>18</sup> This often led to delays of some months in the wool clip reaching port.<sup>19</sup> These delays only further strengthened the demand for rail transportation over the river steamers.

During this early period the focus on river navigation meant that the primary subject of intercolonial communications was the clearing of the river for navigation and the removal of snags from the river (and which colony was to pay for it);<sup>20</sup> however, as water uses changed in the 1880s, so too did the issues of most concern to the colonies. The focus would soon turn to irrigation.

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<sup>16</sup> The main southern railway line from Sydney had reached Albury by 1881, Hay in 1882 and Bourke in 1885: Painter, above n 4, 91; South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 16. Similarly, the Victorian rail network had also been extended to Swan Hill in 1890 and would later reach Mildura in 1903: Painter, above n 4, 92.

<sup>17</sup> Bureau of Meteorology, *Living with Drought* <[web.archive.org/web/20120717182119/http://www.bom.gov.au/climate/drought/livedrought.shtml](http://web.archive.org/web/20120717182119/http://www.bom.gov.au/climate/drought/livedrought.shtml)>; Ian Castles, *Year Book Australia 1988* (Australian Bureau of Statistics, 1988) 622.

<sup>18</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 818 (George Reid).

<sup>19</sup> Painter, above n 4, 54, 85–6; see also New South Wales, Royal Commission — Conservation of Water, *Third and Final Report of the Commissioners* (1887) 11–12; New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 45.

<sup>20</sup> Even in 1881 the South Australian Government seemed more interested in clearing the Murray for navigation than considering the issue of irrigation: see South Australia, *Correspondence Re Clearing River Murray*, Parl Paper No 59 (1882).

### III 1880–1895: IRRIGATION, CONSERVATION AND ROYAL COMMISSIONS

The devastating drought that struck south-eastern Australia in the early 1880s caused water shortages in parts of rural Australia so severe that potable water needed to be transported by rail to the towns in those regions. Victorian Member of Parliament, Mr Charles Young, remarked that the water shortage was so serious that the situation became a matter of ‘life or death.’<sup>21</sup> These dire conditions led to the colonial governments recognising a need to better utilise the water of the Murray-Darling Basin and resulted in all three colonies — New South Wales, South Australia and Victoria — establishing separate Royal Commissions to examine the issue of water use within their respective territories. The use of water for irrigation and water conservation (that is, the locking and damming of a river) were of particular interest to all three Royal Commissions. It was thought that for the colonies to grow and prosper, the waters of the Murray needed to be better utilised for agriculture.<sup>22</sup> However, diverting water for irrigation had the potential to lower water levels and thereby affect navigation and irrigation further downstream.

To varying degrees, each of the three colonies recognised the importance of discussing how water was to be shared amongst them. However, despite acknowledging the need to discuss the issue, arranging a meeting proved impossible, primarily due to the attitude taken by the Government of New South Wales. It was during this period that the seeds of antagonism were sown that would continue to grow during the Australasian Federal Conventions and after federation.

This section examines the failed attempts to organise a meeting between the three colonies to discuss the issue of the allocation of water from the River Murray. It was during this time that the first assertions regarding the ‘rights’ of the colonies to the water from the River Murray were made, albeit with limited explanation as to the substantive principles governing them. South Australia’s negotiating position was weakening. The other colonies were no longer dependent on South Australia for transporting goods to and from the inland parts of their colonies. Further, the legal position of South Australia with respect to the ‘right’ to water from the River was far from certain. From a legal perspective, these were very much unchartered waters.

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<sup>21</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 July 1886, 558 (Charles Young). From 1882 parts of the colony of Victoria were impacted by drought: Victoria, *Parliamentary Debates*, Legislative Assembly, 14 July 1886, 708 (Charles Officer).

<sup>22</sup> New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 32, 45; New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 2–4; New South Wales, Royal Commission — Conservation of Water, *Third and Final Report of the Commissioners* (1887) 2, 4, 6–7, 18.

*A New South Wales Royal Commission on the Conservation of Water*

On 10 May 1884, during a prolonged drought, New South Wales was the first colony to establish a Royal Commission to consider the question of how best to conserve and utilise the waters of the River Murray.<sup>23</sup>

Between 1884 and 1886 the New South Wales Royal Commission produced three reports. The primary focus of the Commission was to investigate practical measures for improving water storage and supply across the colony of New South Wales as opposed to examining the legal questions surrounding the allocation of water between the colonies. However, in the Commission's first report it recognised that one of the 'important points' yet to be investigated was 'the terms on which an equitable settlement of intercolonial water rights in the waters of the Murray River can be made.'<sup>24</sup>

The Commission was of the view that river traffic would ultimately decline in favour of the railways.<sup>25</sup> As a consequence, they showed little concern for how upstream conservation might affect river navigation. In its second report, the New South Wales Royal Commission concluded:

Capital has been invested in steamers, barges, wharves, and warehouses, and the facilities for communication and the transport of commodities afforded by the Murray to the dwellers upon its banks and in districts more remote have been considerable, but the necessity of navigation is being gradually superseded, and it is by no means improbable that, before the time arrives for joint action on the part of Victoria and New South Wales in the construction of weirs, anything like the through navigation of the Murray will be abandoned as unprofitable.<sup>26</sup>

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<sup>23</sup> New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 1. William Lyne, politician and 'persistent advocate of water conservation' was appointed President of the Commission: Chris Cuneen, 'Lyne, Sir William John (1884–1913)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 179, 180. The purpose of the New South Wales Royal Commission was

to make a diligent and full inquiry into the best method of conserving the rainfall, and of searching for and developing the underground reservoirs supposed to exist in the interior of this Colony, and also into the practicability, by a general system of water conservation and distribution, of averting the disastrous consequences of the periodical droughts to which the Colony is from time to time subject.

New South Wales, Royal Commission — Conservation of Water, *First Report of the Commissioners* (1885) 1.

<sup>24</sup> *Ibid* 3.

<sup>25</sup> The Commission arguably went even further to suggest that railways *should* be the primary means of transport: *Ibid* 44–5.

<sup>26</sup> New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 5.

‘Joint action’ was limited in this context to that between New South Wales and Victoria; no mention was made of South Australia.<sup>27</sup>

The New South Wales Royal Commission’s second report concluded that the use of the waters of the Murray should be optimised and ought not to be allowed simply to ‘flow wastefully into the sea’.<sup>28</sup> It was silent as to the effect any future development might have on the environment. The primary concern of the Commission, much like the Victorian Royal Commission appointed later that same year, was to maximise water storage and irrigation. In doing so, the area of land used for agriculture could be increased, which would ultimately lead to the colony being able to grow and sustain a larger population. The focus on enhancing water conservation and irrigation *within* New South Wales, and the emphasis on practical measures for achieving this objective, meant that the legal questions regarding the allocation of the water from the River *between* the colonies were largely ignored in this early stage of the development of a legal framework for the River. To the extent to which the legal position was briefly mentioned, the Commissioners appeared to take the view that ownership in the water of the River Murray while it flowed through the territory of New South Wales was vested in that colony.<sup>29</sup> As I explain later in this article, the legal question became most important when all three colonies — New South Wales, South Australia and Victoria — wanted to divert the waters of the Murray for irrigation.

### B *Victorian Royal Commission on Water Supply*

In the early 1880s the extent to which irrigation could be utilised in Australia was a great unknown. The Victorian Government was particularly interested in developing irrigation along the River Murray and further investigation was deemed necessary. By 1884, and after some experimentation, the potential for irrigation was beginning to be realised and farmers started to see the benefits first hand:<sup>30</sup> crop yields were often double from irrigated land when compared against non-irrigated land.<sup>31</sup>

On 23 December 1884 the Victorian Government appointed a Royal Commission, chaired by Alfred Deakin, and charged with the task of ‘inquir[ing] into the question

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<sup>27</sup> Ibid 6. The Commission added: ‘the importance of navigation, so far as the Murray is concerned, may also be still further lessened by the further development of the railway systems of South Australia and Victoria’.

<sup>28</sup> Ibid 3.

<sup>29</sup> Ibid 2, relying on the *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict. There is also some brief discussion of water allocation between the colonies to ‘safeguard the rights of South Australia’: at 4. However, the position seemed somewhat inconsistent with the position that New South Wales had the legal rights of ownership to the river: at 2.

<sup>30</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 1886, 430 (Alfred Deakin).

<sup>31</sup> Ibid 423–4 (Alfred Deakin); Victoria, *Parliamentary Debates*, Legislative Assembly, 6 July 1886, 566 (Walter Madden).

of Water Supply, and into other matters relating thereto'.<sup>32</sup> Deakin's work as chairman of the Royal Commission was highly influential in the establishment and regulation of irrigation works within that colony. The focus of the Royal Commission's reports was the investigation of the success of irrigation schemes established in other countries with similar climatic conditions to Australia and the consideration of whether like schemes could be implemented successfully in Victoria. On Christmas Eve 1884 — the day after the Royal Commission was appointed — Deakin departed for a three-month visit to America.<sup>33</sup> Deakin travelled throughout the western United States;<sup>34</sup> its dry, arid landscape was not dissimilar to parts of rural Australia. He was keen for Victorians to learn from his experiences and, upon his return, provided a detailed account to the Victorian Government of the American irrigation schemes.<sup>35</sup> Two years later Deakin was invited to attend the Colonial Conference in London and en route to the Conference Deakin visited Egypt, Italy and France. Upon returning to Melbourne he published a further report of the Royal Commission examining irrigation in those countries and its applicability to Victoria.<sup>36</sup>

The reports of the Victorian Royal Commission focussed on establishing irrigation schemes within the colony of Victoria and did not consider how the schemes might affect the other colonies. The Commission did not examine legal questions associated with Victoria's access to the River Murray and its tributaries. However, the Commission noted: 'There are many matters of moment in connexion with the Water Supply of the northern parts of Victoria which can only be properly considered

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<sup>32</sup> Victoria, Royal Commission on Water Supply, *First Progress Report* (1885).

<sup>33</sup> J A La Nauze, *Alfred Deakin — A Biography* (Melbourne University Press, 1965) vol 1, 85. La Nauze also notes (at 85) that Deakin returned to Australia in May 1885. See also J A La Nauze, *Alfred Deakin* (Oxford University Press, 1962) 10.

<sup>34</sup> Deakin visited Colorado, California, Arizona, New and Old Mexico, Nevada and Kansas: Victoria, Royal Commission on Water Supply, *First Progress Report* (1885) 1.

<sup>35</sup> *Ibid.* La Nauze describes the report as 'a brilliantly lucid survey of the types and methods of irrigation, and of irrigation settlements, in western America': see La Nauze, *Alfred Deakin — A Biography*, above n 33, 85. In a further progress report of the Royal Commission, Mr J D Derry, a civil engineer who had accompanied Deakin to America provided a technical report considering the engineering aspects of the irrigation works in America: Victoria, Royal Commission on Water Supply, *Further Progress Report* (9 July 1885). In 1885 The Victorian Royal Commission produced two reports entitled 'Further Progress Report'. The first included the report of Mr Derry and the second provided an update as to the investigations that the Commission had undertaken in Victoria: Victoria, Royal Commission on Water Supply, *Further Progress Report* (31 August 1885).

<sup>36</sup> Deakin did not spend a great deal of time in Italy and Egypt and he makes it clear that, unlike the report on western America, this report was based more on research than on personal experiences gained while visiting: see Victoria, Royal Commission on Water Supply, *Fourth Progress Report* (1887) 8–9. Deakin also later wrote about irrigation in India: Alfred Deakin, *Irrigated India — An Australian View of India and Ceylon, Their Irrigation and Agriculture* (Thacker & Co, 1893).

when the conditions of use of the Murray waters are clearly understood.<sup>37</sup> It is not clear whether this was a reference solely to the *physical* conditions, or also to the *legal* conditions upon which Victoria was permitted to use the water. One glaring omission from the reports was whether Victoria was permitted to access the waters of the Murray given that the southern bank of the river formed the boundary between New South Wales and Victoria.<sup>38</sup>

*C A Joint Royal Commission is Proposed*

While the Victorian Royal Commission did not consider the issue of how the waters of the Murray were to be shared between the colonies, the Victorian Government was active in attempting to arrange for the colonies to meet to discuss the matter. In July 1885 — at about the time that Deakin was delivering his report on irrigation in the western United States — the Victorian Premier, James Service, wrote to the South Australian Chief Secretary, John Downer, and noted: ‘Various proposals have been made — some of considerable importance — for dealing with the River Murray, both in the way of improving its navigation and utilising its waters for irrigation.’<sup>39</sup> He suggested that a joint Royal Commission be appointed:

As of course the interests of New South Wales, South Australia, and Victoria would be affected by any works of the description referred to, it seems desirable that the three colonies should combine and appoint a joint Royal Commission to inquire and advise on the subject.

I beg to invite the co-operation of your Government in this preliminary measure.<sup>40</sup>

Downer wrote back expressing the view that there would be ‘great difficulties’ in any agreement that would affect navigation, and expressing doubt that large scale irrigation could take place without that result.<sup>41</sup> However, Downer stated that South Australia would ‘probably’ join in a joint Royal Commission, ‘for the purpose of considering any proposals which might be submitted and for protecting the interests of this colony.’<sup>42</sup> Downer asked Service to inform him of ‘the nature of the proposals

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<sup>37</sup> Victoria, Royal Commission on Water Supply, *Further Progress Report* (31 August 1885) iv.

<sup>38</sup> *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, s 5.

<sup>39</sup> Letter from James Service, Premier of Victoria, to John Downer, Premier of South Australia, 18 July 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1.

<sup>40</sup> *Ibid.*

<sup>41</sup> Letter from John Downer, Premier of South Australia, to James Service, Premier of Victoria, 28 July 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1.

<sup>42</sup> *Ibid.*

referred to in you[r] letter as having been made to your Government respecting this matter.<sup>43</sup>

Reaching agreement with the Government of New South Wales with regard to a joint Royal Commission proved to be more difficult. In a letter to the Premier of Victoria dated 3 September 1885, the Premier of New South Wales, Alexander Stuart, stated that the letter that had been sent by Service

on [the] subject of waters of [the] River Murray, opens up a very important and very difficult question, which I have submitted for opinion of my honourable colleague, the Attorney-General, and which I must ask you to accept as my excuse for not having previously replied.<sup>44</sup>

Stuart assured Service and Downer that as soon as he received the Attorney-General's opinion he would advise them of that fact.<sup>45</sup> Whether that opinion was ever provided (and its content if it did exist) is not clear from the correspondence between the premiers.<sup>46</sup> Unfortunately, Stuart resigned as Premier in the following month due to ill health.<sup>47</sup> In what would become a familiar occurrence, the Government of New South Wales did not respond and communications between the colonies broke down. By the end of 1885 — six months after the Victorian Premier's first letter — a meeting between the three colonies had still not been arranged.

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<sup>43</sup> Ibid. Downer also sent a copy of this correspondence to the Colonial Secretary of New South Wales: Letter from John Downer, Premier of South Australia to Alex Stuart, Colonial Secretary of New South Wales, 3 August 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1.

<sup>44</sup> Letter from Alexander Stuart, Premier of New South Wales, to James Service, Premier of Victoria, 3 September 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2. Stuart also held the position of Colonial Secretary during his time as Premier. Downer's letter to Stuart quoted the Imperial legislation defining the boundary between New South Wales and Victoria and arguably created the impression that Downer, at least at this stage, saw this as primarily an issue between New South Wales and Victoria: Letter from John Downer, Premier of South Australia to Alex Stuart, Colonial Secretary of New South Wales, 3 August 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 1, citing *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, s 5.

<sup>45</sup> Ibid. Premier Stuart also sent a letter to Downer advising the South Australian Premier that he would be back in contact once he had taken advice from the Attorney-General: see letter from Alexander Stuart, Premier of New South Wales, to John Downer, Premier of South Australia, 3 September 1885 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2.

<sup>46</sup> The opinion books of the New South Wales Attorney-General of that time do not include any legal opinions on this issue: see '1877–1901' in *Opinions of the Attorney General* (State Archives and Records of New South Wales, NRS 303, 5/4696-99).

<sup>47</sup> Premier Stuart resigned due to ill health on 6 October 1885: Bede Nairn and Martha Rutledge, 'Stuart, Sir Alexander (1824–1886)' in Bede Nairn (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1976) vol 6, 211, 213.

With the benefit of hindsight, failing to arrange a meeting between the representatives of the three colonies in 1885 was perhaps a missed opportunity for South Australia. Negotiating these matters while the irrigation schemes were still very much in their infancy was probably the best chance for South Australia to reach an agreement. As the article shows below, as time wore on the investments that the upstream colonies made in irrigation schemes made negotiating with South Australia less likely.

#### *D New South Wales and Victoria Meet without South Australia*

While South Australia waited for a response from New South Wales, in January and May of 1886, representatives of the Royal Commissions of Victoria and New South Wales met and reached agreement between themselves as to the ‘diversion and utilization of flood-waters of the Murray in their respective territories.’<sup>48</sup> The agreement required both colonies to pass legislation to implement the terms of the agreement.<sup>49</sup> However, such legislation was never passed in either colony.<sup>50</sup> It was probably because extractions of water in Victoria from the tributaries of the Murray could potentially diminish the flow of the River through New South Wales, whereas downstream extractions in South Australia could not, that the New South Wales Commissioners ignored the position of South Australia. The New South Wales Royal Commission later explained that not inviting South Australia was not through rudeness, and instead insisted that the deliberations in question

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<sup>48</sup> The colonies of New South Wales and Victoria met on 22 and 23 January 1886 in Melbourne and on 5 and 6 May 1886 in Sydney: New South Wales, Royal Commission Conservation of Water, *Second Report of the Commissioners* (1886) 1. The resolutions of the conference between New South Wales and Victoria are reproduced by the Interstate Royal Commission: see New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, *Report of the Commissioners* (1902) 4. This agreement had not been enacted by either colonial legislature and subsequent conduct by Victoria suggested that it was not entirely confident of its legal position. Limited consideration has been given to the question of the nature of the agreement and whether, in the absence of this agreement, Victoria had a right to water from the River. The fact that New South Wales was prepared to negotiate with Victoria only added to South Australia’s frustrations, for New South Wales had ignored numerous requests from South Australia for a meeting. The agreement between New South Wales and Victoria is also reproduced in New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 4–5. The agreement established:

That a joint Trust shall be constituted, equally representative of the colonies of New South Wales and Victoria, in which shall be vested the control of the whole of the Murray River and its tributaries ... and such Trust shall have power to regulate all diversions of water from the river and tributaries within its jurisdiction.

New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, *Report of the Commissioners* (1902) 4.

<sup>49</sup> See cl 9 of the agreement in New South Wales, South Australia and Victoria, Interstate Royal Commission on the River Murray, *Report of the Commissioners* (1902) 4.

<sup>50</sup> *Ibid* 5.

had exclusive reference to that portion of the Murray which formed the common boundary of the two Colonies [of Victoria and New South Wales], and to the tributaries of from each. *Provision was made for maintaining the normal flow of the river, and for diversion of such surplus water only as might be available after that condition had been met.*<sup>51</sup>

If provision had been made for South Australia, it had not been clearly explained.

When Downer became aware of the meeting between representatives of Victoria and New South Wales in May 1886 he wrote to the leaders of both colonies expressing his concern that a meeting had been held in the absence of representatives from South Australia. After noting that he had not received further communication from New South Wales during the latter part of the previous year, Downer remarked:

but I now observe from the public prints that a conference has been held between New South Wales and Victoria, of which we had no notice, and that certain resolutions had then been arrived at.

I wish to express my regret that we would have heard nothing from you on the subject, and to request that you will take no action on the resolutions arrived at before this Government has had an opportunity of giving them some consideration.<sup>52</sup>

During this time, Victoria also had a change in Premier and the new Premier, Duncan Gillies, sought to explain that South Australia's absence was not Victoria's doing. He stated that, like the Government of South Australia, his Government had been waiting for a response from New South Wales. Gillies pointed the blame squarely at New South Wales:

I beg to state that it was suggested at that conference [between New South Wales and Victoria] by the Victorian Commissioners that representatives from South Australia should be invited to the conference, but the suggestion was not concurred in. The absence of such representatives was not therefore owing to any action on the part of this colony.<sup>53</sup>

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<sup>51</sup> New South Wales, Royal Commission Conservation of Water, *Third and Final Report of the Commissioners* (1887) 2 (emphasis added).

<sup>52</sup> Letter from John Downer, Premier of South Australia, to the Premier of Victoria, 26 May 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2. A letter in similar terms was also sent to the Colonial Secretary of NSW: see letter from John Downer, Premier of South Australia, to the Colonial Secretary of New South Wales, 26 May 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 2.

<sup>53</sup> Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 7 June 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 3.

South Australia's geographical disadvantage coupled with the fact that it had not been invited to the meeting at which New South Wales and Victoria reached an agreement left it in a vulnerable position. Downer seems to have concluded that South Australia needed to take a firmer stand and it was at this time that he started to make reference to the 'rights' of the colonies. However, precisely what Downer thought these 'rights' were and the basis for them was not explained in his correspondence with the other colonies. In a letter to the Victorian Premier dated 14 June 1886 Downer wrote: 'I can only express my surprise at the Governments of Victoria and New South Wales assuming the *right* and responsibility of making any such agreement.'<sup>54</sup>

This was the first time that the question of legal rights was raised and given prominence in the communications between the states. Downer contended that the agreement between Victoria and New South Wales ignored South Australia's 'existing rights':

The treaty, whilst altogether ignoring the status of this province in the matter, assumes throughout, and in fact expressly declares, the absolute title of the two colonies parties to it to the whole of the waters of the river; and though there is a provision for the reservation of such compensation water as the 'trust' may from time to time determine, still, I need hardly point out that this will scarcely compensate us for the abrogation of our *existing rights*.<sup>55</sup>

Downer threatened that if Victoria was to proceed with this agreement and insist on excluding South Australia then his 'Government will have no alternative but to request the Home Government to disallow any such Bill you may pass to give effect to the treaty, and to prevent by Imperial Legislation any future action such as the agreement contemplates.'<sup>56</sup>

Three days later, on 17 June 1886, Downer gave a lengthy speech in the South Australian Parliament detailing the correspondence between the colonies.<sup>57</sup> The actions of New South Wales and Victoria had also caused other members of the South Australian Parliament to consider South Australia's position with respect to the allocation of water from the Murray. At the end of Downer's speech, South Australian Member of Parliament, Ebenezer Ward remarked that:

It was true that by the *Imperial Act* New South Wales might technically maintain her claim to the southern bank, and Victoria could claim its sources, but we had the mouth, which was of as much use as any other position of the river.<sup>58</sup>

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<sup>54</sup> Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 14 June 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 4 (emphasis added).

<sup>55</sup> Ibid (emphasis added).

<sup>56</sup> Ibid (emphasis added).

<sup>57</sup> South Australia, *Parliamentary Debates*, House of Assembly, 17 June 1886, 189–93.

<sup>58</sup> Ibid 194.

Ward probably overestimated the importance of the Murray mouth — it was often closed by sand and difficult to navigate.<sup>59</sup> Furthermore, the fact that navigation was in decline in favour of rail transport meant that South Australia did not have the geographical advantage over the river that Ward asserted.

The fact that the agreement between New South Wales and Victoria had been brokered between the respective Royal Commissions provided the Victorian Government with a degree of separation from the agreement. When Victorian Premier Gillies wrote back to Downer on 3 July 1886 he stressed that the agreement reached between the Royal Commissioners of Victoria and New South Wales was not the doing of the Victorian Government. Gillies claimed that his Government had ‘no knowledge whatever of the arrangements made or the terms provisionally agreed upon until they were made public.’<sup>60</sup> Gillies appeared keen to allay Downer’s concerns, while emphasising the importance of resolving the dispute promptly:

I can say that this Government has no desire to place the rights (navigation and others) of South Australia either in jeopardy or at the mercy of any Commission in which your colony is not represented, or of which you do not approve, and nothing is further from the intention of this Government than to do anything destructive of the rights of your colony.

It must, however, be borne in mind that the utilisation of the surplus waters of our rivers for irrigation purposes has become so urgent a necessity, and is so acknowledged on all sides, that the consideration of its practical solution cannot be longer delayed.<sup>61</sup>

Downer wrote back and requested that until a joint commission or conference between the three colonies was arranged, the agreement reached between the Royal Commissioners of New South Wales and Victoria not be acted upon by their respective

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<sup>59</sup> ‘The Murray-Mouth and the River Trade’, *The South Australian Register* (Adelaide), 15 March 1878, 6. The first judge of the South Australian Supreme Court, John Jeffcott, drowned on 12 December 1837 when the whaling boat he was on capsized as it navigated the Murray mouth: R M Hague, ‘Jeffcott, Sir John William (1796–1837)’ in Douglas Pike (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1967) vol 2, 15.

<sup>60</sup> Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 3 July 1886 in South Australia, *Further Correspondence re Murray River Waters*, Parl Paper No 59A (1886) 1. The letter from Premier Gillies was published in the *South Australian Register* on 7 July for all South Australians to read: ‘The River Murray and Intercolonial Rights’ *South Australian Register* (Adelaide) 7 July 1886, 7. See also letter from C H Langtree, Secretary for Mines and Water Supply, Victoria, to the Conservator of Water (SA), 4 July 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 30, suggesting that the meeting between New South Welsh and Victorian Royal Commissions was ‘of an informal nature’. Whilst the Parliamentary Papers identify C H Langtree as the author of the letter, this appears to be an error; it should be C W Langtree.

<sup>61</sup> Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 3 July 1886 in South Australia, *Further Correspondence re Murray River Waters*, Parl Paper No 59A (1886) 2.

Governments.<sup>62</sup> News of the agreement between New South Wales and Victoria spurred South Australia into action, which was the first real attempt to arrange for the colonies to meet and discuss the question of the sharing of the waters of the Murray.

Downer was concerned that any subsequent conference or commission would use as its starting point the agreement already reached between the New South Wales and Victorian Royal Commissioners, thereby placing South Australia at a disadvantage. In a subsequent letter to Gillies dated 12 August 1886 Downer stated:

Whilst quite willing to take part in any Conference that may be held with reference to the use of the waters of the river, I thought I had sufficiently expressed the views of this Government that the Conference must begin *de novo* and not on the basis of the treaty arrived at between New South Wales and yourselves, though doubtless the information and evidence there obtained and taken will be of great assistance.<sup>63</sup>

In late September 1886, Gillies suggested that the best way for negotiations to proceed was for South Australia to appoint a Royal Commission much like the Royal Commissions already established in the other colonies.<sup>64</sup> In that way, the three Commissions could finally meet and discuss the allocation of water from the River.<sup>65</sup> Downer wrote back immediately and confirmed that South Australia was ‘still

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<sup>62</sup> Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 9 July 1886 in South Australia, *Further Correspondence re Murray River Waters*, Parl Paper No 59B (1886) 1.

<sup>63</sup> Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 12 August 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 27. The South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) is available in South Australia, *Royal Commission on the Utilisaltion of the River Murray Waters — Progress Report*, Parl Paper No 34 (1890).

<sup>64</sup> Letter from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 28 September 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 27. Gillies stated:

I beg to suggest, for your consideration, whether your Government could not see its way to proceed as those of Victoria and New South Wales have done, by appointing a Royal Commission of Inquiry; such a Commission could confer with the Commissioners of the other two colonies, and perhaps jointly with those bodies might be able to offer some important recommendations respecting the locking of the River Murray, and other points in connection with the question.

<sup>65</sup> *Ibid.* Gillies concluded his letter by noting:

I desire, at any rate, to submit that though there may be points on which the several Governments cannot as yet take quite the same view, there should be nothing to prevent united action, so far as they are agreed, or indeed so far as they may be brought into agreement, by the suggested Conference of the various Royal Commissions.

I trust, therefore, in the interests of harmonious action amongst the colonies, you will see no objection to this preliminary step with a view of bringing them into accord, as far as possible.

willing to appoint a Commission to meet the Commissioners appointed by the other colonies'.<sup>66</sup>

There was clearly much interest in this issue in South Australia both in the Parliament<sup>67</sup> and in the wider community. The correspondence between the colonial representatives was reproduced in the local newspapers.<sup>68</sup> Suggestions of a meeting of Royal Commissioners from each of the three colonies caused great optimism in South Australia that agreement between the three colonies would now be reached and a 'treaty' between the colonies would formalise this agreement.<sup>69</sup>

The discussions between the three colonies appeared to be back on track. That was, until, South Australia became aware that Victoria was about to allow large-scale irrigation works along the river.

### *E The Chaffey Brothers' Irrigation Scheme*

While in the United States during 1885, Alfred Deakin had met with Canadian brothers, George and William Chaffey.<sup>70</sup> The Chaffey brothers had established successful irrigation businesses in California and Deakin discussed with them the potential for similar irrigation schemes in Victoria. In 1886 George Chaffey travelled to Victoria to investigate the feasibility of establishing an irrigation scheme on the Murray. His arrival was followed by his brother's, William, in the following year.<sup>71</sup>

When Downer heard of the discussions between George Chaffey and the Victorian Government he sent a telegram to the Victorian Premier stating that he would assume that the Victorian Premier 'will not proceed further in the matter of this agreement

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<sup>66</sup> Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 9 October 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 27. Victoria agreed to contact New South Wales to organise the meeting: see telegram from Alfred Deakin to John Downer, 11 October 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28. Whether 'still willing' was an accurate characterisation of the South Australia position is questionable. It is not that South Australia had previously expressed an unequivocal willingness to appoint a Royal Commission.

<sup>67</sup> See, eg, above nn 57–8 and accompanying text.

<sup>68</sup> See above n 60.

<sup>69</sup> Media reports at the time were optimistic of agreement being reached: 'The River Murray' *South Australian Weekly Chronicle* (Adelaide), 16 October 1886, 5; *The South Australian Advertiser* (Adelaide), 8 October 1886, 4.

<sup>70</sup> See entry dated 11 February 1885 in Alfred Deakin, 'Travel Diary From America, 1885' in *Papers of Alfred Deakin (1804–1973)* (National Library of Australia, MS 1540, Series 2, Item 2/38), 20.

<sup>71</sup> Peter Westcott, 'Chaffey, George (1848–1932) and Chaffey, William Benjamin (1856–1926)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1979) vol 7, 599.

before the joint Commission has met and considered the whole question.’<sup>72</sup> Gillies responded by explaining that while an agreement between the Victorian Government and the Chaffeys had been entered into, it was still subject to the approval of the Victorian Parliament. Gillies stated that, in any event, the agreement ‘would not have been entered into if there could have been the slightest apprehension that it could so interfere [with navigation].’<sup>73</sup> In his view, the agreement entered into with the Chaffeys would not affect any intercolonial conference. However, the South Australian Premier was concerned that an agreement permitting large-scale irrigation within the Victorian colony would affect water levels at Morgan by at least four inches during the summer months.<sup>74</sup> Downer requested that Victoria hold off on legislative approval of the scheme until a conference between the three colonies had had an opportunity to meet.<sup>75</sup>

Downer’s request was ignored and the agreement reached between the Chaffeys and Deakin was put before the Victorian Parliament for its approval.<sup>76</sup> Rather than approving the agreement, the Parliament decided to put the offer of developing an irrigation settlement out to tender.<sup>77</sup> This had little effect on the end result — no other tenders were received for the 250 000 acre Mallee Irrigation Scheme at what is now known as Mildura and the Chaffeys were awarded the tender.<sup>78</sup>

Despite Downer’s concerns regarding the Chaffey agreement, it appeared that the joint conference would still convene. On 31 December 1886 the Victorian Secretary for Mines and Water Supply, C W Langtree, wrote to Downer advising him that Alfred Deakin had received confirmation that the New South Wales Royal Commissioners were agreeable to a conference between representatives of the three colonies being held in Adelaide ‘for the purpose of setting all intercolonial rights involved in the apportionment of the waters of the River Murray.’<sup>79</sup>

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<sup>72</sup> Telegram from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 11 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28.

<sup>73</sup> Telegram from Duncan Gillies, Premier of Victoria, to John Downer, Premier of South Australia, 12 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28.

<sup>74</sup> Telegram from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 15 November 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28. No doubt Downer would have been concerned given the fact that river boats were already finding it difficult to complete with the railways.

<sup>75</sup> *Ibid.*

<sup>76</sup> This led to the Victorian Parliament ultimately enacting the *Waterworks Construction Encouragement Act 1886* (Vic).

<sup>77</sup> *Ibid* s 7.

<sup>78</sup> ‘The Mallee Irrigation Scheme’, *The Age* (Melbourne) 4 March 1887, 5.

<sup>79</sup> Letter from C W Langtree, Secretary for Mines and Water Supply, Victoria, to John Downer, Premier of South Australia, 31 December 1886 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 28.

Eager for the three colonies to meet, on 9 February 1887 the South Australian Government appointed its own Royal Commission to investigate

the question of utilising the waters of the River Murray for irrigation purposes, and the preservation of the navigation and water rights of this province in the river; and, for that purpose, *to confer and consult with any Commission appointed, or to be appointed, by the Governments of New South Wales and Victoria on the same subject.*<sup>80</sup>

The South Australian Royal Commission was thus formed for somewhat different purposes to its counterparts in New South Wales and Victoria, which were formed primarily for the purpose of investigating the use of water *within* each of the respective colonies.

Despite Downer's earlier protests regarding Deakin's agreement with the Chaffey brothers, the South Australian Government was quick to make a similar arrangement with the Chaffey brothers to establish a settlement in South Australia at Renmark. The agreement was signed on 14 February 1887 by the South Australian Commissioner of Crown Lands, on behalf of the Government of South Australia, and George and William Chaffey. While concerns were raised as to how the scheme would affect navigation and water levels in the lower lakes,<sup>81</sup> the agreement was authorised by the Parliament by the *Chaffey Brothers Irrigation Works Act 1887* (SA).<sup>82</sup> The South Australian agreement granted the Chaffey brothers up to 250 000 acres and granted licences permitting them to extract water from the Murray for irrigation.<sup>83</sup>

In March 1887 the Victorian Premier wrote to the Premier of New South Wales, as he understood that the term of the New South Wales Royal Commission was about to expire and suggested that it be extended so that the conference between the Royal Commissions of the three colonies could take place.<sup>84</sup> The Colonial Secretary of New South Wales, Henry Parkes, replied on 6 April and advised Victoria that the term of the Commission had been extended until 10 May 1887. However, this brief extension gave little time for Victoria and South Australia to arrange the joint conference.

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The use of the word 'setting' suggests that this was not a process of examining existing legal principles to determine such rights, but rather that an agreement would be reached based solely on the negotiation.

<sup>80</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) iii (emphasis added). Patrick Glynn and Charles Hussey were appointed additional Commissioners on 13 December 1889: at iii.

<sup>81</sup> See, eg, South Australia, *Parliamentary Debates*, Legislative Council, 16 August 1887, 478–9.

<sup>82</sup> The Act was assented to on 16 November 1887: *Chaffey Brothers Irrigation Works Act 1887* (SA).

<sup>83</sup> *Ibid* Schedule.

<sup>84</sup> Letter from Duncan Gillies, Premier of Victoria, to the Premier of New South Wales, 10 March 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 31.

The matter was made more difficult by the fact that Deakin was attending the Colonial Conference in London and would not return to Australia until June; this complicated matters because the Victorian Government wanted Deakin, as President of its Royal Commission, to attend any such conference between the three colonies.<sup>85</sup>

Perhaps motivated by the fact that it had nothing to lose by maintaining the status quo, New South Wales declined to extend further its Royal Commission and the three colonies were again unable to arrange for the joint conference to take place as originally planned. Over the next two years the colonial governments turned their attention inward and focused on developing irrigation within the respective colonies.<sup>86</sup>

#### *F A Further Attempt to Meet*

Despite the encouraging signs prior to the appointment of the South Australian Royal Commission, a meeting with representatives from all three colonies proved difficult to achieve (primarily due to the position taken by New South Wales). However, two years later in April 1889, the South Australian Premier, Thomas Playford, wrote to the Governments of New South Wales and Victoria again urging them to agree to a conference between the three colonies.<sup>87</sup> Victoria promptly replied expressing a willingness to attend a joint conference. The Victorian Premier noted, however, that the New South Wales Royal Commission had expired and it would be necessary to reappoint or appoint a similar Royal Commission in that colony.<sup>88</sup> In the early days of attempting to secure a meeting between the three colonies the Victorian Government had been proactive in securing the support of New South Wales. However, by this time the Victorians took a more passive role and left it to South Australia to gain New South Wales' support. As the South Australian Royal Commissioners noted in their second report: 'Victoria has always been prompt in its profession of great readiness

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<sup>85</sup> Letter from Duncan Gillies, Premier of Victoria, to the Premier of New South Wales, 30 April 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 31.

<sup>86</sup> By the end of the 19<sup>th</sup> century the colonies had invested significant funds into developing irrigation: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 24 January 1898, 69 (Richard O'Connor). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1956–8 (Joseph Carruthers).

<sup>87</sup> Letter from Thomas Playford to the Colonial Secretary's Office of New South Wales, 27 April 1887 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 33. The receipt of Playford's letter is acknowledged in a letter from Culcheth Walker, Principal Under Secretary of the Colonial Secretary's Office of New South Wales to Thomas Playford, 17 May 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 34.

<sup>88</sup> Letter from Duncan Gillies, Premier of Victoria, to the Premier of South Australia, 8 May 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 33–4.

to concur in the appointment of a conference, but has carefully abstained from taking any decisive step that would tend to secure such a meeting of representatives'.<sup>89</sup>

With the establishment of the irrigation scheme at Mildura, Victoria now had more to lose and less to gain from any potential agreement between the colonies.

While Playford's letter of 27 April 1889 was formally acknowledged by New South Wales,<sup>90</sup> a substantive response was not forthcoming for over 10 months, despite a number of promises.<sup>91</sup> It was not until 6 March 1890 that South Australia received the promised response. The Colonial Secretary of New South Wales, Henry Parkes, provided a reply that carefully ignored the request for a conference between the colonies. Parkes responded by telling South Australia that east of the South Australian boundary 'the whole watercourse of the Murray ... and the waters of the river ... belong, therefore, to New South Wales, as part of her territory.'<sup>92</sup> Parkes cited s 5 of the *New South Wales Constitution Act 1855*, which stated:

the whole Watercourse of the said River Murray, from its Source therein described to the Eastern Boundary of the Colony of South Australia, is and shall be within the Territory of New South Wales'.<sup>93</sup>

New South Wales contended that the Imperial legislation made it clear in whose territory the river flowed and, within that territory, the scope of the colonial legislative power. At around the same time, Parkes also took aim at Victoria and, in particular, the Chaffey Brothers. Adopting similar reasoning, Parkes claimed that 'any parties who had planted works in the fairway [of the river] were trespassers on New South Wales territory.'<sup>94</sup>

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<sup>89</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) v–vi. The South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) is available in South Australia, *Royal Commission on the Utilisation of the River Murray Waters — Second Report*, Parl Paper No 34a (1890).

<sup>90</sup> Letter from Culcheth Walker, Principal Under Secretary of the Colonial Secretary's Office of New South Wales to Thomas Playford, 17 May 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 34.

<sup>91</sup> Telegrams from Henry Parkes to the Premier of South Australia, 20 June 1889, 23 July 1889 and 6 September 1889 in South Australia, *Correspondence Re River Murray Riparian Rights*, Parl Paper No 131 (1889) 34.

<sup>92</sup> Letter from Henry Parkes to John Cockburn, 6 March 1890 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 48. Cockburn had succeeded Playford as Premier on 27 June 1889.

<sup>93</sup> (Imp) 18 & 19 Vict, c 54.

<sup>94</sup> Interestingly, these remarks by Parkes in the New South Wales legislature were reproduced in the South Australian press: 'The River Murray: New South Wales Asserting Her Rights' *Adelaide Observer* (Adelaide), 7 September 1889, 28.

Parkes — apparently adopting the position that attack was the best form of defence — reminded South Australia of the following:

I desire, however, to intimate that it is held by this Government that South Australia cannot use the waters to such unreasonable extent as would interfere with the normal level of the river without committing a breach of international obligations.<sup>95</sup>

Thus, in addition to the letter ignoring the request for a meeting between the three colonies, the letter from Parkes attempted to turn the tables on South Australia by focusing on whether the Imperial legislation placed any limitation on South Australia's ability to use the waters of the Murray. However, Parkes' letter failed to address the question of whether New South Wales had a similar corresponding obligation. Parkes' letter was the first correspondence in which the colony had asserted a legal position; earlier correspondence had spoken in terms of the 'rights' of the colonies,<sup>96</sup> but had made no attempt to define those 'rights' or explain their source.

The South Australian Royal Commission published the first two of its three reports in June and December 1890 respectively, and provided a comprehensive analysis of the use of the River Murray for navigation and irrigation.<sup>97</sup> The reports also detailed the attempts made by the South Australian Royal Commission and Government to arrange a meeting of the three colonies. After the Royal Commission presented its second report in December 1890, it 'suspended meetings in the hope that events would transpire favorable to the holding of an intercolonial conference to consider the *riparian rights* of the respective provinces'.<sup>98</sup> Precisely what was meant by the 'riparian rights' of the colonies was not explained in the report; however, it appeared to go beyond acknowledging the rights of individuals within each of the colonies and to suggest that the colonies (or their governments) had a 'right' to water (as against each other).

<sup>95</sup> Letter from Henry Parkes to John Cockburn, 6 March 1890 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) 48 (emphasis added). Parkes' letter was published in *The Express and Telegraph* for all South Australians to read: 'The River Murray: Riparian Rights of New South Wales' *The Express and Telegraph* (Adelaide), 11 March 1890, 3.

<sup>96</sup> See, eg, Letter from John Downer, Premier of South Australia, to Duncan Gillies, Premier of Victoria, 14 June 1886 in South Australia, *Navigation of and Irrigation from River Murray*, Parl Paper No 59 (1886) 4.

<sup>97</sup> See South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890); South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890).

<sup>98</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 3 (emphasis added). The South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) is available in South Australia, *Royal Commission on the Utilisaltion of the River Murray Waters — Final Report*, Parl Paper No 34 (1894).

It was now more than five years since the Victorian Premier, James Service, had first written to the South Australian Premier, John Downer, to suggest a meeting between the colonies and still the matter remained unresolved. On 27 October 1892 further promises were made by the Colonial Secretary of New South Wales, George Dibbs, who wrote to the South Australian Premier assuring him that a meeting of the colonies would soon be possible.<sup>99</sup>

The South Australian Royal Commissioners had received similar promises before and did not believe that the Government of New South Wales was genuine in its desire to meet. The Commissioners were of the opinion that Dibbs' letter did not contain 'such an assurance that the question of a conference is being seriously considered as would justify us in postponing the presentation of this our final report'<sup>100</sup> and, in June 1894, the South Australian Royal Commission produced its final report. The report was much shorter than the previous two and simply stated that, despite numerous attempts to arrange a meeting with the other two colonies, arranging such a meeting had proved unsuccessful.<sup>101</sup>

#### IV THE EARLY WATER 'RIGHTS' ARGUMENTS

During the period when the colonies were attempting to arrange an opportunity to meet, they were also starting to consider the 'rights' of the colonies with respect to the waters of the River Murray. However, those making these arguments were more interested in bringing about a political agreement as to how to share the waters of the Murray and less concerned if such a 'right' actually existed. The arguments that South Australia had a legal right to the share of the waters of the Murray were not strong.

##### *A New South Wales Claims Legal Ownership of the River*

The New South Wales Royal Commission considered, in a limited way, the rights of the colonies to the waters of the River Murray. The New South Wales Royal Commission took the view that east of the South Australian border the Murray was

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<sup>99</sup> Letter from George Dibbs to John Downer, 27 October 1892 in South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 4. Dibbs explained at 4:

I have the honor to inform you that a Bill has been prepared, and will be introduced at once (notice to that effect having already been given), which, *inter alia*, will give power to the Governor, with the concurrence of the Government of any other colony, to deal with matters of common concernment as to riparian and other rights; and that, pending this proposed legislation, the Government consider it advisable that the final consideration of Mr Playford's suggestions should remain in abeyance.

<sup>100</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 3.

<sup>101</sup> *Ibid.*

within the colony of New South Wales and as such that colony had absolute legal control over the River as it passed through its territory:

We are fully aware that no action which it might be in our power to take could abrogate the legal rights of ownership in the Murray, which, as we have seen, is by the *Constitution Act* vested in the Legislature of New South Wales.<sup>102</sup>

However, the New South Wales Royal Commission acknowledged that this right was ‘qualified ... by co-ordinate powers in regard to navigation and the collections of Customs duties by the Government of Victoria, and by the riparian rights of the inhabitants of Victoria who are settled upon the southern bank of the stream’.<sup>103</sup> The common law riparian rights doctrine granted the owners of the bank along a river within each colony — referred to as the ‘riparian proprietor’ — a right ‘to the reasonable use of the water for ... domestic purposes and for ... cattle’ and also the right to dam the river or take water for irrigation so long as those ‘extraordinary use[s]’ did not ‘interfere with the rights of other [riparian] proprietors’.<sup>104</sup> The emphasis of the riparian rights doctrine was on maintaining the natural flow and ‘extraordinary use[s]’, such as irrigation, were impermissible where they would disturb the flow for downstream users.<sup>105</sup>

While willing to concede that the Victorian land owners along the River might be entitled to use the waters as riparian proprietors, no such similar acknowledgment was made with respect to the downstream proprietors in South Australia. However, arguably the same concession should have applied to riparian proprietors in that colony. While the rights of the individual land owners were recognised, no mention was made as to the ability of the Victorian Parliament to regulate the Murray (or its tributaries) in a way that could affect the interests of either the Government of New South Wales or landowners within that colony.

While acknowledging the common law rights of the riparian owners, there was a practical problem with the application of the doctrine in Australia. The New South Wales Royal Commission took the view that the English riparian rights doctrine that applied between land owners along the banks of a river was unsuitable for the Australian conditions because rivers did not flow all year round:

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<sup>102</sup> New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 2.

<sup>103</sup> *Ibid* 2–3. Although the Commission also took the pragmatic view that they should not ‘insist upon such an extreme view of our statutory position as should preclude the consideration and recommendation of any scheme which might seem to be equitable and advantageous to the *two* Colonies’: at 2 (emphasis added). The reference to the ‘two’ colonies was a reference to New South Wales and Victoria, omitting any reference at this point to South Australia.

<sup>104</sup> *Miner v Gilmour* (1858) 12 Moo 131, 156; 14 ER 861, 870.

<sup>105</sup> *Ibid*.

the presumptions of English law in regard to riparian rights are not applicable to the conditions of New South Wales, where, in too many cases, what are called rivers are actually the dry channels of watercourses, which need to be converted into canals; and this opinion has led us to the conclusion that each Colony must be allowed to deal with the tributaries of the Murray in such manner as will best conduce to its own development, with the sole reservation that a certain proportion of the water contained in those streams must be allowed to flow into the Murray.<sup>106</sup>

Furthermore, the Commission was of the opinion that if the riparian rights doctrine was to be applied across colonial boundaries it would impair development along the River Murray and in effect cede control of the Murray to South Australia:

A just application of the principle will safeguard the rights of South Australia, which we recognize to be as valid as our own; but the logical outcome of legal presumptions in regard to the riparian rights, if Queensland, New South Wales, Victoria and South Australia, were one community, would enable the last named Colony to insist on the uninterrupted flow of an immense proportion of the whole rainfall of the Continent, simply because the waters of the Murray run through her territory to the sea.<sup>107</sup>

This passage is important as it shows that the legal questions were starting to be considered and that the obvious source of law — the riparian rights doctrine — might be inadequate for the conditions (both environmental and legal) in Australia. In any event, the New South Wales Royal Commission was of the opinion that the most appropriate way to deal with the allocation of water as between the colonies was by mutual agreement. The Royal Commission was keen to develop the River in a way that would be ‘equitable and advantageous’<sup>108</sup> to both New South Wales and Victoria.

In 1889 in a memorandum to the Colonial Secretary, Henry Parkes, the Engineer for Water Conservation in New South Wales, Hugh McKinney, set out what he believed

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<sup>106</sup> New South Wales, Royal Commission — Conservation of Water, *Second Report of the Commissioners* (1886) 3. Similar views were expressed in the first report:

The doctrine of riparian rights ... appears better adapted to England, where the people are more concerned to drain off the water as quickly as possible than to New South Wales, where the all-important question is how best to retain it. ... We believe there is a large amount of uncertainty as to what the application of the common law of England would be in cases which might be brought before the Courts, inasmuch as those cases would be founded upon circumstances entirely novel, and to which no analogy could probably be discovered in causes tried elsewhere.

New South Wales, Royal Commission Conservation of Water, *First Report of the Commissioners* (1885) 68.

<sup>107</sup> New South Wales, Royal Commission Conservation of Water, *Second Report of the Commissioners* (1886) 4.

<sup>108</sup> *Ibid* 2.

to be the position with regard to intercolonial water rights.<sup>109</sup> Like the New South Wales Royal Commissioners, he stated that the fact that the river was within the colony of New South Wales granted that colony the ownership of the water:

Under the *Constitution Act* the River Murray is altogether within the territory of New South Wales as far as the junction of South Australia; and, as national territory consists of water as well as land, the waters of the Murray belong primarily to New South Wales.<sup>110</sup>

McKinney, however, made a number of concessions to this position which were not fully explained. For example, with regard to the position of South Australia he noted:

The colony of South Australia has no statutory right in the River Murray and its only legal claim is under the British Law of Riparian Rights, which gives to South Australia only similar rights to those possessed by riparian owners and occupiers in New South Wales and Victoria.<sup>111</sup>

McKinney may have been making a similar point here to that which was made by the New South Wales Royal Commission: that the individual landowners along the river, the riparian proprietors, might have a limited right to use the water, but the colony of South Australia at large did not have an entitlement to a particular share of the water from the river.

McKinney also contended that South Australia did not have a moral claim to the waters because there were no tributaries in that colony which contributed to the waters of the Murray.<sup>112</sup> There were a number of inconsistencies in McKinney's analysis. First, according to McKinney, South Australia was not entitled to a share of the waters of the Murray, but the riparian proprietors in that colony were, whereas the colony of New South Wales (not just the riparian proprietors) was entitled to a share of the water despite the fact that the Murray flowed through both of these States. Secondly, if New South Wales was entitled to a share of the water from the tributaries from Victoria because the River flowed through its territory, why was South Australia not also entitled to a share of the water from those tributaries given that the lower parts

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<sup>109</sup> For a short biography of McKinney see Annette Alafaci, *McKinney, Hugh Giffen (1846–1930)* Encyclopedia of Australian Science <<http://www.eoas.info/biogs/P004573b.htm>>.

<sup>110</sup> Legal opinion of Hugh McKinney for Henry Parkes, 28 October 1889, 1 in *Sir Henry Parkes — Papers* (State Library of New South Wales, Correspondence vol 27), 319–27.

<sup>111</sup> *Ibid* 1–2.

<sup>112</sup> 'Regarding the moral rights to the waters of the River Murray, New South Wales and Victoria are, in a large measure, in similar positions as contributors to these waters; but South Australia contributes practically nothing to the ordinary discharge of the Murray and therefore has no moral right on that ground': see *ibid* 2.

of the Murray flowed through South Australia?<sup>113</sup> McKinney's analysis is perhaps an example of barracking for one's own state in preference to developing a well-reasoned analysis of the problem. However, in his defence, it must also be remembered that McKinney was an engineer, and not a lawyer, so it is unsurprising that there is no legal analysis supporting the conclusions he asserted in the memorandum to Parkes. While the memorandum does not assist in determining how water from the River Murray might be allocated in the absence of an intergovernmental agreement, it does demonstrate that officials from that colony were starting to realise that this was a legal question that — one way or another — needed to be resolved.

### B *The Early South Australian 'Rights' Arguments*

As time progressed, it must have become apparent to the South Australian Government and to the members of the South Australian Royal Commission that the chance of organising a joint conference between the Royal Commissions of the respective colonies was unlikely. The South Australian Royal Commissioners were also aware that the Royal Commissioners of New South Wales and Victoria had already met and made a tentative agreement regarding the allocation of water between those two colonies. It is unsurprising, therefore, that the South Australian Royal Commission and the South Australian Government sought advice as to the legal position of the colony with respect to the waters of the River Murray.

#### 1 *The South Australian Attorney-General Briefs Counsel*

While reference is made in the minutes of the South Australian Royal Commission's meetings to legal opinions, the authorship and content of the opinions was not identified within the Royal Commissioners' reports.<sup>114</sup> The opinion of Charles Mann, the South Australian Crown Solicitor, dated 19 December 1887, is one of the earliest legal opinions on the question of how to allocate water from the River Murray between the colonies. No mention is made of Mann's opinion<sup>115</sup> in the existing literature.

Mann's opinion reveals that the Attorney-General, Charles Kingston, had also briefed prominent South Australian lawyers, John Downer and Josiah Symon.<sup>116</sup> Mann's

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<sup>113</sup> 'As owner of the River Murray, New South Wales has a certain right in the Victorian tributaries of that river — a point which is admitted in the resolutions agreed to by the Victorian Water Commission at its conference with the Water Commission of New South Wales': see *ibid* 2.

<sup>114</sup> Reference was, however, made in the South Australian Parliament to 'the joint opinion of the Crown Solicitor, Sir J W Downer QC and Mr J H Symon QC': South Australia, *Parliamentary Debates*, Legislative Council, 17 August 1887, 510 (J G Ramsay).

<sup>115</sup> Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16).

<sup>116</sup> Kingston was Attorney-General from 11 June 1887 to 27 June 1889 and it must have been shortly after his appointment that he requested the opinions. The advice of Mann makes reference to the opinion of Downer and Symon.

opinion stated that while the three men ultimately delivered separate advices, for the most part, they reached the same conclusion.<sup>117</sup> Unfortunately, the opinions of Downer and Symon have never been located, but they are referred to and described by Mann.<sup>118</sup> Mann noted that those opinions

only differ and that not to any very great extent as to the principles on which the Imperial Parliament would be likely to act in settling the rights of this colony and those of Victoria and New South Wales to the reasonable use of the waters of the Murray.<sup>119</sup>

To the extent that the opinions did differ, Mann remarked:

Mr Symon takes very strongly the view that under no circumstances would higher Riparian colonies be allowed to use the higher waters as to affect the navigability of the River where it flows through South Australian territory. Sir John Downer seems to take a similar view but thinks that New South Wales and Victoria would be allowed a reasonable use of the higher waters for such purposes as irrigation etc even though such use might to some extent impair the navigability of the lower river.<sup>120</sup>

Importantly, Mann's opinion recognises the differing water uses of the colonies. From a practical perspective, Mann thought any concession made by South Australia that navigation could be interfered with may place the downstream colony in a difficult

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<sup>117</sup> Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16).

<sup>118</sup> However, Downer and Symon were both present at the Federal Conventions and the views on the question (or at least those they expressed publicly) are set out in the transcript of the debates. Further, Symon provided an additional opinion to the South Australian Government after federation in 1906, which provides further insight into his view on the matter: see Legal opinion of J H Symon and P McM Glynn for the Attorney-General, 26 March 1906, 1 in *Papers of Sir Josiah Symon* (National Library of Australia, MS 1739, Series 10, Folder 26); (South Australian Parliamentary Library).

<sup>119</sup> Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16). The question whether the Judicial Committee of the Privy Council provided a forum for the resolution of this dispute (rather than the Imperial Parliament) is explained below in Part IV(C).

<sup>120</sup> Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16). For a discussion of the idea that the states have a common law 'right' to a share of the waters of rivers that flow through them, see Ian Renard, 'Australian Inter-State Common Law' (1970) 4 *Federal Law Review* 87; Ian A Renard, 'The River Murray Question: Part III — New Doctrines for Old Problems' (1972) 8 *Melbourne University Law Review* 625, 649; Adam Webster, 'Sharing Water from Transboundary Rivers in Australia — An Interstate Common Law?' (2015) 39 *Melbourne University Law Review* 263.

position. Even without water being extracted for irrigation, navigation along the river was at times extremely challenging.<sup>121</sup> A further reduction in water levels by allowing upstream irrigation would only compound the problem. For the purposes of negotiations with the other colonies, Mann recommended that the approach advocated by Symon should be preferred as

once [we] admit the principle that the other colonies may so use the water as to injuriously affect even in a small degree the navigation of the lower river it seems to me it will be very difficult indeed for us afterwards to object and endeavour to fix the extent to which the navigation may be interfered with.<sup>122</sup>

There was, therefore, awareness that there may need to be a difference between the publicly asserted bargaining position and the legal advice received on point.<sup>123</sup>

## *2 The Royal Commissioners Consider the Legal Question*

The opinions from Mann, Symon and Downer were obviously of great interest to the South Australian Royal Commissioners. James Howe, Chairman of the South Australian Royal Commission and Commissioner of Public Works,<sup>124</sup> wrote to the Chief Secretary of South Australia, Thomas Playford, requesting that the Royal Commission be provided with access to the legal opinions.<sup>125</sup> At first, the Chief Secretary refused the request of the Commission; however, the Commissioners were ultimately permitted to view the opinions.<sup>126</sup> The legal opinions were mentioned briefly in the minutes of the proceedings of the South Australian Royal Commission and there was no detailed analysis of these views in the Commissioners' reports.<sup>127</sup>

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<sup>121</sup> South Australian steamers were already struggling to compete against the Victorian railways and a drop in the water level in drought years made the river difficult to navigate: see above Parts II(B)–(C).

<sup>122</sup> Legal opinion of C Mann for Charles Kingston, Attorney-General, 19 December 1887 in *Opinions — Crown Solicitor* (State Records of South Australia, GRG57/16) (emphasis in the original).

<sup>123</sup> Unfortunately, my searches of the State Archives and Records of New South Wales and the Public Records Office of Victoria have not revealed any legal opinions from the Attorneys-General, Solicitors-General or Crown Solicitors of those colonies during this period. That does not exclude the possibility that such opinions exist but have not been made publicly available.

<sup>124</sup> Rob van den Hoorn, 'Howe, James Henderson (1839–1920)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1983) vol 9, 378.

<sup>125</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Progress Report* (1890) ix.

<sup>126</sup> The Commissioners were permitted to view the opinions on 5 February 1890. After the Commissioners viewed the opinions, they were returned to the Attorney-General: *ibid* x.

<sup>127</sup> *Ibid*.

As attempts to negotiate with the other colonies started to break down, the South Australian Royal Commissioners considered the colony's legal position. In late 1890 the South Australian Royal Commission published its second progress report which set out, again albeit briefly, the legal arguments. There was some division between the Commissioners as to the best way to proceed. Patrick Glynn, Commissioner and Member of the House of Assembly, was reluctant to call upon the Imperial Parliament to interfere in the dispute. Glynn's views reflected a desire for South Australia to self-govern without the need to involve the British Government. He thought that the Imperial Parliament could only amend the *Imperial Act*<sup>128</sup> to 'express what either is known already, or had been agreed'<sup>129</sup> between the colonies. Furthermore, he added that any such request would be 'out of keeping with the spirit of constitutional liberty in the colonies'.<sup>130</sup>

The question whether the Imperial Parliament would interfere in such disputes had been debated several years earlier in 1887 by members of the South Australian Parliament. Some members were of the view that the Imperial Parliament should be appealed to without delay. However, as Member of the Legislative Council and former Commissioner of Public Works, William West-Erskine noted, the Imperial Government may be less inclined to interfere 'if the other colonies went to any great expense' in developing, for example, dams or irrigation settlements along the river.<sup>131</sup> Fellow South Australian Member of Parliament, Richard Baker, also thought that the Imperial Government would not intervene; however, he took the more cynical view that the Imperial Government would not intervene merely for fear of 'offending Victoria or New South Wales.'<sup>132</sup> It must also be remembered that the colonies were now largely self-governing and any Act of the Imperial Parliament would only apply in the colonies if such an intention was made clear by the Imperial Parliament.<sup>133</sup>

To reach an agreement Glynn suggested that the negotiations between the colonies could be 'guided' by principles of private and international law.<sup>134</sup> He said that '[o]n the analogy of private riparian rights the mutual claims of the colonies can easily be settled.'<sup>135</sup> In drawing a comparison with nation states, Glynn stated that:

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<sup>128</sup> *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54 ('*Imperial Act*').

<sup>129</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vi.

<sup>130</sup> *Ibid* vii.

<sup>131</sup> South Australia, *Parliamentary Debates*, Legislative Council, 19 July 1887, 242. James Rankine also expressed the view: 'If we waited till the other colonies constructed their works the Home Government would then decline to act in the matter': at 243.

<sup>132</sup> *Ibid* 242.

<sup>133</sup> *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, s 1.

<sup>134</sup> The view was supported by Messrs Jones, Burgoyne, Landseer and Kirchauff. Glynn, however, does not consider how these principles would be applied: South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vii. See also Glynn, above n 9, 10–11; P McM Glynn, *The Interstate Rivers Question* (W K Thomas & Co, 1902) 6–7.

<sup>135</sup> Glynn, above n 9, 9.

The claim of a nation upstream to navigate a river to the mouth, though expressive only of an imperfect right, and having its origin only in a sense of natural justice, has been recognised by treaties in Europe and America, and has acquired the strength of custom.<sup>136</sup>

Glynn referred to the rights with respect to navigation; however, no mention is made as to whether nation states had a right to take water for irrigation. Glynn's argument that future negotiations should be guided by principles of either the common law or international law perhaps reflected the unique position of the colonies: the perception was that colonies fell somewhere in between the position of a wholly sovereign states and private citizens.<sup>137</sup>

Charles Hussey, South Australian Royal Commissioner and fellow Member of the House of Assembly, dissented from the recommendations of the other Commissioners and wrote a separate, brief, opinion as to how the matter must be resolved. Hussey's recommendations, like Glynn's, reflected a practical desire to solve the problem rather than any detailed analysis of the legal issues. The difference between the two approaches was that for Hussey, the existence of s 5 of the *Imperial Act* prevented the colonies reaching a practical solution. Hussey was of the opinion that irrespective of whether s 5 of the *Imperial Act* actually granted New South Wales control of the water of the Murray, the existence of the provision meant that New South Wales would continue to make the argument and would have no reason to negotiate with South Australia. He noted that 'so long as that Act is in existence the riparian rights of neither of the colonies concerned can be equitably defined or adjusted.'<sup>138</sup> As a consequence, Hussey argued that s 5 of the *Imperial Act* impeded the resolution of the matter and needed to be 'immediately repealed, and legislation clearly defining the riparian rights of each of these colonies adopted.'<sup>139</sup> Like Mann, Hussey was of the view that it was ultimately for the Imperial Parliament to resolve this matter and that the South Australian Government ought to request that the Imperial Parliament clarify the position by introducing legislation stating that s 5 did not confer a right to water.<sup>140</sup> Hussey maintained his position that the *Imperial Act* must be 'amended or repealed' and 'with a view of this necessity being accomplished, the Privy Council should be appealed to without delay.'<sup>141</sup>

Hussey thought that any request to the Imperial Parliament would need to be made through the Privy Council. However, the more likely avenue was a request to the

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<sup>136</sup> Ibid 10.

<sup>137</sup> Glynn's argument was developed further by the South Australian delegates at the Federal Conventions: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 50–7.

<sup>138</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vii.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Final Report* (1894) 4.

Secretary of State for the Colonies. A few years later this problem arose in the context of a long running dispute between South Australia and Victoria over the location of the shared border. In 1894 the South Australian Governor, Lord Kintore, wrote to the Secretary of State for the Colonies requesting the Imperial Parliament pass legislation clarifying the location of the border between South Australia and Victoria. The Secretary of State for the Colonies, the Marquis of Ripon, wrote back advising that the Imperial Parliament could not interfere unless the colonies were in agreement as to the terms of the legislation.<sup>142</sup> The difficulty for South Australia was that even the intervention of the Imperial Parliament would require New South Wales to agree a solution. Hussey's recommendations in the final report of the Commission do, however, raise the question of what role the Privy Council could have played in the resolution of a dispute between the colonies over the waters of the River Murray. There is the question of whether a dispute such as this could even be referred to the Judicial Committee of the Privy Council.

*C A Forum to Hear Colonial Disputes over the River Murray?*

If requesting the Imperial Parliament to intervene in a dispute over the River Murray would require the consent of the colonies involved, could a colony appeal to the Judicial Committee of the Privy Council?

After the passing of the *Judicial Committee Act 1833* (Imp) 3 & 4 Wm 4, c 41 and the establishment of the Judicial Committee of the Privy Council, intercolonial disputes were referred to the Judicial Committee instead of to the Committee for Trade and Plantations, which had previously dealt with these matters.<sup>143</sup> Section 4 of the Act provided a discretion that allowed 'any such other matters whatsoever as His Majesty shall think fit' to be referred to the Judicial Committee.<sup>144</sup> However, by the end of the

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<sup>142</sup> *South Australia v Victoria* (1911) 12 CLR 667, 698.

<sup>143</sup> Since as early as the 17<sup>th</sup> century, disputes between British colonies in North America had arisen involving the fixing of a shared boundary: 'Documents: vol 5' in *South Australia v Victoria* (State Library of New South Wales, Q990.4/A). In the early disputes, the power to settle intercolonial disputes rested with the Sovereign. As Griffith CJ explained: 'up to the middle of the 18th century the Royal Prerogative to determine questions of disputed boundaries between Dependencies of the Crown was recognized and exercised': *South Australia v Victoria* (1911) 12 CLR 667, 702. The disputes often, but not always, came to the monarch with the consent of both colonies; however, on at least one occasion a dispute was resolved without the consent of both colonies. Griffith CJ noted that '[i]t also appears that the jurisdiction was exercised *in invitos*, and not merely on reference by both parties': *South Australia v Victoria* (1911) 12 CLR 667, 702. See also 'Documents: vol 5' in *South Australia v Victoria* (State Library of New South Wales, Q990.4/A); W F Finlason, *The History, Constitution, and Character of the Judicial Committee of the Privy Council, Considered as a Judicial Tribunal: Especially in Ecclesiastical Cases, with Special Reference to the Right and Duty of its Members to Declare their Opinions* (Stevens and Sons, 1878) 34.

<sup>144</sup> Isaacs argued that s 4 did not extend beyond matters that were judicial in nature: *South Australia v Victoria* (1911) 12 CLR 667, 720–1. In contrast, Harrison Moore has argued that the referral under s 4 can extend beyond matters that are solely judicial:

19<sup>th</sup> century the practice was to require all colonies party to the dispute to consent before the matter could be referred to the Judicial Committee.<sup>145</sup>

South Australia, therefore, found itself in a difficult position. Both options available to it — seeking the Imperial Parliament to define the ‘rights’ of the colonies with respect to the River Murray or having the Judicial Committee settle the dispute — required the consent of the other colonies. What South Australia required was a mechanism by which this dispute could be settled without the need to seek agreement or consent from the other colonies.

The great hope for South Australia was that federation and the drafting of the *Australian Constitution* would provide an opportunity to define the ‘rights’ of the colonies (and later states) and create a mechanism for resolving disputes between governments over the waters of the River Murray. However, unfortunately for South Australia, that hope would also be dashed. The upstream colonies had no incentive to define expressly the rights of the future states to the waters of the River, as they had made significant investment in irrigation schemes and only risked limiting the amount of water available to their communities.<sup>146</sup> While the *Australian Constitution* placed a limit on the powers of the newly-formed Commonwealth Parliament, it was silent on any limits on the powers of the states. By failing to define the ‘rights’ of the states within the *Australian Constitution*, the dispute has always needed to be resolved post-federation through negotiation.<sup>147</sup>

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W Harrison Moore, ‘The Case of Pental Island’ (1904) 20 *The Law Quarterly Review* 236, 236. For a discussion of s 4 see also P A Howell, *The Judicial Committee of the Privy Council 1833–1876* (1979, Cambridge University Press) 40–2.

<sup>145</sup> In *South Australia v Victoria*, Griffith CJ suggested that by this time the Crown’s prerogative to resolve these matters on their own volition may have no longer existed:

the Prerogative so freely exercised in the 18<sup>th</sup> century ought not, in the existing conditions of the self-governing Dependencies, to be exercised without the consent of the Dependencies concerned. The Prerogative may, therefore, I think be regarded as having then fallen into abeyance, and as no longer affording a practicable means of solution of such difficulties.

*South Australia v Victoria* (1911) 12 CLR 667, 703.

<sup>146</sup> See above n 86. See also Williams and Webster, above n 3.

<sup>147</sup> Agreement after federation was first reached on 9 September 1914 when the Prime Minister and the Premiers of New South Wales, Victoria and South Australia signed the *River Murray Waters Agreement*. The agreement was implemented by the Commonwealth and the relevant States passing separate but substantially similar legislation: see *River Murray Waters Act 1915* (Cth); *River Murray Waters Act 1915* (NSW); *River Murray Waters Act 1915* (SA); *River Murray Waters Act 1915* (Vic). The most recent agreement between the states and the Commonwealth is encapsulated in the *Water Act 2007* (Cth). The Murray-Darling Basin Agreement is set out in Schedule 1 to the Act. The *Water Act 2007* (Cth) was amended by the *Water Amendment Act 2008* (Cth) to give effect to the intergovernmental agreement entered into between the Commonwealth, New South Wales, Victoria, Queensland, South

## V CONCLUSION

During the second half of the 19<sup>th</sup> century there was great change in the use of the waters of the River Murray. Over this period river navigation started to decline and irrigation had become an important water use. There was some tension between these water uses: navigation required water levels be maintained, whereas for irrigation to prosper there was likely to be a reduction in water levels. As the importance of river navigation declined, South Australia's negotiating position with respect to defining the rights of the colonies to the waters of the River was weakened.

At least in the beginning, all three colonies — New South Wales, South Australia and Victoria — recognised the importance of being able to utilise better the waters of the River Murray. Vital to achieving that objective was determining how the waters of the Murray would be shared between the three colonies. If there was ever going to be a resolution of this matter it was going to be immediately after New South Wales and Victoria had established Royal Commissions in 1884. With the benefit of hindsight, the failure to arrange a meeting between the three colonies in 1885 was a missed opportunity for South Australia. As this article demonstrates, as time wore on and the upstream colonies invested in irrigation schemes, there was less incentive for them to negotiate with South Australia. As a consequence, there was considerable difficulty in arranging a meeting between the three colonies to discuss this question. This, of course, made reaching agreement impossible.

As early as the 1880s South Australians had started to assert a 'right' to the waters of the Murray. They thought that the scope of these 'rights' could be 'guided'<sup>148</sup> by principles of international law or by the common law riparian rights doctrine. However, there was no detailed *legal* analysis of these proposed solutions. On the one hand, this might be explained by the fact that there were no clear legal principles to resolve intercolonial disputes of this nature. On the other hand, perhaps not exploring fully the legal questions was a function of energies being focused on the attempt to negotiate a solution. Furthermore, keeping the legal questions unanswered also increased the chances of bringing the upstream colonies to the bargaining table: while no one was entirely confident of what the legal rights were (and feared what they could be), negotiations towards a non-legal solution were more likely to continue. However, South Australia's uncertain legal position coupled with the fact that there were no practical incentives for the other colonies to negotiate with their downstream neighbour made reaching agreement between the three colonies near impossible.

South Australia carried this weak negotiating position into the Australasian Federal Conventions. Considerable time during the Federal Convention debates was

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Australia and the Australian Capital Territory: see *Agreement on Murray-Darling Basin Reform* (3 July 2008) Council of Australian Governments <[https://www.coag.gov.au/sites/default/files/agreements/Murray\\_Darling\\_IGA.pdf](https://www.coag.gov.au/sites/default/files/agreements/Murray_Darling_IGA.pdf)>.

<sup>148</sup> South Australia, Royal Commission on the Utilisation of the River Murray Waters, *Second Report* (1890) vi.

dedicated to the issue of the River Murray.<sup>149</sup> The Convention delegates — many of whom were the same political figures involved in these earlier attempts to hold meetings between representatives of the three colonial Royal Commissions — were unable to reach agreement as to defining the rights of the colonies to the waters of the Murray. New South Wales and Victoria had the geographical upper hand and there were no legal or practical incentives for them to resolve this issue by prescribing the respective rights of the future state to the waters of the Murray within the *Australian Constitution*. As a consequence, the uncertainty over the legal rights of the colonies continued after federation between the states and still exists today.<sup>150</sup>

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<sup>149</sup> About one-fifth of the time during the Melbourne Convention in 1898 was spent debating the issues relating to transboundary rivers and, in particular, the River Murray: Nicholas Kelly, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use' (2007) 30 *University of New South Wales Law Journal* 639, 642.

<sup>150</sup> See, eg, Renard, 'Australian Inter-State Common Law', above n 121; Renard, 'The River Murray Question: Part III — New Doctrines for Old Problems', above n 121; Webster, above n 121; Adam Webster, 'Sharing Water from Transboundary Rivers in Australia: Limits on State Power' (2016) 44 *Federal Law Review* 25.



## THE CONSTITUTIONAL CONVENTIONS AND CONSTITUTIONAL CHANGE: MAKING SENSE OF MULTIPLE INTENTIONS

### ABSTRACT

The delegates to the 1890s Constitutional Conventions were well aware that the amendment mechanism is the ‘most important part of a Constitution’, for on it ‘depends the question as to whether the state shall develop with peaceful continuity or shall suffer alternations of stagnation, retrogression, and revolution’.<sup>1</sup> However, with only 8 of 44 proposed amendments passed in the 116 years since Federation, many commentators have questioned whether the compromises struck by the delegates are working as intended, and others have offered proposals to amend the amending provision. This paper adds to this literature by examining in detail the evolution of s 128 of the *Constitution* — both during the drafting and beyond. This analysis illustrates that s 128 is caught between three competing ideologies: representative and responsible government, popular democracy, and federalism. Understanding these multiple intentions and the delicate compromises struck by the delegates reveals the origins of s 128, facilitates a broader understanding of colonial politics and federation history, and is relevant to understanding the history of referenda as well as considerations for the section’s reform.

### I INTRODUCTION

Over the last several years, three major issues confronting Australia’s public law framework and a fourth significant issue concerning Australia’s commitment to liberalism and equality have been debated, but at an institutional level progress in all four has been blocked. The constitutionality of federal grants to local government remains unresolved, momentum for Indigenous recognition in the *Constitution* ebbs and flows, and the prospects for marriage equality and an

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<sup>1</sup> John Burgess, *Political Science and Comparative Constitutional Law* (Ginn & Company, 1890) 137, quoted in *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 719 (Isaac Isaacs).

Australian republic remain uncertain. In all four cases the prospect of a referendum has been raised.

Local government has come the closest to reform. In 2013, a proposed constitutional alteration to enable the Commonwealth to directly fund local councils was passed by both Houses of Parliament.<sup>2</sup> Despite bipartisan support, the referendum was discarded after the 7 September 2013 federal election, and has not been revisited.<sup>3</sup> Prospects of an Australian republic also appear to be in a holding pattern; with grass roots support apparently lacking,<sup>4</sup> many proponents are resigned to wait until the end of Queen Elizabeth II's reign — whether this proves an effective catalyst is uncertain.<sup>5</sup> Indigenous recognition seems at once both nearer and farther off: despite the various reports by Parliamentary and expert bodies,<sup>6</sup> recognition in state constitutions<sup>7</sup> and by the Commonwealth Parliament,<sup>8</sup> considerable public support,<sup>9</sup> and

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<sup>2</sup> Constitution Alteration (Local Government) Bill 2013 (Cth).

<sup>3</sup> Phillip Hudson, 'Abbott Government Kills off Local Government Referendum', *Herald Sun* (online), 31 October 2013 <<http://www.heraldsun.com.au/news/abbott-government-kills-off-local-government-referendum/news-story/51bebe420855276c2b36f43933df14de>>.

<sup>4</sup> Stephanie Peatling, 'Support for a Republic Flatlines as Public Continues its Royal Fascination', *Sydney Morning Herald* (online), 15 February 2016 <<http://www.smh.com.au/federal-politics/political-news/support-for-a-republic-flatlines-as-public-continues-its-royal-fascination-20160215-gmu4f0.html>>.

<sup>5</sup> Luke Mansillo, 'Loyal to the Crown: Shifting Public Opinion Towards the Monarchy in Australia' (2016) 51 *Australian Journal of Political Science* 213.

<sup>6</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, Parliament of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Commonwealth of Australia, *Interim Report* (July 2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Commonwealth of Australia, *Final Report* (June 2015).

<sup>7</sup> Victoria: *Constitution (Recognition of Aboriginal People) Act 2004* (Vic), inserting s 1A into the *Constitution Act 1975* (Vic); Queensland: *Constitution (Preamble) Amendment Act 2010* (Qld), inserting a new preamble and s 3A into the *Constitution of Queensland 2001* (Qld); New South Wales: *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW), inserting a new s 2 into the *Constitution Act 1902* (NSW); South Australia: *Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013* (SA), inserting a new s 2 into the *Constitution Act 1934* (SA); Western Australia: *Constitution Amendment (Recognition of Aboriginal People) Act 2015* (WA), amending the preamble to the *Constitution Act 1889* (WA). Tasmania: *Constitution Amendment (Constitutional Recognition of Aboriginal People) Act 2016* (Tas), amending the preamble of the *Constitution Act 1934* (Tas).

<sup>8</sup> *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 3.

<sup>9</sup> See, eg, Anna Henderson, 'Indigenous Recognition in the Constitution Overwhelmingly Supported in New National Poll', *ABC News* (online), 27 March 2015 <<http://www.abc.net.au/news/2015-03-27/poll-surveys-australians-on-indigenous-disadvantage/6350098>>.

consensus among Aboriginal and Torres Strait Islander peoples,<sup>10</sup> constitutional change appears distant. In December 2015 a Referendum Council was established to ‘advise ... on progress and next steps towards a referendum’.<sup>11</sup> Once tentatively scheduled for 2013, that vote is now unlikely to occur before 2018.<sup>12</sup>

The difficulty of success at a referendum has had two perverse effects. On the one hand, for those in favour of change (such as those supporting Indigenous recognition and republicanism), a referendum is not worth having unless its success is assured.<sup>13</sup> On the other hand, the rigidity of the referendum process has encouraged those opposed to change to propose it as a mechanism in circumstances where it is plainly unnecessary. For example, it is now confirmed that the Commonwealth Parliament has the power to legislate with respect to same-sex marriage,<sup>14</sup> but some politicians attracted to retaining the status quo once suggested that a referendum — rather than a plebiscite (or a vote in Parliament) — might be the appropriate mechanism for legal change.<sup>15</sup>

These developments call for closer analysis of the referendum mechanism under s 128 of the *Constitution*. In recent years, a number of scholars have examined why constitutional change has proved so difficult in Australia, and recommended ways to either successfully navigate through the shoals or amend the provision entirely.<sup>16</sup>

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<sup>10</sup> Referendum Council, *Uluru Statement From the Heart* (26 May 2017) <[https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart\\_0.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF)>.

<sup>11</sup> Malcolm Turnbull and Bill Shorten, ‘Referendum Council’ (Media Release, 7 December 2015) <<https://www.pm.gov.au/media/2015-12-07/referendum-council>>.

<sup>12</sup> Calla Wahlquist, ‘Indigenous Recognition Referendum Likely to be Delayed Until 2018’, *Guardian Australia* (online), 9 August 2016 <<https://www.theguardian.com/australia-news/2016/aug/09/indigenous-recognition-referendum-likely-to-be-delayed-until-2018>>.

<sup>13</sup> See, eg, *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 4(2)(a): ‘Those undertaking the review must consider the readiness of the Australian public to support a referendum to amend the Constitution to recognise Aboriginal and Torres Strait Islander peoples’; Jared Owens, ‘Republic Referendum: Timing Has to be Right Warns Malcolm Turnbull’, *The Australian* (online), 26 January 2016 <<http://www.theaustralian.com.au/national-affairs/republic-referendum-timing-has-to-be-right-warns-malcolm-turnbull/news-story/e0d481cb4b87ad7a37933f1e75e0cf34>>.

<sup>14</sup> *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

<sup>15</sup> See Louise Yaxley and Anna Henderson, ‘Cabinet split over holding plebiscite or referendum for same-sex marriage public vote’, *ABC News* (online), 14 August 2015 <<http://www.abc.net.au/news/2015-08-14/same-sex-marriage-debate-exposing-rifts-in-government/6696532>>.

<sup>16</sup> See, eg, Paul Kildea and A J Brown, ‘The Referendum That Wasn’t: Constitutional Recognition of Local Government and the Australian Federal Reform Dilemma’ (2016) 44 *Federal Law Review* 143; Anne Twomey, ‘A Revised Proposal for Indigenous Constitutional Recognition’ (2014) 36 *Sydney Law Review* 381; Paul Kildea, ‘A Little More Conversation? Assessing the Capacity of Citizens to Deliberate about Constitutional Reform in Australia’ (2013) 22 *Griffith Law Review* 291; Sarah

Other commentators have questioned whether reform can be undertaken without formal amendment.<sup>17</sup> This article complements this substantial body of work by exploring in detail the evolution of s 128 from its first draft to its current form. We take this approach as we believe that a historical understanding of the motivations behind the genesis of this provision is relevant to understanding the history of referenda as well as considerations for the section's reform. Our analysis brings to light the competing ideologies and shifting power balances between conservative, liberal, and federalist camps during the drafting.<sup>18</sup> Ultimately, the struggle between these camps has had significant consequences for the Australian federation.

Section 128, which determines the entities by whom and means by which the distribution of power between organs of the state may be altered, or the limitations on state power tightened or dispensed with, identifies the locus of internal sovereignty within the Australian Federation.<sup>19</sup> It is unsurprising then that s 128 was fiercely debated. To understand the motivations of the drafters, however, is also to assess their continuing relevance and weight against contemporary norms and values. Such an assessment of the legitimacy of the amendment provision also has implications for the authority of the *Constitution* generally. On one view, the *Constitution*, like any law, derives authority from the ability of its subjects to reform it through legitimate means.<sup>20</sup> To the extent that the *Constitution* may be perceived as unduly difficult to

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Murray, 'State Initiation of Section 128 Referenda' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation* (Federation Press, 2012) 332; Graeme Orr, 'Compulsory Voting: Elections, not Referendums' (2011) 18 *Pandora's Box* 19; Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34 *Melbourne University Law Review* 805; Alan Fenna, 'Constitutional Amendment and Policy-Making through the Citizen-Initiated Referendum' (2010) 5 *Public Policy* 65; George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010); George Williams, 'Thawing the Frozen Continent' (2008) 19 *Griffith Review* 11.

<sup>17</sup> George Williams, 'Rewriting the Federation Through Referendum' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation* (Federation Press, 2012) 294, 296–9 (arguing that formal amendment is necessary to solve many of Australia's pressing problems); Brian Galligan, 'Processes for Reforming Australian Federalism' (2008) 31 *UNSW Law Journal* 617, 630 (arguing that formal amendment is unnecessary to reform federalism).

<sup>18</sup> For an analysis of the significance of federalism in the drafting of s 128, see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 229–334. For a précis of the drafting see John Williams, 'The Constitutional Amendment Process: Poetry for the Ages' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 1.

<sup>19</sup> Though note considerations raised by Gummow J in *McGinty v Western Australia* (1996) 186 CLR 140, 274–5.

<sup>20</sup> Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) ch 5. There are of course other views of the source of authority of law, including through the threat or application of force: Thomas Hobbes, *Leviathan*, ch 17 (Bk II, Chapter 17);

modify on the basis of considerations that are no longer relevant, that legitimacy is undermined. In aid of that debate, this study traverses the compromise ‘very deliberately’<sup>21</sup> struck in s 128 to facilitate that understanding.

## II A BACKGROUND TO SECTION 128

A significant portion of criticism targeted at the *Constitution* has focused on s 128. The amendment mechanism is ‘the most important part of a Constitution’, for in it ‘depends the question as to whether the state shall develop with peaceful continuity or shall suffer alternations of stagnation, retrogression, and revolution’.<sup>22</sup> With only eight of the 44 proposed amendments since 1901 having succeeded, the last of which was some 40 years ago,<sup>23</sup> commentators have long labelled Australia — ‘[c]onstitutionally speaking’ — as the ‘frozen continent’,<sup>24</sup> and suggested that the provision has ‘failed to achieve much purpose’.<sup>25</sup> Others who have argued that the rigidity of the provision has created greater difficulty than might have been foreseen include High Court justices,<sup>26</sup> and prominent academics.<sup>27</sup> Conversely, other equally eminent

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its inherent morality: Joseph Raz, ‘Authority, Law and Morality’ (1985) 68 *The Monist* 295; or the acceptance of a rule of recognition by the people, or at least the officials representing the people in government: H L A Hart, *The Concept of Law* (Oxford University Press, 3<sup>rd</sup> ed, 2012) 94. For a discussion in the Australian context, see Aroney, above n 18, 345–55; Simon Evans, ‘Why is the Constitution Binding? Authority, Obligation and the Role of the People’ (2004) 25 *Adelaide Law Review* 103; Anthony Dillon, ‘A Turtle by Any Other Name: The Legal Basis of the Australian Constitution’ (2001) 29 *Federal Law Review* 241.

<sup>21</sup> John Latham, ‘Changing the Constitution’ (1953) 1 *Sydney Law Review* 14, 18.

<sup>22</sup> John Burgess, *Political Science and Comparative Constitutional Law* (Ginn & Company, 1890) 137, quoted in *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 719 (Isaac Isaacs).

<sup>23</sup> *Constitution Alteration (Referendums) Act 1977* (Cth).

<sup>24</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

<sup>25</sup> J E Richardson, ‘Patterns of Australian Federalism’ (Research Monograph No 1, Centre for Research on Federal Financial Relations, Australian National University, 1973) 105. See also George Williams and Hume, above n 16, 88.

<sup>26</sup> See, eg, Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience’ (1986) 16 *Federal Law Review* 1, 22; *R v Hughes* (2000) 202 CLR 535, 562–3 (Kirby J).

<sup>27</sup> See, eg, John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 287; Richardson, above n 25, 105; Michael Coper, ‘The People and the Judges: Constitutional Referendums and Judicial Interpretation’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 73, 87; George Williams and Hume, above n 16, 88.

judges and leading academics acknowledge and consider the limited number of successful referenda to be a sign of the health of the federation.<sup>28</sup>

Close examination of the development of s 128 is, post *Cole v Whitfield*,<sup>29</sup> potentially useful to contemporary constitutional interpretation, particularly in revealing the nature and objectives of the federation movement.<sup>30</sup> However, lawyers and historians turn to the past for different purposes,<sup>31</sup> and care must be taken not to substitute the subjective intentions of the drafters for the meaning of the words eventually adopted. Originalism ‘sits uncomfortably’ within Australia’s constitutional traditions,<sup>32</sup> but history will always remain an important dimension of legal methodology and constitutional interpretation.<sup>33</sup>

Close examination of the drafting of s 128 can therefore serve an important goal. By contextualising a sparse text and the ‘fragmentary statements of individuals,’<sup>34</sup> it can facilitate a broader understanding of the amendment provision itself, as well as colonial politics and federation history. Such statements are only ever partial indicators of intention; alone they are either unhelpful or can potentially lead to mistaken views. Only by situating each statement within its environment, and tracing their evolution, can the multiple, ‘interlocking intentions’ be revealed.<sup>35</sup>

<sup>28</sup> See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 300–1 [735] (Callinan J) (*WorkChoices*); Paul de Jersey, ‘A Sketch of the Modern Australian Federation’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 66, 66; Gregory Craven, ‘The High Court of Australia: A Study in the Abuse of Power’ (1999) 22 *University of New South Wales Law Journal* 216, 232–3; Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 683–4; Fenna, above n 16, 65; Brian Galligan, ‘Amending Constitutions Through the Referendum Device’ in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2000) 109.

<sup>29</sup> (1988) 165 CLR 360.

<sup>30</sup> *Ibid* 385.

<sup>31</sup> Anne Carter, ‘The Definition and Discovery of Facts in Native Title: The Historian’s Contribution’ (2008) 36 *Federal Law Review* 299, 299.

<sup>32</sup> Cheryl Saunders, ‘Interpreting the Constitution’ (2004) 15 *Public Law Review* 289, 291.

<sup>33</sup> See Susan Kenny, ‘The High Court of Australia and Modes of Constitutional Interpretation’ in Tom Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of NSW, 2007) 45 for discussion of theories of constitutional interpretation adopted by the High Court.

<sup>34</sup> Michael Coper, ‘Law, History, and the Idea of the High Court’ (Speech delivered at the Australian Government Summer School for Teachers of Australian History, Canberra, 18 January 2000). See also Michael Coper, ‘The Place of History in Constitutional Interpretation’ in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) 5.

<sup>35</sup> Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 220.

Historians find ‘multiple intentions and diverse experiences in federation, while lawyers usually strive to establish single meanings in order to support definitive judgments.’<sup>36</sup> The evolution of the referendum mechanism reveals the futility of searching for a single intention. Rather, close examination of the evolution of s 128 reveals a conflict between the political philosophies of conservatism and liberalism, waged through a battle between the principles of responsible and representative government on one side and popular democracy on the other; though federalism complicated the ‘apparently simple confrontations of liberals and conservatives’.<sup>37</sup> For example, the issues of women’s suffrage and a direct popular vote on proposed amendments — key liberal platforms — became proxies for arguments about states’ rights. The anxiety of the ‘small’ states that the ‘large’ states might use their power to overwhelm them forced compromises in the drafting of s 128.

The delegates to the Constitutional Conventions drew on the practice and experience of many nations — most notably the United States and Switzerland — from which to draw the final model.<sup>38</sup> Under the mechanism finally agreed upon, a referendum will only succeed if it obtains a double majority — that is, if it achieves a majority of votes across Australia, including the territories,<sup>39</sup> and a majority of votes in a majority of states. The two primary limbs are born of competing political theories: while the first requirement is steeped in direct popular democracy,<sup>40</sup> the second is a concession to federalism.<sup>41</sup> In addition, any proposed amendment that seeks to diminish the proportionate representation or minimum number of representatives of a state, or alter the limits of a state will only be successful if a majority of voters in that particular state approve the proposed amendment. In those circumstances it is more appropriate to speak of the requirement for a triple majority. Finally, reflective of the critical importance the drafters placed on representative government, a proposed amendment will only be voted on by the people if it is either passed by an absolute

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<sup>36</sup> John Waugh, ‘Lawyers, Historians and Federation History’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 25, 28.

<sup>37</sup> La Nauze, above n 27, 125. See also *Wong v Commonwealth* (2009) 236 CLR 573, 582 [18] (French CJ and Gummow J).

<sup>38</sup> See especially *Official Report of the National Australasian Convention Debates*, Sydney, 16 March 1891, 386 (Alfred Deakin):

‘an Australian constitution that was begun by setting aside the political experience of the civilised world would have a poor chance of doing any good. Any constitution that is built up must be built on the experience gained of other constitutions in other parts of the world.’

Alan Watson has argued that ‘borrowing (with adaption) has been the usual way of legal development’ in the western world: see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2<sup>nd</sup> ed, 1993) 7. The story is no different for s 128.

<sup>39</sup> *Constitution Alteration (Referendums) 1977* (Cth).

<sup>40</sup> See *WorkChoices* (2006) 229 CLR 1, 299–300 [732]–[735], 319–22 [772]–[779] (Callinan J).

<sup>41</sup> *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 49–50 [102] (Kirby J).

majority of both Houses of Parliament, or passed by the same House of Parliament twice (after a period of three months) if the second House refuses to pass it.

### III THE EVOLUTION OF SECTION 128

A mechanism for constitutional alteration was first proposed during the Australasian Federation Conference held in Melbourne between 6 and 14 February 1890. Alfred Deakin, the liberal Victorian delegate, appears to have been the first to propose that the people themselves be permitted to vote on any alteration or amendment. The suggestion seems to have been simply ignored — no other delegate discussed it, or proposed an alternative, and the two early drafts of the *Constitution*, one by Andrew Inglis Clark and the other by Charles Kingston, adopted different mechanisms.<sup>42</sup>

Nevertheless, the early presence of an amendment mechanism indicated that the drafters always intended to vest the power of amendment, at least in part, directly in the people or indirectly via the states that comprised the federation, rather than in the institutions that preceded or were formed as a result of Federation. This was a departure from the Canadian approach, which left the power of amendment to the Imperial Parliament.<sup>43</sup> Such a model was never seriously considered for Australia and especially not by Inglis Clark or Kingston who would have considered it inconsistent with their ‘legal nationalism and republican inclination’.<sup>44</sup> Certainly, delegates considered that Canada had ‘made a mistake’.<sup>45</sup> Likewise, those who considered that power for constitutional change should be vested entirely in the federal Parliament were in a minority.

This section canvasses four factors which influenced the drafters of the *Constitution* and of s 128. In Part A, we explore the tension between stability and flexibility, before addressing the competing considerations of States’ rights and popular sovereignty in Part B. In Part C, the terrain shifts to the conflict between representative and responsible government on the one side, and popular sovereignty on the other. Finally, in Part D, federal concerns bubble up to the surface as the impact of competing polities in a federal system is addressed.

#### *A Stability v Flexibility*

As the mechanism for formal constitutional amendment,<sup>46</sup> an appropriate balance between stability and flexibility is essential to guarantee the Constitution’s sound

<sup>42</sup> See below Part III.B.

<sup>43</sup> *British North America Act 1876* (Imp), 30 & 31 Vic, c. 3.

<sup>44</sup> John Williams, ‘The Constitutional Amendment Process: Poetry for the Ages’, above n 18, 7.

<sup>45</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 497 (Thomas Playford).

<sup>46</sup> As to other informal means of alteration, see James A Thomson, ‘Altering the Constitution: Some Aspects of Section 128’ (1983) 13 *Federal Law Review* 323, 323–4 n 4; Anne Twomey, ‘Constitutional Alteration and the Jurisprudence of Justice Callinan’

operation. An overly rigid provision would have the effect of stymieing constitutional change, while an excessively fluid referendum mechanism would allow it to be altered 'to every gust of wind that blows hither and thither.'<sup>47</sup> As Robert Garran explained in *The Coming Commonwealth*, the challenge 'is to find the golden mean which will adequately secure state rights whilst allowing fair scope for constitutional development.'<sup>48</sup>

An examination of the Convention Debates indicates that there was broad agreement from the very beginning that the referendum mechanism should be strict.<sup>49</sup> Tasmanian Premier Edward Braddon argued that amendment 'should be made as difficult as possible',<sup>50</sup> while future High Court Justice Richard O'Connor considered the *Constitution* should 'not be lightly interfered with.'<sup>51</sup> Although amendment should not be 'made absolutely impossible', it was viewed as essential that the *Constitution* not be subject to 'any fluctuation of public opinion, any change of feeling on the part of the people in some crisis of a temporary character'.<sup>52</sup> Repeatedly emphasised was the need to 'provide all necessary safeguards against its being lightly amended'.<sup>53</sup> There was, of course, some opposition to such a sentiment from more liberal delegates, among them Isaac Isaacs, who, while noting that the *Constitution* 'should not be rudely touched or hastily altered', suggested that the interests of progress would demand that 'the political development of the Commonwealth shall keep pace with the social and commercial development of the people.'<sup>54</sup>

The compromise ultimately sketched out lessons learnt from the experience of the United States. Amendments to the *United States Constitution* may be proposed by either a two-thirds majority of Congress, or a national convention assembled at the

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(2008) 27 *University of Queensland Law Journal* 47, 48; Charles Sampford, 'Some Limitations on Constitutional Change' (1979) 12 *Melbourne University Law Review* 210, 211, 229–39.

<sup>47</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1023 (Simon Fraser).

<sup>48</sup> Robert Garran, *The Coming Commonwealth* (Simpkin, Marshall, Hamilton, Kent & Co, 1897) 182.

<sup>49</sup> See, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 497 (William Russell); Sydney 8 April 1891, 887 (John Donaldson); Adelaide 20 April 1897, 1021 (Edmund Barton), 1023 (Simon Fraser); Melbourne 9 February 1898, 716 (William McMillan), 744 (Edward Braddon), 748 (John Forrest), 748–9 (Charles Kingston), 752 (Vaiben Solomon), 759 (Isaac Isaacs).

<sup>50</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021.

<sup>51</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 745.

<sup>52</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021 (Edward Barron).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 759.

request of at least two-thirds of the States. The proposed amendment will only be successful if ratified by at least three-quarters of the states, either by legislatures or conventions.<sup>55</sup> The added complication of the Presidential system is avoided with the Executive being excluded from the process: the proposed amendment does not need to be signed by the President, and the President does not have the power to veto an amendment.<sup>56</sup>

The ‘rigidity’ of the *United States Constitution* was at the front of the minds of many delegates at the Australian Convention Debates. In Adelaide in 1897, Isaacs twice noted that, in 1880, three million Americans could resist an amendment supported by 45 million, a fact he considered an ‘intolerable ... mistake we must not follow’<sup>57</sup> and a situation that arises ‘from the iron grasp of the dead hand.’<sup>58</sup> Former South Australian Premier Dr John Cockburn, ‘advanced liberal’ and ‘ardent Federationist’,<sup>59</sup> agreed, arguing that ‘an amendment of the Constitution should not be made too easy, but on the other hand it should not be made too difficult. In America it is too difficult’.<sup>60</sup> In Melbourne in 1898, William McMillan recorded his disapproval ‘of the rigidity of the American Constitution’,<sup>61</sup> and Isaacs renewed his assault.<sup>62</sup> Henry Higgins attempted to assuage Isaacs by noting that the amendment procedure then being debated would make it easier to amend the Australian Constitution than it is in America.<sup>63</sup> Patrick Glynn, Richard O’Connor, Edmund Barton, and James Howe sought a middle ground,<sup>64</sup> agreeing that the ‘American process’<sup>65</sup> was undesirable — in the words of Barton ‘not only a complicated process, but ... one of extreme difficulty’ and that that would not be the case in Australia.<sup>66</sup> Structurally this is true — s 128 offers a lower threshold than article V of the *United States Constitution*.

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<sup>55</sup> *United States Constitution* art V.

<sup>56</sup> *Hollingsworth v Virginia*, 3 US 378 (1798).

<sup>57</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 181; *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021.

<sup>58</sup> *Ibid* 1020.

<sup>59</sup> John Playford, ‘Cockburn, Sir John Alexander (1850-1929)’ in Bede Nairn and Geoffrey Searle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1981) vol 8, 42, 43.

<sup>60</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1022.

<sup>61</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 716.

<sup>62</sup> *Ibid* 719–21.

<sup>63</sup> *Ibid* 720, 766–8.

<sup>64</sup> *Ibid* 736–7 (Patrick Glynn), 745 (Richard O’Connor), 750 (Edmund Barton), 754–55 (James Howe).

<sup>65</sup> *Ibid* 750 (Edmund Barton).

<sup>66</sup> *Ibid*. See also Garran, above n 48, 70: ‘though rigidity in a federal constitution is desirable, it seems that the rigidity of the American Constitution has been somewhat overdone.’

Between 1789 and 1898, the *United States Constitution* was amended 15 times.<sup>67</sup> However, this belies its true ‘rigidity’.<sup>68</sup> The first 10 amendments (the Bill of Rights) were ratified within the first two years, and are not, as Glynn argued, ‘strictly speaking, amendments at all’, as they were ‘alterations referring to the security of civil and religious liberty and such matters, which were proposed as conditions precedent to the adherence of several of the states to the Union’.<sup>69</sup> Further, the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> amendments were adopted in the wake of the Civil War — a ‘most extraordinary circumstance’.<sup>70</sup>

Nevertheless, as the requirements of s 128 have been met only eight times, it is true that in practice s 128 has proven to operate just as, or even more, restrictively than Article V. The compromise struck by the delegates at the Convention Debates with regard to the rigidity of the *Constitution* has proven false — the gauntlet of s 128 poses extreme difficulty. Of course, whether this is seen as positive or negative depends both upon one’s normative perspective and the particular proposals for alteration.

Measuring the stability or flexibility of constitutional amendment comparatively is a difficult task, but comparative constitutional scholars agree that Australia’s procedure is particularly difficult. In the leading large-scale comparative study, Donald Lutz has attempted to ascertain the difficulty of constitutional amendment by quantifying the difficulty of discrete steps in the process.<sup>71</sup> Lutz identified 68 possible steps, such as initiation by citizens, the executive, or a specially constituted body, and aggregated the scores to provide an overall index of difficulty. According to Lutz, Australia’s *Constitution* is the fifth most difficult to amend in the world.<sup>72</sup> George Williams and David Hume note, however, that Lutz did not take into account the full process that amendments to Australia’s *Constitution* must go through, failing to include the fact that amendments require bicameral absolute majority approval, executive approval, and approval by a majority of people in a majority of states. Including these features would mean that Australia’s *Constitution* ‘jumps to the top of the list as the most difficult in the world to change’.<sup>73</sup> Other studies paint a similar picture. Arend Lijphart places

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<sup>67</sup> The 16<sup>th</sup> Amendment was ratified in 1913. As of June 2016, the United States Constitution has been amended 27 times, though in addition to the qualification noted above, the 21<sup>st</sup> Amendment (1933) simply repealed the 18<sup>th</sup> Amendment (1920).

<sup>68</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 181 (Isaac Isaacs); 29 March 1897, 248 (William Trenwith); 30 March 1897, 335 (William Trenwith).

<sup>69</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 737 (Patrick Glynn).

<sup>70</sup> *Ibid.* The 10 amendments that make up the Bill of Rights were conditions for ratification under the Massachusetts Compromise: Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxford University Press, 2006) 58–9.

<sup>71</sup> Donald S Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006).

<sup>72</sup> *Ibid.* 170.

<sup>73</sup> George Williams and Hume, above n 16, 11.

Australia in the top group of amendment difficulty, alongside Canada, Japan, Switzerland and the United States.<sup>74</sup> Similarly, Astrid Lorenz ranks Australia in fifth position, behind only Belgium, the United States, the Netherlands and Bolivia.<sup>75</sup>

The second limb of s 128 — the requirement that a majority of voters in a majority of states must approve of a proposed alteration — appears to create an onerous limitation on constitutional amendment. With six states, it has meant that no amendment can pass without four out of six voting in favour.<sup>76</sup> However, this requirement has only defeated 5 of 36 failed amendments. The marketing,<sup>77</sup> industrial employment,<sup>78</sup> and simultaneous elections<sup>79</sup> referenda all obtained a majority of votes nationally and carried three states, while aviation<sup>80</sup> and terms of senators<sup>81</sup> referenda obtained a national majority but carried only two states. Although the result of the simultaneous elections referendum would have particularly displeased Isaacs — the ‘yes’ camp received 62.22 per cent of the national vote but the amendment was defeated by a mere 9 211 voters in Western Australia<sup>82</sup> — the difficulty in adopting constitutional amendments has not, in general, been attributable in any real sense to this limb.

Simply counting the rate of successful amendments, however, paints a misleading picture. A better — though perhaps empirically impossible — indicator of the stability of the process under s 128 would include the number of proposals that did not reach the people.<sup>83</sup> That is, proposals (like those mentioned in the introduction) that were raised but never formally initiated — only 44 proposals for constitutional alteration have ever been put to the people. This relatively small number is a result of several factors, chief among them that amendment may only be initiated by bicameral absolute majority approval (and therefore on the instigation of the executive). As will

<sup>74</sup> Arend Lijphart, *Patterns of Democracy* (Yale University Press, 1999) 220.

<sup>75</sup> Astrid Lorenz, ‘How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives’ (2005) 17 *Journal of Theoretical Politics* 339, 358–9.

<sup>76</sup> Chapter VI of the Constitution allows for the establishment or admission of new states to the Federation, but until and unless this occurs these difficulties will continue. On Chapter VI see Anna Rienstra and George Williams ‘Redrawing the Federation: Creating New States from Australia’s Existing States’ (2015) 37 *Sydney Law Review* 357.

<sup>77</sup> Constitution Alteration (Organised Marketing of Primary Products) Bill 1946 (Cth).

<sup>78</sup> Constitution Alteration (Industrial Employment) Bill 1946 (Cth).

<sup>79</sup> Constitution Alteration (Simultaneous Elections) Bill 1977 (Cth).

<sup>80</sup> Constitution Alteration (Aviation) Bill 1936 (Cth).

<sup>81</sup> Constitution Alteration (Terms of Senators) Bill 1984 (Cth).

<sup>82</sup> Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Constitutional Change: Select Sources on Constitutional Change in Australia 1901–1997* (1997) 104.

<sup>83</sup> Kathleen Sullivan estimates that some 11 000 amendments have been proposed to the US Constitution. However, only 33 have attained the necessary Congressional super-majorities, and only 27 have been ratified by three-quarters of the states: Kathleen Sullivan, ‘Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever’ (1996) 17 *Cardozo Law Review* 691, 692.

be discussed below, some members of the Convention Debates recognised that expanding this requirement to permit the states or citizens themselves to initiate proposals would affect the stability/flexibility of the document they agreed to.

Certainly, the text of s 128 means that the *Constitution* cannot be ‘lightly amended’, however, broader cultural and institutional reasons — what Tom Ginsburg and James Melton refer to as a country’s ‘amendment culture’<sup>84</sup> — should not be ignored. In particular, constitutional illiteracy, state interests, government error, a committed opposition and status quo bias, amongst many other reasons, have all contributed to the low success rate.<sup>85</sup> Indeed, the High Court has also acknowledged the role of party politics in influencing the outcome of proposals,<sup>86</sup> though this influence likely stems from the necessity that the executive initiates a referendum. In addition, the mechanics of the referendum process itself — most particularly compulsory voting — has also been identified as a possible cause.<sup>87</sup> These factors suggest that rigidity is not tied solely to the text of s 128 — something proponents of an Australian republic may be all too aware of. They also suggest that any amendment to s 128 may have unintended consequences. For example, it is not clear that allowing citizens to introduce referendum proposals would axiomatically lead to a more flexible *Constitution*. As has proven the case in California, proposals may include stringent manner and form requirements that limit the potential for future amendment.<sup>88</sup>

### B *States’ Rights v Popular Sovereignty*

The ‘amending power’ is ‘the highest expression of the will of the sovereign people of the Nation and the sovereign people of the States’;<sup>89</sup> it is ‘the real legislative sovereign which presides directly over the constitution’.<sup>90</sup> An amendment mechanism therefore focuses attention on the location of ultimate lawful authority within a polity.<sup>91</sup> A key

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<sup>84</sup> Tom Ginsburg and James Melton, ‘Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty’ (2015) 13 *International Journal of Constitutional Law* 686–713.

<sup>85</sup> George Williams and Hume, above n 16, 199–237. See also Scott Bennett, ‘The Politics of Constitutional Amendment’ (Research Paper No 11, Parliamentary Library, Parliament of Australia, 2002–03). Ron Levy considers that declining trust in government is a critical reason for the failure of referenda: Levy, above n 16.

<sup>86</sup> *WorkChoices* (2006) 229 CLR 1, 101 [132] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>87</sup> Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 49; Orr, above n 16.

<sup>88</sup> See, eg, California Proposition 13 (1978); *California Constitution* art XIII A.

<sup>89</sup> Garran, above n 48, 182.

<sup>90</sup> *Ibid* 25.

<sup>91</sup> Stephen Tierney, ‘Constitutional Referendums: A Theoretical Enquiry’ (2009) 72 *Modern Law Review* 360, 360–1. See also James Bryce, *Studies in History and Jurisprudence* (Clarendon Press, 1901) vol 2, 53: ‘in a country governed by a Rigid Constitution which limits the power of the legislature’, ultimate sovereignty resides with the authority ‘which made and can amend the Constitution.’

ideological conflict in the drafting of the *Constitution* was between states' rights on the one hand and popular sovereignty on the other. The different positions on whether a direct popular vote should be included in the referendum mechanism reveal divergent views on the extent of direct political sovereignty afforded to the people. Additionally, inter-state divisions over the breadth of popular sovereignty necessitated the curio that remains in paragraph four.

Delegates in favour of state sovereignty considered that the compromises struck between the states at Federation were fought for 'peg by peg, and word by word' and therefore should not be 'tampered with on the slightest provocation'.<sup>92</sup> The clear implication is that the legal framework achieved by the people acting through their representatives at state level was to be preferred to that proposed or voted on by the people themselves. The interests of the states should be 'safeguarded',<sup>93</sup> in order to 'guarantee to every one of the states ... the permanence of the agreement they have made'.<sup>94</sup> By contrast, others, among them Isaacs, argued that the *Constitution*, governing as it did the institutions of the nation, was fundamentally a matter for the people, not the representatives they elect: 'after all, the Constitution is being made for the people, not the people for the Constitution'.<sup>95</sup> For these delegates, the referendum mechanism was seen as 'the next stage in the evolution of democracy, whatever its theoretical and practical difficulties in a system of government that otherwise relied on representation'.<sup>96</sup>

As noted above, Deakin appears to have been the first to propose popular ratification of any constitutional amendment. In Melbourne in 1890, Deakin cited the 'innumerable precedents in the United States for the submission of constitutional amendments direct to the people' and asked whether the Australasian colonies 'may not prefer to adopt this method'.<sup>97</sup> The suggestion seems to have been simply ignored as two early drafts of the *Constitution* adopted different mechanisms. Inglis Clark's draft required a proposed amendment to be approved by two-thirds of the state legislatures, and left no room for a direct vote.<sup>98</sup> Kingston's draft *Constitution* maintained the state

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<sup>92</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 752 (Vaiben Solomon).

<sup>93</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 887 (John Donaldson); See also *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021 (Edward Braddon).

<sup>94</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 745 (Richard O'Connor).

<sup>95</sup> *Ibid* 759.

<sup>96</sup> Saunders, above n 87, 48. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 758 (Isaac Isaacs).

<sup>97</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 13 February 1890, 96.

<sup>98</sup> Andrew Inglis Clark, *Inglis Clark's Bill for the Federation of the Australasian Colonies* (6 February 1891) s 93, cited in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004) 92.

legislatures' requirement, but added a two-thirds majority vote of the electors.<sup>99</sup> John Williams observes that in its entirety, Kingston's draft *Constitution* 'balanced both his democratic and "States' rights" tendencies',<sup>100</sup> but it is within this amendment provision in particular that this balance is achieved. While the first limb protects the rights of states, the second grants the people a direct vote on any proposed alteration — endorsing change with democratic authority. Kingston was certainly not averse to popular democracy. In '[perhaps] the most radical feature'<sup>101</sup> of his draft, Kingston was prepared to permit a referendum on *any* Bill passed by Parliament.<sup>102</sup>

Under Sir Samuel Griffith's first official draft,<sup>103</sup> the *Constitution* could be amended by two steps: one federal and one state but neither by direct vote. The amendment would have to achieve an absolute majority vote in both Houses of Parliament. It would then be submitted to conventions of elected officials of each state, and must pass in a majority of those conventions and, if the proportionate representation of a state was diminished, in that state's convention. Griffith's clause 75, with its deference to state conventions, clearly aligned with the former ideology, but the idea of a direct popular vote, canvassed as early as 1890, overtook it as the debates progressed. In this shift, the delegates moved decisively away from the United States model and towards the Swiss.<sup>104</sup>

### 1 *Sydney, 1891*

The first proposal for direct popular involvement in the referendum mechanism was made by the Queensland delegate, Andrew Thynne in Sydney in 1891. Thynne argued that the mechanism would be 'much embellished and improved' if it preserved the right of amendment for the people.<sup>105</sup> He regarded such an approach as 'thoroughly democratic' and also 'guarded against hasty and ill-considered changes of the

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<sup>99</sup> Charles Cameron Kingston, *Kingston's Draft of a Constitution Bill* (26 February 1891) Pt XVII, cited in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004), 133.

<sup>100</sup> John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004) 114.

<sup>101</sup> *Ibid.*

<sup>102</sup> Kingston, *Kingston's Draft of a Constitution Bill*, above n 99, Pt IX. This is a feature of the 1874 Swiss Constitution: *Federal Constitution of the Swiss Confederation* (Switzerland) 19 April 1874, art 89.

<sup>103</sup> John Williams, *The Australian Constitution: A Documentary History*, above n 100, 134. Griffith's Draft combined aspects of Inglis Clark's and Kingston's work, as well as being influenced by discussions with other delegates. The proposed referenda mechanism is listed as clause 75 and is located under 'Chapter VIII: Amendment of Constitution'.

<sup>104</sup> Something that Garran considered the US would do, 'were they to recast their Federal Constitution at the present day': see Garran, above n 48, 137.

<sup>105</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 6 March 1891, 107. See also *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 495.

Constitution'.<sup>106</sup> He made explicit<sup>107</sup> that his proposal was predicated on the constitutional theory of popular sovereignty, arguing:

Any constitution we draw will have to be adopted by the whole of the people; it will virtually be a constitution rising and coming from them ... the people will be much more satisfied if they find ... that they themselves must be again consulted before any change is made<sup>108</sup>

His proposal was also supported by more practical arguments. It would remedy the possibility of gridlock between the Houses of Parliament,<sup>109</sup> entice the people of Australia into supporting federation,<sup>110</sup> and encourage the delegates at the Convention Debate to vote in favour of the Bill.<sup>111</sup> Unfortunately Thynne's proposal was misunderstood as intending either to allow the people alone to propose an alteration, a concept labelled 'pernicious',<sup>112</sup> or that only the people (and not the states) should be consulted on a referendum question,<sup>113</sup> and sparked rancorous debate forcing him to withdraw it. Nevertheless, the seed of popular democracy was sown and it would be raised again and again<sup>114</sup> — and, eventually, form part of s 128.<sup>115</sup>

Indeed, the very next month, some delegates used the space opened up by Thynne to advocate for the abandonment of the state conventions on the same basis. On 8 April 1891, Liberal Victorian Premier James Munro proposed that the state conventions be replaced with a popular vote, because it was more appropriate for questions of amendment to be determined by the people directly than by elected representatives,

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<sup>106</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 6 March 1891, 107.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 495–6. See also *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 441.

<sup>109</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 441.

<sup>110</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 495–6.

<sup>111</sup> *Ibid.* 496.

<sup>112</sup> *Ibid.* 497 (William Russell).

<sup>113</sup> *Ibid.* 497 (Thomas Playford).

<sup>114</sup> Including in Melbourne in 1898 in an ultimately unsuccessful motion of Isaacs: *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 717, 719.

<sup>115</sup> Thynne was not mentioned and he did not attend the debate, having resigned from his Ministerial portfolio: Brian Stevenson, 'Thynne, Andrew Joseph (1847–1927)' in John Richie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1990) vol 12, 228–9.

who ‘very often vote against their promises.’<sup>116</sup> South Australian Premier Thomas Playford agreed, stating that unless the people were consulted as well as the state officials they elect, ‘you can never ascertain correctly the views of the people ... [but only] the views of the men who have been elected members of the convention.’<sup>117</sup> He was also concerned to avoid a situation where a minority of electors might amend the constitution by virtue of their being part of a majority of state conventions, which ‘no one in his senses’ would consider fair.<sup>118</sup> Accordingly, he took inspiration from the Swiss model, which he considered ‘has worked exceedingly well’.<sup>119</sup> Dr Cockburn also opposed the conventions as ‘an error in theory, and useless in practice.’<sup>120</sup> The former South Australian Premier believed that in the United States the use of conventions were first proposed ‘as a barrier against’, and as a ‘check on the popular will’.<sup>121</sup> For Dr Cockburn, ‘[o]n any question so vital as the amendment of the Constitution the people have a right to be consulted directly, without any conventions whatever.’<sup>122</sup>

The argument revealed the tension between states’ rights and popular sovereignty: effectively, the reliance on state entities to effect constitutional change gave the power to the four smaller states to effect change without the significantly more populous Victoria and New South Wales; and perhaps more egregiously, to prevent constitutional change supported by all but three states. This was because the population of the continent was unevenly distributed. As of 30 June 1897, the estimated population of the colonies was as follows: New South Wales (1 311 440); Victoria (1 170 301); Queensland (480 000), South Australia, including the Northern Territory, (356 877); Western Australia (157 781); and Tasmania (167 062).<sup>123</sup> Stark distinctions among the population size of the colonies meant, in theory, constitutional change could be

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<sup>116</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 888.

<sup>117</sup> *Ibid* 891.

<sup>118</sup> *Ibid* 892.

<sup>119</sup> *Ibid* 891–2 (Thomas Playford):

The Swiss Constitution, which has worked exceedingly well, provides that any alteration in it shall be effected only by an expression of the views of the majority of the states and also of a majority of the people. ... I think ... that the Swiss provision ought to be embodied in the clause, so that in addition to a majority of the states there might also be a majority of the people

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid* 892–3. This is incorrect. While the convention process is indirect, it is more democratic than the alternative allowed in the United States — ratification by state legislatures: William Fisch, ‘Constitutional Referendum in the United States of America’ (2006) 54 *American Journal of Comparative Law* 485, 490. This is because representatives in a state ratifying convention stand and are elected on a single issue, rather than a multitude of issues as in the state legislature.

<sup>122</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 892–3.

<sup>123</sup> Sydney Morning Herald, ‘Population of the Australian Colonies’, *Sydney Morning Herald* (Sydney), 28 August 1897, 9 (population estimates prepared by the Acting

agreed to despite a substantial country-wide popular vote majority against. Nonetheless, the proposal to detract from states' rights was met with strong reactions from some of the states' delegates.

Conservative former Victorian Premier Duncan Gillies thought that any provision that requires direct popular approval would 'sacrifice' the smaller colonies.<sup>124</sup> Popular involvement was sufficiently catered for by the democratic elections of the Commonwealth Parliament and the state conventions.<sup>125</sup> The concern about amendments being made against the will of more populous states was hypothetical because they would block it in the Parliament.

In defence of the conventions, Griffith invoked notions of responsible and representative government. He noted that millions of people 'are not capable of discussing matters in detail', and so they elect their representatives to govern *for* them.<sup>126</sup> Further, by delegating sovereignty, the conventions would avoid expense and delay.<sup>127</sup> However, Deakin noted that the proposed conventions would not act as a deliberative body, amending the proposed constitutional amendment in slightly different ways; if their only function was to 'say aye or no', they would be in no better position than the people to make that determination.<sup>128</sup> Deakin argued that direct popular democracy was not foreign to representative government, 'but can be grafted upon it as an assistance to Parliament'.<sup>129</sup>

Although Griffith predicated his position on practicality — the simple impossibility of direct democracy in modern states — it ran close to that of classical political theorists of his time who distrusted popular majorities. Perhaps most prominently, the *Federalist Papers* emphasised representative government's advantages as an institutional constraint on the tyranny of (an uneducated) majority.<sup>130</sup> It is unclear

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Government Statist, Mr Fenton). These figures likely do not include Aboriginal and Torres Strait Islander peoples.

<sup>124</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 888.

<sup>125</sup> *Ibid* 888–9. But see Richard Baker, *A Manual of Reference to Authorities for the Use of the Members of The National Australasian Convention* (W. K. Thomas & Co, 1891) 43, in which Richard Baker questioned this view, arguing that elected representatives are often chosen on the basis of 'so many questions', such that elections are not the same as a referendum.

<sup>126</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 894.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid* 895.

<sup>129</sup> *Ibid* 896.

<sup>130</sup> James Madison, 'The Federalist No. 10' in Henry B Dawson (ed), *The Federalist* (Charles Scribner, 1863) vol 1, 62. While it is impossible to ascertain whether Griffith read The Federalist No. 10, in Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects: A Paper Presented to the Government of Queensland* (Edmund Gregory, 1896) he cited The Federalist Nos. 15 and 43. The Federalist

whether Griffith would have gone so far, but certainly he would have considered that ordinary citizens would not have had the qualities (education, time, expertise etc) required to make good decisions, whereas those elected to the state conventions would. Conversely, Deakin's understanding of limited direct democracy as an adjunct to representative government emphasised the importance of a popular mandate.

Ultimately, the amendment to strike out the conventions in favour of a popular vote was defeated by 19 votes to 9. However, something of a middle ground was achieved with a requirement, in addition to majorities both in the Houses of Parliament and at the state conventions, that those conventions voting in the affirmative represent a majority of the population.<sup>131</sup> While this amended clause protected the two large states from being overwhelmed by the three smaller states, it did little to sate the appetite of committed democrats and liberals.

## 2 *Adelaide, 1897*

Despite the defeat in Sydney, the movement towards a popular vote was supported by liberals and radicals and 'gathered pace in the 1890s', though the prospect of federation itself was "'put by" for six years.<sup>132</sup> Into this interregnum stepped committed democrats, who held two unofficial conferences in the period. The 1893 Corowa Conference and the 1896 People's Federal Convention<sup>133</sup> propelled the issue forward, helping to transform the legitimating force of federation from the states to the people.<sup>134</sup> Writing extra-curially, Justice Kirby notes that the popular movement 'came to affect the way in which the Adelaide Convention itself was constituted and the way in which the constitutional alteration provision was finally drawn'.<sup>135</sup> Unlike the 1891 Convention, the 1897 Convention in Adelaide comprised representatives

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was also discussed at the 1890 Conference and 1891 Convention at which Griffith attended: See *Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne*, 11 February 1890, 44 (John Cockburn); *Official Report of the National Australasian Convention Debates*, Sydney 9 March 1891, 151 (Arthur Rutledge).

<sup>131</sup> *Official Report of the National Australasian Convention Debates*, Sydney 8 April 1891, 884.

<sup>132</sup> La Nauze, above n 27, 87.

<sup>133</sup> Commonwealth, *The People's Conventions: Corowa (1893) and Bathurst (1896)*, Parl Paper No 32 (1998).

<sup>134</sup> Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1997) 152.

<sup>135</sup> Michael D Kirby, 'Deakin: Popular Sovereignty and the True Foundations of the Australian Constitution' (1997) 4 *Deakin Law Review* 129, 135.

directly elected by the people.<sup>136</sup> No doubt this feature gave an ‘impetus and legitimacy’<sup>137</sup> to the movement towards a direct popular vote.

Before the Adelaide Convention in 1897, a ‘secret’ Constitutional Committee chaired by Barton examined 14 motions that centred on the extent of appropriate ‘democratic participation’.<sup>138</sup> Although only four were carried, they were significant, including, relevantly, the abandonment of conventions in favour of reference to electors.<sup>139</sup> That recommendation was accepted without a division and was included in the draft in Adelaide,<sup>140</sup> with little debate.

In light of the extensive debate in Sydney six years earlier, it is curious that state conventions were discarded so readily in Adelaide. Apart from new concerns in Australian society, two reasons can be put forward. First, as noted above, the popular election of delegates here, as well as in Corowa and Bathurst, helped to legitimise the movement towards a direct popular vote. Now representing the ‘people’ (or at least the electors), the delegates were no longer bound to accept amendments suggested by their state parliaments but were conscious of the fact that they were making a constitution that must be accepted by the people of Australia.<sup>141</sup> And second, perhaps more instrumentally, Griffith, who ably defended state conventions in 1891, did not attend the 1897–98 Conventions. In fact, no Queensland delegate did, as disputes over the popular election of delegates (and the referendum) meant the enabling act failed to pass.<sup>142</sup> Whether or not Griffith could have marshalled a majority against a direct popular vote — La Nauze considers the larger number of lawyers in 1897–98

<sup>136</sup> Except Western Australia, whose representatives were selected by the two Houses of Parliament in a joint sitting. See James Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth* (University of Western Australia, 1978) 442. See also Charles Cameron Kingston, *The Democratic Element in Australian Federation* (L Bonython & Co, 1897) arguing in favour of this change.

<sup>137</sup> Kirby, above n 135, 135. A wealth of popular materials published at this time advocated that ‘the power of constitutional amendment should be reserved to the people subject to defined conditions’: John Quick, *A Digest of Federal Constitutions* (Bendigo Branch of the Australian Natives Association, 1896) 11. See also Lilian Tomn, ‘The Referendum in Australia and New Zealand’ (1897) 72 *Contemporary Review* 242; See generally Kingston, *The Democratic Element in Australian Federation*, above n 136. On Corowa see: *Official Report of the Federation Conference held in the Courthouse, Corowa 1893*, Corowa, 1 August 1893, app B.

<sup>138</sup> La Nauze, above n 27, 124.

<sup>139</sup> *Ibid.*

<sup>140</sup> John Williams, *The Australian Constitution: A Documentary History*, above n 100, 610.

<sup>141</sup> La Nauze, above n 27, 115. See also GH George Reid, ‘The Outlook of Federation’ (1897) (January) *Review of Reviews* 33. On the advance of democracy in the 1890s and alterations to the draft Constitution see also Harry Evans, ‘The Other Metropolis: The Australian Founders’ Knowledge of America’, in Commonwealth, *Harry Evans: Selected Writings*, Parl Paper No 52 (2009) 72–3.

<sup>142</sup> Irving, above n 134, 141; Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880–1900* (Melbourne University Press, 1963) 59.

meant that it was unlikely the Convention would be ‘dominated by the abilities and presence of one man’<sup>143</sup> — his absence highlights that although s 128 was a careful compromise between federalism, conservatism and liberalism, a compromise is dependent on the parties’ starting positions.

The introduction of a direct popular vote was, however, not without difficulties, as it presented the question of how the new Commonwealth would deal with the problem of unequal voting rights.<sup>144</sup> Although nominally a clear liberal-conservative issue, it quickly became a federalist one as suffrage was understood to significantly affect state voting power, and South Australia was the only colony with female suffrage at the time. The conflict between liberalism and federalism was demonstrated by the schism between Kingston, the liberal Premier of South Australia and ‘radical federationist’,<sup>145</sup> and Higgins, the radical progressive (and eventually anti-federalist) delegate from Victoria.<sup>146</sup> Both men supported universal female suffrage, but Higgins considered it impossible or impractical to use the *Constitution* to require the states to legislate for it.<sup>147</sup>

The question of female suffrage in South Australia raised practical issues. Barton saw ‘only one way out of this difficulty’, proposing that only male votes be counted until suffrage laws became uniform.<sup>148</sup> John Gordon helpfully noted it might not be so difficult as women’s votes ‘are known approximately now’,<sup>149</sup> though he did not explain why this was apparently the case. Deakin suggested ‘two separate ballot boxes, one for the male and one for the female votes’,<sup>150</sup> though Sir George Turner cautioned that the electoral staff ‘would be sure to make many mistakes’ and that different coloured papers was far more preferable.<sup>151</sup> Isaacs did not like such a proposal as it ‘makes the women suffer because the other States have not given them the right to vote’.<sup>152</sup> Deakin agreed, arguing that ‘we must allow women to have their

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<sup>143</sup> La Nauze, above n 27, 115.

<sup>144</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1205 (Edmund Barton).

<sup>145</sup> The subtitle of L F Crisp’s biographical monograph on Kingston: *Charles Cameron Kingston: Radical Federationist* (Australian University Press, 1984).

<sup>146</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1208.

<sup>147</sup> See also *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 715–32 (James Howe, Patrick Glynn and William Trenwith); Cf *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 723 (Charles Kingston).

<sup>148</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1205.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid* 1206.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid* 1207.

vote to ascertain whether there is a majority in the state'.<sup>153</sup> Ultimately, a 'rough and ready'<sup>154</sup> approach suggested by Holder prevailed, whereby the South Australian votes would simply be divided by two.<sup>155</sup> An attempt by South Australia to omit this clause was defeated without debate in Melbourne.<sup>156</sup>

The issue of women's suffrage, ostensibly a battle between liberalism and conservatism, served as a proxy for a battle over the federation. Federal concerns of an imbalanced compact led liberal supporters into a compromise position, supporting a transitory provision which nonetheless ensured that female voters would receive the same rights as male voters in each state where universal adult suffrage prevailed. This battle was not contained to s 128;<sup>157</sup> it raged into the early years of the new Commonwealth.<sup>158</sup> However, as adult suffrage (at least among non-Indigenous Australians) was quickly enacted in Australia, the rough and ready compromise agreed to by the drafters was never utilised, but sits uneasily and incongruously (not unlike s 25)<sup>159</sup> in the section's fourth paragraph.

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid (Isaac Isaacs).

<sup>155</sup> Ibid.

<sup>156</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 766.

<sup>157</sup> See the debate on s 41: *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 715–32, 1191–7; *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 3 March 1898, 1840–55.

<sup>158</sup> Non-Indigenous women were granted the right to vote in Commonwealth elections in 1902: *Commonwealth Franchise Act 1902* (Cth), but most Indigenous women did not enjoy that right until much later. Some Indigenous women voted in South Australia at the first Commonwealth election in 1901, and their right to vote was sustained by s 41 of the *Constitution*. However, the Commonwealth adopted a restrictive interpretation of s 41 which limited the right to vote to Indigenous peoples enfranchised prior to 1902. The right of Indigenous women to vote in Commonwealth elections was confirmed in 1949 for those who had the right to vote in State elections (New South Wales, Victoria, Tasmania and South Australia): *Commonwealth Electoral Act 1949* (Cth) s 3. Indigenous women in Western Australia, Queensland and the Northern Territory did not enjoy the right to vote in Commonwealth elections until 1962: *Commonwealth Franchise Act 1902* (Cth) s 2. See also Murray Goot, 'The Aboriginal Franchise and its Consequences' (2006) 52 *Australian Journal of Politics and History* 517, 522–3. Paradoxically, it was illegal to encourage Indigenous Australians to enrol to vote: *Commonwealth Electoral Act 1962* (Cth) s 4, amending *Commonwealth Electoral Act 1918-1961* (Cth) s 156. Indigenous voting was not compulsory until 1984: *Commonwealth Electoral Amendment Act 1984* (Cth).

<sup>159</sup> The deference towards the states concerning suffrage is also seen in s 25: see Dylan Lino and Megan Davis, 'Speaking Ill of the Dead: A Comment on s 25 of the Constitution' (2012) 23 *Public Law Review* 231, 232.

### 3 *Melbourne, 1898*

Despite success at Adelaide, the principle of popular democracy and the federal compromises already struck were not on entirely solid ground. In 1898 in Melbourne, the Legislative Council of New South Wales suggested reverting to amendment by state Parliaments rather than by direct vote, in a manner inspired by the *United States Constitution* which also required a two-thirds majority of members present in each House of the state legislature.<sup>160</sup> However, in an even greater deference to states' rights, the New South Wales proposal went further, requiring those majorities in each and every state. The proposal was apparently negated without debate.<sup>161</sup>

As we have noted, in devising s 128 the Australian delegates looked to both the United States and Switzerland. The absence of a direct popular vote in Article V of the *United States Constitution* may '[reflect] the Framers' idea that the democratic will was most appropriately expressed through intermediary, representative institutions rather than in a direct manner',<sup>162</sup> but it served as the catalyst for many Australian delegates' insistence that a popular vote was desirable. The following discussion between Deakin and Symon at Melbourne in 1898 is apposite:

Mr Deakin: It appears to me that the extension of the power which my honourable and learned friend proposes is very desirable and equitable. If we lay to heart the experience of America, we shall find that men of all parties unite in agreeing that a cardinal defect of the American Constitution is the difficulty of having any amendment submitted to the electors of the republic ...

Mr Symon: Responsible government will cure that.

Mr Deakin: Responsible government will not wholly cure it. We should not be blind to the fact that the greatest Federal Constitution in the world has been confronted with serious difficulties and discords because its amendment can only be accomplished by a single iron-bound method.<sup>163</sup>

If the Legislative Council of New South Wales's proposal had been adopted s 128 would have lost an important element of direct democracy, stymieing subsequent constitutional change. The 1910 state debts referendum is a good illustration of the impact of introducing popular sovereignty in preference to defence to state parliaments.<sup>164</sup> That referendum permitted the Commonwealth to take over state debts

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<sup>160</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 765.

<sup>161</sup> *Ibid* 766.

<sup>162</sup> Stephen Markman, 'The Amendment Process of Article V: A Microcosm of the Constitution' (1989) 12 *Harvard Journal of Law & Public Policy* 113, 116.

<sup>163</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 731. The United States Supreme Court has held firm to the single iron-bound method of Article V: *Hawke v Smith* 253 US 221, 227 (1920).

<sup>164</sup> *Constitution Alteration (State Debts) Act 1909* (Cth).

arising at any time (and not only those that existed prior to Federation), passing with 54.95 per cent of the vote nationally.<sup>165</sup> Intended as it was as a relief to the smaller states, it passed notwithstanding a poor performance in New South Wales, where it failed by 318 412 votes to 159 275.<sup>166</sup>

The shift from electoral conventions to a direct popular vote was significant in introducing the principle of popular sovereignty into the Australian constitutional framework.<sup>167</sup> Despite Griffith's protestations that the people would be unable to intelligently decipher any proposed constitutional amendment, the drafters eventually accepted the desirability and necessity of the authority that comes with a popular vote. As will be discussed below, Switzerland — a country with a heavy emphasis on direct democracy — was at the forefront of the minds of many delegates during these discussions.

#### 4 *The 1970s Referenda*

The compromise struck in 1898 between states' rights and popular sovereignty was an uneasy one and two proposed amendments to s 128 concerning this balance were sent to a referendum during the 1970s. A proposed amendment in 1974<sup>168</sup> provided that voters in the territories, as well as the states would be counted towards the national majority,<sup>169</sup> although not towards any state total. It also proposed to reduce the requirement for a majority of states (four) to one with not less than half (three).<sup>170</sup> Under a s 128 in that form, the marketing,<sup>171</sup> industrial employment,<sup>172</sup> and simultaneous elections,<sup>173</sup> referenda would all have succeeded. However, the proposal was only carried in New South Wales and received 47.99 per cent of the vote nationally, although it seems that if the territories section had been separate, it would have carried.<sup>174</sup> That separate question was put in 1977.<sup>175</sup> This time, absent a corresponding proposal to alter the states-limb, the question 'was relatively uncontroversial'.<sup>176</sup>

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<sup>165</sup> Bennett, above n 85, 6.

<sup>166</sup> Standing Committee on Legal and Constitutional Affairs, above n 82, 63.

<sup>167</sup> Both Canada and India, former British colonies and now modern federations, do not permit a direct popular vote on proposed constitutional amendments: see *Constitution Act 1982*, Part V; *Constitution of India*, Art 368.

<sup>168</sup> Constitution Alteration (Mode of Altering the Constitution) Bill 1974 (Cth).

<sup>169</sup> *Ibid* s 2(a).

<sup>170</sup> *Ibid* s 2(c).

<sup>171</sup> Constitution Alteration (Organised Marketing of Primary Products) Bill 1946 (Cth).

<sup>172</sup> Constitution Alteration (Industrial Employment) Bill 1946 (Cth).

<sup>173</sup> Constitution Alteration (Simultaneous Elections) Bill 1977 (Cth).

<sup>174</sup> Bennett, above n 85, 13.

<sup>175</sup> Constitutional Alteration (Referendums) Bill 1977 (Cth) s 2(a).

<sup>176</sup> Bennett, above n 85, 14.

The proposal was carried in every state and received a national total of 77.7 per cent.<sup>177</sup>

Interestingly, this is in line with the 1890s Convention debates: a central concern during the drafting of s 128 was the need to reach a compromise between federalism and popular democracy. With the passage of the territories question without amending state voting power, democratic elements were strengthened but not at the expense of a robust federalism.

### *C Responsible and Representative Government v Popular Sovereignty*

There were two further proposals at the intersection of popular sovereignty and responsible and representative government. The referendum might be initiated either by petition of a certain number of citizens, or as a means of breaking a parliamentary deadlock. Both represent the promotion of the authority of the people over the authority of their elected government. In both cases, opposition to the referendum was strong, as many delegates considered its very existence an anathema; for example, Edmund Barton, who favoured strong parliamentary sovereignty, considered it a ‘means of eating away the very foundations of responsible government, and rendering responsible government a myth’.<sup>178</sup>

#### 1 *Citizen-Initiated Referenda* (‘CIR’)

A mechanism to empower electors to initiate proposals to alter the *Constitution* was a central part of Kingston’s initial draft *Constitution*.<sup>179</sup> It was not ultimately adopted and received little attention during the drafting stage. It has, however, been mooted on various occasions since Federation,<sup>180</sup> and forms a critical part of the Swiss Constitution. In examining the compromises struck in the 1890s, it is worthwhile exploring CIR, and efforts to introduce it since 1901.

Under article 121 of the 1874 Swiss Federal Constitution, an elector could propose a partial revision of the Constitution, upon the collection of 100 000 signatures within 18 months.<sup>181</sup> Parliament had the power to supplement the proposed amendment with a counter-proposal, meaning that voters needed to indicate a preference in

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<sup>177</sup> Standing Committee on Legal and Constitutional Affairs, above n 82, 105.

<sup>178</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 751.

<sup>179</sup> Kingston, *Kingston’s Draft of a Constitution Bill*, above n 99.

<sup>180</sup> See, eg, *Final Report of the Constitutional Commission 1988* (Australian Government Publishing Service, 1988) vol 2, 864–6 [13.60]–[13.66].

<sup>181</sup> *Federal Constitution of the Swiss Confederation* (Switzerland) 19 April 1874, art 121(2). The current Swiss Constitution permits a complete revision on the collection of 100 000 signatures: *Federal Constitution of the Swiss Confederation* (Switzerland) 18 April 1999, art 138. The referendum mechanism is detailed in ch II, arts 138–42.

case both proposals were adopted.<sup>182</sup> Article 123(1) established that any proposed amendment to the Constitution (either partial or complete) must obtain a majority of the people and of the Cantons — a double majority requirement.<sup>183</sup> In addition to constitutional referenda, under the 1874 Constitution, citizens in Switzerland could call for a referendum on any piece of legislation passed by the Federal government. This is a particularly robust form of direct democracy (reminiscent of Kingston's draft), requiring only 50 000 signatures of eligible voters, or the request of eight Cantons, within 100 days of the official publication of the enactment.<sup>184</sup> In a country of 8 million people and 26 Cantons, it is not surprising that there have been a considerable number of legislative and constitutional referenda throughout Swiss history: for example, between 1980 and 2008, Switzerland held 246 nationwide referenda.<sup>185</sup>

Swiss direct democracy was frequently referred to during the Convention Debates — both in positive and negative terms. In Sydney in 1891, Playford critiqued the use of conventions elected by the people to vote on proposed amendments as not requiring both a majority of states and a majority of citizens, a method which he considered the Swiss Constitution illustrated 'worked exceedingly well'.<sup>186</sup> In contrast, in Melbourne in 1898, Howe questioned the reverence paid to the Swiss model, arguing that the referendum should be exercised 'only in times of great emergency, and as seldom as possible'.<sup>187</sup> In his opinion, its overuse in Switzerland and on matters as mundane as the salary of high officials was not a model to follow, particularly due to the cost involved in a country as large as Australia.<sup>188</sup> While Howe appeared concerned about the frequency of the popular initiative, in *The Coming Commonwealth*, Robert Garran gave voice to a more common complaint — the danger of demagoguery:

The dangerous nature of the Initiative in this form is admitted by Swiss statesmen. It amounts to this: that a law drafted by an irresponsible demagogue may be passed in the heat of a popular agitation without revision of any kind by the responsible representatives of the people.<sup>189</sup>

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<sup>182</sup> *Federal Constitution of the Swiss Confederation* (Switzerland) 19 April 1874, arts 121(5), (6), 121bis.

<sup>183</sup> *Ibid* art 123(1).

<sup>184</sup> *Ibid* art 89. This remains the case today: See *Federal Constitution of the Swiss Confederation* (Switzerland) 18 April 1999, art 141.

<sup>185</sup> Laurence Morel, 'Referendum' in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 501, 513.

<sup>186</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 888. See also 891–2 (Thomas Playford).

<sup>187</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 755.

<sup>188</sup> *Ibid*.

<sup>189</sup> Garran, above n 48, 74.

Although responsible and representative government was Garran's touchstone, the nature of the federal compact served as an additional consideration.<sup>190</sup> As noted, Howe's position won the day and, reflecting representative and responsible government, the Commonwealth Parliament has the exclusive authority to propose referenda.

Nevertheless, since 1901, the concept of CIR has at various times been supported by parties in a minority.<sup>191</sup> The Australian Labor Party ('ALP') first introduced CIR mechanisms in their federal platform in 1908,<sup>192</sup> members of the Liberal Party have supported CIR (while in opposition),<sup>193</sup> and during their political life the Australian Democrats were consistent in their support.<sup>194</sup> Three Bills were presented by the Democrats in the 1980s to allow referenda, upon signature of 250 000 electors,<sup>195</sup> or on the support of five per cent of the electors.<sup>196</sup> The independent member for North Sydney, Ted Mack in 1990<sup>197</sup> and federal Liberal frontbencher Peter Reith in 1994<sup>198</sup> would have set the mark at three per cent. None of these proposals were put to a vote in Parliament. Most recently, Victorian Senator John Madigan of the Democratic Labour Party proposed an amendment which would require only one per cent of voters (147 128 in the 2013 federal election). However, unlike its predecessors, it retained the important role of Parliament, providing that while one per cent of voters could require an amendment to be considered by Parliament, it would only go to a referendum if passed in accordance with s 128.<sup>199</sup>

CIR has been addressed and rejected by several commissions. It was raised by 'one witness' at the 1929 Royal Commission on the *Constitution*, and debated at the Brisbane session of the 1985 Australian Constitutional Convention, though

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<sup>190</sup> Ibid 140. Garran considered that the initiative is 'specially undesirable in a federal constitution' at 140.

<sup>191</sup> George Williams and Geraldine Chin, 'The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35 *Australian Journal of Political Science* 27, 38–9.

<sup>192</sup> LF Crisp, *The Australian Federal Labour Party, 1901–51* (Longmans, 1955) 209.

<sup>193</sup> See, eg, Peter Reith, *Direct Democracy: The Way Ahead* (1994).

<sup>194</sup> George Williams, 'Distrust of Representative Government: Australian Experiments with Direct Democracy' in Marian Sawer, Gianni Zappala (eds), *Speaking for the People: Representation in Australian Politics* (Melbourne University Press, 2001) 80, 85–6.

<sup>195</sup> Constitution Alteration (Electors' Initiative) Bill 1982 (Cth) cl 5.

<sup>196</sup> Constitution Alteration (Electors' Initiative) Bill 1989 (Cth) cl 3.

<sup>197</sup> Constitutional Alteration (Alterations of the Constitution on the Initiative of the Electors) Bill 1990 (Cth).

<sup>198</sup> Reith, above n 193, 1–2.

<sup>199</sup> Citizen Initiated Referendum Bill 2013 (Cth). The Senate Finance and Public Administration Legislation Committee recommended the Bill not be passed and the Bill lapsed at the end of Parliament on 12 November 2013.

overwhelmingly defeated.<sup>200</sup> The Advisory Committee on Individual and Democratic Rights recommended to the 1988 Constitutional Commission that s 128 be amended to enable citizens to initiate proposals for altering the *Constitution* on motion of a petition signed by 500 000 electors.<sup>201</sup> By 3–2 the Commission decided against recommending this alteration.<sup>202</sup>

The common thread behind all of these proposals is the suggestion that representative democracy is failing, with the dominance of the two-party system leading to alienation, dissatisfaction, political apathy and cynicism.<sup>203</sup> Indeed, the 18 year gap since the last constitutional referendum does not suggest an energised political culture. A more representative form of decision-making would, it is said, ‘re-awaken ... the participatory ethic’,<sup>204</sup> and revitalise the political process.<sup>205</sup> Certainly it appears that Australians are frustrated with their political system.<sup>206</sup> The Third Biennial Constitutional Values Survey found that Australians’ satisfaction with democracy had fallen from 82.3 per cent in 2010 to 73.1 per cent in 2012. Further, trust and confidence in the federal tier of government had dropped precipitously from 81.6 per cent in 2008 to 55.6 per cent in 2012 and 52.5 per cent in 2014.<sup>207</sup> Another recent survey by the Australian National University and the Social Research Centre recorded similar results: satisfaction in Australia’s democratic system slumped from 86 per cent in 2007 to 72 per cent in 2014, and only 43 per cent of respondents believed it made a difference whether the ALP or the Coalition held government (from 68 per cent in 2007).<sup>208</sup> Reflecting this disengagement is the fact that in the 2016 federal election over 2.6 million Australians opted out, by either failing to enrol to vote, enrolling but failing to vote, or voting informally.<sup>209</sup> Whether these polls accurately reflect the

<sup>200</sup> *Final Report of the Constitutional Commission 1988*, above n 180, 864–6 [13.60]–[13.66].

<sup>201</sup> *Ibid* 866.

<sup>202</sup> *Ibid* 866–72.

<sup>203</sup> George Williams and Chin, above n 191, 28; Levy, above n 16, 813; Kildea, above n 16, 292.

<sup>204</sup> Margaret Cotton and Bob Bennett, ‘Citizen Initiated Referenda: Cure-All or Curate’s Egg?’ (Parliamentary Research Service, Current Issues Brief No 21, 1994) 2.

<sup>205</sup> Helen Gregorczyk, ‘Citizen Initiated Referendums: Republican Innovation or Scourge of Representative Democracy?’ (1998) 7 *Griffith Law Review* 249, 256.

<sup>206</sup> An oft-cited 1991 poll found that 49 per cent of respondents had ‘not much’ confidence in the political system, while only 36 per cent had a ‘fair amount’ or a ‘great deal’ of confidence: ‘The Sad Truth About Politics’, *The Sydney Morning Herald*, 8 July 1991, cited in George Williams and Chin, above n 191, 40.

<sup>207</sup> Griffith University, *Australian Constitutional Values Survey 2014* (October 2014).

<sup>208</sup> Ian McAllister, ‘ANU-SRC Poll: Changing Views of Governance: Results from the ANUpoll, 2008 and 2014’ (Report No. 17, August 2014) 6–7.

<sup>209</sup> Australian Electoral Commission, *2016 Federal Election Key Facts and Figures* (11 August 2016) <[http://www.aec.gov.au/Elections/Federal\\_Elections/2016/key-facts.htm](http://www.aec.gov.au/Elections/Federal_Elections/2016/key-facts.htm)>; Australian Electoral Commission, *Informal Votes by State* (3 May 2017) <<http://results.aec.gov.au/20499/Website/SenateInformalByState-20499.htm>>.

general feeling in the Australian community or not, the direct democracy offered by CIR is enticing.

The difficulty with CIR, however, is two-fold. At a practical level, it is not certain that CIR would rejuvenate Australia's political process and reduce any feelings of alienation.<sup>210</sup> In fact, some evidence suggests the contrary — as Garran warned, CIR may enhance feelings of alienation and vilification of minority groups, rather than provide a means to ensure greater participation.<sup>211</sup> For example, in November 2009, a Swiss constitutional CIR banning the building of minarets was passed by 57.5 per cent to 42.5 per cent, securing a majority in 19.5 out of 23 Cantons.<sup>212</sup> In California, proposals to ban gay people from teaching in public schools<sup>213</sup> and to quarantine AIDS patients<sup>214</sup> have been put to a constitutional referendum. Although both of these proposals were defeated, a recent proposal to enact a constitutional ban on gay marriage was carried.<sup>215</sup> Similar concerns have been raised in Australia on the prospect of a plebiscite (or referendum) on marriage equality.<sup>216</sup> Rather than allow the diverse views of citizens and minorities to be debated, CIR 'can be "hijacked" by well financed interests'.<sup>217</sup> Appreciation of this fact has led scholars to shift focus

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<sup>210</sup> Lisa Hill, 'Democratic Deficit in the ACT: Is the Citizen Initiated Referendum a Solution?' (2003) 38 *Australian Journal of Social Issues* 495, 497–8; Cotton and Bennett, above n 204, 14–5.

<sup>211</sup> Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Citizen Initiated Referendum Bill 2013* (2013) 10 [1.35]. See also: Shipra Chordia et al, 'Submission to the Senate Finance and Public Administration Legislation Committee — Inquiry into Citizen Initiated Referendum Bill 2013' (22 April 2013), UNSW Gilbert + Tobin Centre of Public Law, 1, 3.

<sup>212</sup> Rainer Grote, *The Swiss Confederation: Introductory Note* (2013) Oxford Constitutional Law <<http://oxcon.ouplaw.com/view/10.1093/law-ocw/law-ocw-cm777.document.1/law-ocw-cm777>>.

<sup>213</sup> California Proposition 6 (1978).

<sup>214</sup> California Proposition 64 (1986).

<sup>215</sup> California Proposition 8 (2008). Same sex marriage in California resumed after the sponsors were found not to have standing: *Hollingsworth v Perry* (S Ct, No 12–144, 26 June 2013). In *Obergefell v Hodges* (S Ct, No 14–556, 26 June 2015) the Supreme Court held that same sex marriage is guaranteed by the due process and equal protection clauses of the 14<sup>th</sup> amendment.

<sup>216</sup> George Williams, 'Referendum Not the Way to Resolve our Impasse on Same-Sex Marriage', *The Sydney Morning Herald* (online), 16 May 2015 <<http://www.smh.com.au/comment/referendum-not-the-way-to-resolve-our-impasse-on-samesex-marriage-20150515-gh31f1.html>>.

<sup>217</sup> Cotton and Bennett, above n 204, 30; Anne Twomey, 'Dangerous Democracy: Citizens' Initiated Referenda in California' (2010) 21 *Public Law Review* 70, 72–4. For an empirical analysis see Daniel Bochsler and Simon Hug, 'How Minorities Fare Under Referendums: A Cross-National Study' (Paper presented at the ECPR General Conference, Potsdam, 10–12 September 2009).

to citizen-led deliberative forums,<sup>218</sup> which combine democratic engagement with some elite oversight, or — as in senator Madigan’s proposal — retain a decisive role for Parliament. This shift recognises that ‘Governments have a duty to guard against the persecution of an unpopular minority’,<sup>219</sup> and is a positive compromise between responsible and representative government and popular democracy.

Second, at a theoretical level, it may be that CIR mechanisms are incompatible with responsible government and representative democracy,<sup>220</sup> a point that likely proved decisive during the constitutional debates. Indeed, as noted above, despite the value that the drafters placed on the Swiss Constitution, CIR was dismissed by all but Kingston. Although New Zealand utilises an advisory non-binding CIR mechanism as an augmentation rather than a replacement to its Westminster model of government, it is unclear whether such a model could be transplanted into Australia. An important element of responsible government in Australia is the notion of accountability that stems from free and fair elections between competing political parties with distinct policies. As the 1988 Constitutional Commission noted, the existing arrangements provide that proposals for alteration of the *Constitution* must first be deliberated in Parliament, ‘with due regard for the proposal’s consistency with the existing and foreshadowed legislation of the Government of the day’.<sup>221</sup> The concern is that CIR mechanisms may introduce proposals contrary to government policy, compromising its authority, de-legitimising its governance and weakening principles of accountability.<sup>222</sup> This is not to say that an adapted CIR-model with appropriate Parliamentary oversight, such as the deliberative forums examined by Paul Kildea, may not avoid the pitfalls of a pure CIR and enhance s 128. Additionally, if structured appropriately, it may not mark a dramatic shift from the current provision but could reflect the compromises struck in the 1890s.

## 2 A Referendum Where Parliament is Divided

The question of division between the Houses of Parliament is dealt with in two sections of the *Constitution*. Where the House of Representatives passes a proposed law but it is twice rejected by the Senate during a period of at least three months, two options arise: in the case of an ordinary law, dissolution of the entire Parliament,<sup>223</sup> and in the case of a proposed law for the alteration of the *Constitution*,

<sup>218</sup> See, eg, Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012); Kildea, above n 16; Levy, above n 16.

<sup>219</sup> *Final Report of the Constitutional Commission 1988*, above n 180, 869 [13.81].

<sup>220</sup> *Ibid* 868–9 [13.75]–[13.80], though cf 870–1 [13.91]–[13.92]. See also Elizabeth McLeay, ‘Democratic Experiments in New Zealand’ in Commonwealth, *Democratic Experiments*, *Parl Paper No 44* (2006) 91, 99–100.

<sup>221</sup> *Final Report of the Constitutional Commission 1988*, above n 180, 868 [13.76].

<sup>222</sup> Chordia et al, above n 211, 1, 2–3. Although clearest in the case of proposals to amend legislation, this could also occur with constitutional CIR.

<sup>223</sup> *Constitution* s 57.

a referendum.<sup>224</sup> These circuit breaker provisions provoked substantial debate, with delegates wary of the delicate balance between popular sovereignty and responsible and representative government.

In Melbourne in 1898, Isaacs proposed amending the alteration clause to permit a proposed amendment to be brought to the popular vote if there was a dispute between the House of Representatives and the Senate.<sup>225</sup> Isaacs had in mind the difficulties encountered with the *United States Constitution* noted earlier, as well as those in the lived experience of the legislatures of the Australian colonies<sup>226</sup> and, of course, democratic principles. He did not distrust elected representatives, but recognised that members of Parliament are elected on a variety of questions, some obscured, and in those circumstances it may on occasion be more appropriate to ask the people themselves.<sup>227</sup> Interestingly, Isaacs predicated his support on two of Andrew Thynne's pragmatic justifications — as a way to deal with Parliamentary congestion<sup>228</sup> and to entice the people of the colonies to support federation.<sup>229</sup> However, opposing delegates questioned whether such a proposal was necessary,<sup>230</sup> an infringement on states' rights,<sup>231</sup> or even congruent with representative and responsible government.<sup>232</sup>

George Reid and Higgins backed the proposal as 'a question of common sense'.<sup>233</sup> John Quick and Robert Garran observe that the proposal would simply deny one House the ability to delay or obstruct 'the submission of a proposed amendment to the people'.<sup>234</sup> While clearly a democratic and liberal initiative, by applying equally to both Houses it did not contain any covert anti-federalist implications. In fact, in allowing the people to vote on referenda initiated by the Senate, Isaacs' proposal had

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<sup>224</sup> Ibid s 128.

<sup>225</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 717.

<sup>226</sup> Jack Richardson, 'Resolving Deadlocks in the Australian Parliament' in Geoffrey Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Federation Press, 2001) 291, 296.

<sup>227</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 722. See also Baker, above n 125, 43.

<sup>228</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 717.

<sup>229</sup> Ibid 719.

<sup>230</sup> Ibid 717–2 (Josiah Symon, Patrick Glynn and Bernhard Wise), 757–63 (Edward Braddon and John Forrest).

<sup>231</sup> Ibid 736 (Patrick Glynn); 745 (Richard O'Connor); 747 (Henry Dobson); 752–4 (Vaiben Solomon and James Howe); 764 (Bernhard Wise).

<sup>232</sup> Ibid 725 (John Downer and Bernhard Wise); 740, 746–7 (Henry Dobson); 743–4 (William McMillan); 744 (Edward Braddon); 751 (Edmund Barton).

<sup>233</sup> Ibid 736 (George Reid); 740 (Henry Higgins).

<sup>234</sup> John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901) 992.

important pro-federalist implications — a point recognised by John Downer.<sup>235</sup> Additionally, Isaacs considered that ‘instead of being adverse to responsible government’, his proposal carried ‘responsible government to the very highest point’:<sup>236</sup> where the Parliament is divided, and persists in its division, the people should be allowed to decide.

Conversely, Henry Dobson considered that Isaacs’ proposal struck ‘at the very root of our system of government’,<sup>237</sup> for, as McMillan noted, it asked the people ‘to practically legislate for themselves’.<sup>238</sup> Under a system of responsible and representative government, ‘the people’, as Dobson argued, ‘admit that they have not the experience, the intelligence, or the time to govern themselves, and, therefore, they depute representatives to do it for them’.<sup>239</sup> It was sufficient, he argued, that the people return members ‘disposed to make [such] amendment[s]’ as they desire,<sup>240</sup> and the expense of a referendum was unnecessary and undesirable.<sup>241</sup>

While the motion was negatived in Melbourne,<sup>242</sup> it became part of the eventual text at the 11<sup>th</sup> hour, at the Premier’s Conference held in Melbourne over five days beginning on 29 January 1899.<sup>243</sup> Following the failure of the Convention Bill to obtain the statutory quota of 80 000 votes required in New South Wales (although obtaining a majority vote in favour),<sup>244</sup> both Houses asked that it be reconsidered.<sup>245</sup> When it was inserted, a statutory majority was achieved.

Although not yet relied upon, this amendment permits a divided Parliament to seek the view of the Australian people in the event of persistent division. In so doing it operates as a circuit breaker, preventing one House of Parliament from blocking a proposal being put to the people. Because the Australian Senate is an elected body (whose members are elected under a different electoral system) this is an important and necessary provision. In contrast, appointed Upper Houses, such as the English House of Lords or the Canadian Senate, suffer from democratic deficits and thus rarely oppose, or are prevented by convention or legislation from opposing, certain

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<sup>235</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 725 (John Downer). See also Sarah Murray, ‘State Initiation of Section 128 Referenda’ in Kildea, Lynch and Williams (eds), above n 16, 332, 338.

<sup>236</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 756.

<sup>237</sup> *Ibid* 746.

<sup>238</sup> *Ibid* 743.

<sup>239</sup> *Ibid* 746.

<sup>240</sup> *Ibid* 757 (Bernhard Wise).

<sup>241</sup> *Ibid* 755 (James Howe).

<sup>242</sup> By 31 votes to 14: *Ibid* 765.

<sup>243</sup> Aroney, above n 18, 178. Deakin, above n 142, 102.

<sup>244</sup> Quick and Garran, above n 234, 218.

<sup>245</sup> *Ibid* 988.

types of Bills passed in their respective lower Houses.<sup>246</sup> Although the Canadian Senate could block supply, a constitutional crisis the like of which occurred in Australia is unlikely to arise. Therefore, such jurisdictions do not have a ‘circuit-breaker’ double-dissolution provision.

### D *Strengthening States’ Rights*

Two further issues at the crux of federalism were examined during the Convention Debates, both having significant consequences for the future federation. The first — whether there should be an extra hurdle requiring the consent of a state in order to alter or diminish its proportionate representation, was decided quickly. The second — whether the states themselves should be able to initiate a referendum proposal, was roundly ignored.

#### 1 *The Triple-Majority Safeguard*

Section 128 provides that in order to alter or diminish the proportionate representation of a state, the electors of *that* state must vote in favour. This extra hurdle has its roots in federalism, satisfying the fears of the smaller states by preventing the larger states from abusing their size in order to reduce the representation and power of the small states in the central government.<sup>247</sup>

At Adelaide in 1897 Higgins wondered whether the extra hurdle was necessary. He suggested that it might unduly restrict the Commonwealth by tying it to contemporary circumstances, which may be entirely different in the future:

So it is possible for one colony, according to this proposal to be wiped out and become as bare as the plains of Babylon, but still to remain in possession of the same representation. I wish members to face the position which is the most absurd that any legislation can contemplate.<sup>248</sup>

Despite Higgins’ protestations, the clause was agreed to with minimal discussion. However, Higgins was not content, and in Melbourne he made a last-ditch effort to amend the triple majority provision. Higgins proposed that the triple majority be retained only ‘for a term of ten years from the establishment of the Constitution’, but offered to extend it to 20 in the spirit of ‘conciliatory compromise’.<sup>249</sup> Perhaps underscoring the antagonism engendered by this proposed amendment, Braddon interjected ‘put in 100 years’.<sup>250</sup>

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<sup>246</sup> In the UK, see *Parliament Act 1911* 1 & 2 Geo 5, c 13.

<sup>247</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 885 (Duncan Gillies).

<sup>248</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1028.

<sup>249</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 768.

<sup>250</sup> *Ibid.*

Higgins' argument, based as it was on democratic legitimacy and popular sovereignty at the expense of the federal compact, was doomed to fail from the outset. Despite Higgins' exhortations that the people of the larger states may find eternal equal representation untenable and reject the draft *Constitution*, the smaller states were united in their refusal to budge.<sup>251</sup> The death-knell for Higgins' proposal came from George Reid, Premier of New South Wales, who, despite noting his support for the proposal, resigned to vote against it in order to secure federation.<sup>252</sup> Higgins' proposal failed 34 votes to two.

## 2 State-Initiated Referenda

One other suggestion, made by Deakin at Melbourne in 1898, was to enable state legislatures to initiate proposals to amend the Commonwealth *Constitution*.<sup>253</sup> The ability of states to propose amendments is one of the significant features of Article V of the *United States Constitution*.<sup>254</sup> In light of the heavy reliance that the delegates placed on the *United States Constitution*, it is surprising that Deakin never moved his mooted amendment, and it appears to have been forgotten during the rest of the discussion. This is even more evident as, opposed to CIR, providing state legislatures with this power would not have weakened representative and responsible government (though it would have strengthened federalism). The final text of s 128, and its form today, continue to deny a mechanism for the states to propose constitutional amendments — though proposals to amend this have been made from time to time.

On second thoughts, however, its absence may be unsurprising. Indeed, at the time Isaacs dismissed the suggestion by noting that his own proposal 'will give the states power to do that through their accredited representatives, the senators'.<sup>255</sup> As Jeffrey Goldsworthy has stated, the Premiers who eventually agreed to the final wording of s 128 at the 1899 Conference 'seem to have believed, albeit erroneously, that they had achieved' that outcome, 'they relied on the Senate, but it has failed them'.<sup>256</sup> Goldsworthy contends therefore that s 128 lacks the federal balance which it 'was originally intended to have'.<sup>257</sup>

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<sup>251</sup> Frederick Holder considered it a breach of the federal compact. See *ibid.*

<sup>252</sup> *Ibid* 769–70. Of course, similar pacts were reached in the United States and Switzerland.

<sup>253</sup> *Ibid* 730.

<sup>254</sup> Although it has never been successfully invoked, it may have propelled the Congress to propose the 17<sup>th</sup> Amendment: Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005) 290; James Kenneth Rogers, 'The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process' (2006) 30 *Harvard Journal of Law and Public Policy* 1005, 1008.

<sup>255</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 730.

<sup>256</sup> Jeffrey Goldsworthy, 'A Role for the States in Initiating Referendums' (Paper presented at the Eighth Conference of the Samuel Griffith Society, Canberra, 7–9 March 1997) 5; Sarah Murray makes the same point, above n 16, 332.

<sup>257</sup> Goldsworthy, above n 256; Murray, above n 16, 339.

However, while it is true that s 128 does not operate as a proxy for states interests, as Commonwealth senators have largely failed to propose questions to alter the federal balance towards the states, significantly, not all framers believed that the Senate would operate this way. Indeed, Nicholas Aroney's study indicates that for many drafters, equal *representation* was considered a right of each state, whether or not their representatives would protect the interests of their state.<sup>258</sup> For example, in Melbourne in 1898, Higgins cast his mind forward and perceptively considered how the Senate would operate: 'there will be no real line of cleavage between small states and large states as such; there will be the old lines of cleavage of conservative and liberal parties in the large and small states'.<sup>259</sup> Despite a clear intent to include a strong notion of federalism within s 128, it is not at all clear that the federal balance was to lean as far as Goldsworthy suggests.

Nevertheless, a mechanism to enable state Parliaments to initiate referenda was advocated for at three Constitutional Conventions in 1973, 1975 and 1985, and was unanimously recommended by the 1988 Constitutional Convention.<sup>260</sup> And at times, some states have advocated for particular questions to be posed.<sup>261</sup> However, no referendum has sought to provide this power to the states. Conversely, of the 44 referenda: 17 have sought to increase Commonwealth economic power; four have sought to increase non-economic Commonwealth power; and two (almost three) have sought Commonwealth involvement in local government. Interestingly, as Scott Bennett notes, the only successful referenda that have sought to increase Commonwealth power 'were not typical of such questions',<sup>262</sup> suggesting that leaving the initiation solely in the hands of the Commonwealth Parliament has contributed to the low success rate.

Ultimately, whether the drafters believed that future Commonwealth senators would protect their home states by posing referendum questions to tilt the federal balance away from the central government or not, the absence of a procedure for states to propose referendum questions has helped to continue the shift towards centralisation.<sup>263</sup> In s 128's second limb the compromise the drafters struck imbued the

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<sup>258</sup> Aroney, above n 18, 359–60.

<sup>259</sup> *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 768. See also *Official Record of the Debates of the Australasian Federal Convention, Sydney*, 9 September 1897, 263 (Henry Higgins); *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 434 (John Macrossan).

<sup>260</sup> *Final Report of the Constitutional Commission 1988: Summary* (Australian Government Publishing Service, 1988) vol 1, 75(i).

<sup>261</sup> See, eg, Western Australia's response to the *Mabo* decision: Richard Bartlett, 'Political and Legislative Responses to *Mabo*' (1993) 23 *University of Western Australia Law Review* 352, 353.

<sup>262</sup> Bennett, above n 85, 20.

<sup>263</sup> Murray, above n 16, 334–5; David Solomon, 'Federalism, Impact of Court's Decisions on', in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 275, 275.

referendum mechanism with a strong federalist element; as this article as illuminated, however, federalism did not surpass all other concerns.

#### IV CONCLUDING REMARKS

Tracing the evolution of s 128 exposes the ideological conflicts that affected the convention delegates in and around the late nineteenth century. These conflicts clearly impacted the text eventually adopted. The first limb of s 128 — that a majority of voters must approve a proposed alteration to the *Constitution* — reflects democracy and its underpinning notion of popular sovereignty. The second limb — that a majority of states must also approve — reflects federalist concerns. Finally, that a proposed alteration can only be initiated by the Commonwealth Parliament reflects the essential framework of representative and responsible government.<sup>264</sup> As Cheryl Saunders has noted, holistically, the design of s 128 is ‘consistent with the federal structure of the *Constitution*, the manner in which it was made and the generally progressive aspirations for it in 1901’ —<sup>265</sup> it is a compromise, but a well struck one.

Although this exercise has demonstrated that no single intent animated the drafters, perhaps a narrow purpose can be found. Addressing Parliament in 1902, Alfred Deakin clarified the Convention’s thinking behind s 128. Deakin explained that the *Constitution* ‘was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered’.<sup>266</sup> It is a view that reverberates with Quick and Garran:

These are safeguards necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic change. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable.<sup>267</sup>

Debate will continue over the appropriateness of the compromise struck by the drafters.<sup>268</sup> And certainly, as this paper has illustrated, many of the positions that

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<sup>264</sup> Susan Crennan, ‘Section 128 of the Commonwealth Constitution and Constitutional Change’ (Speech at La Trobe University Law Student’s Association, Melbourne, 22 August 2013) 14.

<sup>265</sup> Saunders, above n 87, 48. Or, as Robert Garran framed it: The amendment mechanism must be ‘consistent alike with federalism, with state rights, and with progress’: Garran, above n 48, 183.

<sup>266</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

<sup>267</sup> Quick and Garran, above n 234, 988.

<sup>268</sup> It is likely that debate never truly ceased. See, eg, discussion concerning suggested alterations of s 128 in the *Report of the Royal Commission on the Constitution* (1929), 234–9.

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motivated the convention delegates no longer animate contemporary Australians, and many of the justifications offered to support their contentions are clearly anachronistic. However, as the success of the 1977 referendum demonstrated, the final text adopted by the delegates was only ever a temporary compromise. As Australians continue to debate constitutional change, the mechanism by which those changes are implemented as developed by the drafters should not go unquestioned. The political and historical context, including the resolution of competing ideologies in the current formulation of s 128 will, it is hoped, inform that debate.



## **EXEMPLARY DAMAGES: RETRIBUTION AND CONDEMNATION — THE PURPOSE CONTROLLING THE SCOPE OF THE EXEMPLARY DAMAGES AWARD**

### ABSTRACT

Exemplary damages have caused a long and unresolved struggle with the underlying compensatory purpose of tort law because they award the plaintiff more than is necessary to compensate actual loss. This article identifies key principles from Australian High Court jurisprudence regarding such damages before turning to divergent authority from New Zealand and the New South Wales Court of Appeal. It is apparent from this review that the scope of the award (in terms of whether consciousness of wrongdoing is required) can only be determined by clarifying the proper purpose of the award of such damages. Only if the High Court continues to move from a punishment purpose to a condemnatory purpose will an award of exemplary damages be justified for less than conscious wrongdoing. It is argued that such windfall gain for the plaintiff is only justified when the defendant deserves punishment and consequently is required to have some subjective fault.

### I INTRODUCTION

The ordinary tool for tort law to provide relief for a proven cause of action has always been an award of pecuniary damages. The generally accepted purpose of pecuniary damages is to compensate the plaintiff for their injury. Exemplary damages have caused a long and unresolved struggle with the underlying compensatory purpose of tort law because a plaintiff receives more than is necessary to compensate actual loss (a windfall gain). In Australia exemplary damages have been limited to cases where the defendant ‘engaged in conscious wrongdoing in contumelious disregard’<sup>1</sup> for the plaintiff’s rights. That limitation recognises the need for subjective fault to justify the imposition of a punishment on the defendant (also described as the imposition of retribution).

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<sup>1</sup> *Whitfeld v De Lauret and Co* (1920) 29 CLR 71, 77 (Knox CJ) (*‘Whitfeld’*), cited in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J) (*‘Uren’*); *XL Petroleum (NSW) Pty Ltd v*

In the superior courts of New Zealand and at Australian intermediate court level, there has been discussion of awarding exemplary damages for objective wrongdoing rather than subjective or conscious wrongdoing.

This article argues that any future shift in the fault element required of a defendant to justify an award of exemplary damages will reflect a shift in the purpose of those exemplary damages. As the High Court has over time shifted the stated basis for an award of exemplary damages there may be some basis for movement in the future. However, it is argued that because criminal punishment in Australia focuses predominantly on a retributive function, courts should similarly constrain exemplary damages to civil cases where retribution is justified, namely those cases with subjective wrongdoing.

The article commences by examining in Part II the Australian High Court jurisprudence regarding exemplary damages. In Part III the article considers the diverging authority (in New Zealand and the New South Wales Court of Appeal) suggesting that conscious wrongdoing is necessary before a court can award exemplary damages. Finally in Part IV the article considers different expressions of the purpose of exemplary damages (retribution, specific deterrence, general deterrence, vindication of the plaintiff's interests, and condemnation of the defendant's conduct), identifying an increasing recognition of the ability of exemplary damages to serve a condemnatory purpose. It is concluded that consciousness of wrongdoing justifies punishment of the defendant, recognising the retributive aspect of punishment. Reliance on condemnation (or the communicative effects of a penalty) elevates society's interests over the individual defendant and fails to sufficiently justify the plaintiff's windfall gain from exemplary damages.

## II HIGH COURT OF AUSTRALIA JURISPRUDENCE: GENERAL PRINCIPLES REGARDING EXEMPLARY DAMAGES

This section examines the English approach to exemplary damages, as context to the High Court's jurisprudence, before identifying unresolved questions of principle.

### *A The English Historical Position*

The label 'exemplary damages' appears to have first arisen in the 1763 English decision of *Huckle v Money*.<sup>2</sup> The plaintiff had been arrested and detained for approximately

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*Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 470 (Brennan J) ('*XL Petroleum*'); *Lamb v Contogno* (1987) 164 CLR 1, 13 ('*Lamb*'); *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gray*').

<sup>2</sup> (1799) 2 Wils KB 20; (1799) 95 ER 768 ('*Huckle*'). Note that whilst the case was reported in 1799, the judgment is dated 1763; see also David A Rice, 'Exemplary Damages in Private Consumer Actions' (1969) 55 *Iowa Law Review* 307, 308; Theodore Sedgwick, 'A Treatise on the Measure of Damages; Or, An Inquiry into the

six hours by the defendant, who had acted under an unlawful warrant.<sup>3</sup> The jury awarded £300 damages,<sup>4</sup> despite the plaintiff's limited injury (losing only 6 hours of his time). The Lord Chief Justice held, on a motion for a new trial, that the jury was right 'in giving exemplary damages'<sup>5</sup> on the basis that the defendant was 'exercising arbitrary power ...; violating the Magna Carta; ... and [acting in] a tyrannical and severe manner.'<sup>6</sup> The rationale for the principle was more fully explained by the Lord Chief Justice directing a jury in *Wilkes v Wood*.<sup>7</sup> He explained:

Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.<sup>8</sup>

The Court justified exemplary damages as both a punishment of the defendant and a tool to communicate the court's disapproval of the conduct.

Subsequently, exemplary damages became more common throughout England.<sup>9</sup> However, the stated rationale and purpose of the principle varied between different judges. Stated purposes included: to make an example,<sup>10</sup> to restrain a man from disregarding principles actuating the conduct of a gentleman,<sup>11</sup> and to prevent the practice of duelling (implicitly referring to a retribution or vindication purpose).<sup>12</sup> Implicit in each of these stated purposes is a notion of punishment, deterrence or retribution. Each focuses on the defendant's conduct as the trigger for the award.

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Principles which Govern the Amount of Compensation Recovered in Suits at Law' (Baker, Voorhis and Co, 8<sup>th</sup> ed, 1891) 502 [348]; *New South Wales v Ibbett* (2006) 229 CLR 638, 648–9 [38] (*Ibbett HCA*).

<sup>3</sup> *Huckle* (1799) 2 Wils KB 20; (1799) 95 ER 768, 768 [206]. Note that the *North Briton No 45* was alleged to have contained a libel on the three branches of the legislative body: *Wilkes v Wood* (1763) Lofft 1; 98 ER 489, 493 [8]–[9].

<sup>4</sup> The equivalent of approximately \$AUD 90,000 today: *Inflation Calculator* (2016) Bank of England <<http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/default.aspx>>; *Currency Conversion and Latest Exchange Rates for 90 World Countries* (8 April, 2017) The Money Converter <<http://themoneyconverter.com>>.

<sup>5</sup> *Huckle* (1799) 2 Wils KB 20; (1799) 95 ER 768, 769 [207].

<sup>6</sup> *Ibid*.

<sup>7</sup> *Wilkes* (1763) Lofft 1; 98 ER 489, 498–99 [18]–[19] (*'Wilkes'*).

<sup>8</sup> *Ibid*.

<sup>9</sup> John D Mayne and Lumley Smith, *Mayne's Treatise on Damages* (Stevens and Haynes, 7<sup>th</sup> ed, 1903) 44–5; F O Arnold, *The Law of Damages and Compensation* (Butterworth, 2<sup>nd</sup> Ed, 1919) 6–7. For earlier applications see, eg, *Tullidge v Wade* (1769) 3 Wils KB 18; 95 ER 909; *Merest v Harvey* (1814) 5 Taunt 442; 128 ER 761; *Emblen v Myers* (1860) 6 H & N 54; 158 ER 23; *Bell v Midland Railway Company* (1861) 10 CB NS 287; 142 ER 462.

<sup>10</sup> *Tullidge v Wade* (1769) 3 Wils KB 18; 95 ER 909, 909 [19] (Wilmot CJ).

<sup>11</sup> *Merest v Harvey* (1814) 5 Taunt 442; 128 ER 761, 761 [443] (Gibbs CJ).

<sup>12</sup> *Ibid* 761 [444] (Heath J).

*B Rookes v Barnard — House of Lords Limits Exemplary Damages*

Prior to 1964, no consistent or enunciated test had developed in English Courts to identify the circumstances in which exemplary damages would be awarded. In that year the House of Lords effectively exploded the law of exemplary damages in England.<sup>13</sup> Lord Devlin<sup>14</sup> delivered the critical speech which noted the punishment and deterrence object of exemplary damages<sup>15</sup> and stated: ‘It may well be thought that this confuses the civil and criminal functions of the law.’<sup>16</sup>

A primary justification for reconsidering exemplary damages was the confused and disjointed early cases of exemplary damages. The House of Lords considered that many cases cited to justify exemplary damages were cases where damages were large and the plaintiff’s injury was aggravated by ‘the motives and conduct of the defendant ... such as to injure the plaintiff’s proper feelings of dignity or pride.’<sup>17</sup> Lord Devlin later noted that such cases were properly cases of aggravated damages being a type of compensatory damages.<sup>18</sup> In such cases punishment, if required, could usually be given by the criminal law.<sup>19</sup>

His Lordship identified that there was a ‘valuable purpose [for awards of exemplary damages in] restraining the arbitrary and outrageous use of executive power’<sup>20</sup> and ‘vindicating the strength of the law’. As a consequence of the limited purpose for exemplary damages, his Lordship identified two categories at common law, in addition to awards authorised by statute, within which exemplary damages would be justified, namely:

- 1 Cases of ‘oppressive, arbitrary or unconstitutional actions by the servants of the government’<sup>21</sup> and,
- 2 those in which the ‘defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff’.

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<sup>13</sup> *Rookes v Barnard* [1964] AC 1129, 1221 (‘*Rookes*’).

<sup>14</sup> *Ibid* 1179 (Lord Reid), 1197 (Lord Evershed), 1203 (Lord Hodson), 1238 (Lord Pearce).

<sup>15</sup> *Ibid* 1221.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid*, citing *Huckle* (1799) 2 Wils KB 20; (1799) 95 ER 768; *Benson v Frederick* (1766) 3 Burr 1845; 97 ER 1130.

<sup>18</sup> *Rookes* [1964] AC 1129, 1229-230.

<sup>19</sup> *Ibid* 1230.

<sup>20</sup> *Ibid* 1223.

<sup>21</sup> *Ibid* 1226.

The second category was considered to be necessary in order to ‘teach wrongdoers that tort does not pay’<sup>22</sup> and to show that the law ‘cannot be broken with impunity.’<sup>23</sup> Lord Devlin’s reasoning does not clearly identify why the deterrence purpose applies to a profit case and not to other categories of conduct. The decision is not sufficiently reasoned to explain a punitive aspect for some categories of tort but not others.

In addition to the categories, Lord Devlin also identified three considerations to be applied in making any exemplary damages award, regardless of categorisation. Firstly, the plaintiff must be the victim of the behaviour in order to receive the award of damages.<sup>24</sup> Secondly, any award must be made with restraint, having regard to its ability to be a weapon.<sup>25</sup> Thirdly, the means of the parties are material to the assessment of quantum.<sup>26</sup> These considerations were not new, and largely adopted the common law position of the time.

His Lordship’s stated purposes of exemplary damages<sup>27</sup> moved away from the imposition of a penalty on a wrongdoer or deterrence. He expressly stated that in cases outside of the categories, such as assaults and malicious injuries to property, it was not appropriate that: ‘an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law.’<sup>28</sup>

However, concepts of punishment were reinforced by Lord Devlin’s explanation about the scope of the award. He considered the jury ought to be directed only to award such sum as necessary to impose a punishment. He said:

if, but only if, the sum which they have in mind to award as compensation ... is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.<sup>29</sup>

### *C The Australian ‘Test’*

Since 1920, the High Court has consistently accepted the language that exemplary damages will be awarded in cases of ‘conscious wrongdoing in contumelious

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<sup>22</sup> Ibid 1227.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 1228.

<sup>27</sup> Namely to restrain the arbitrary and outrageous use of executive power and to vindicate the rule of law.

<sup>28</sup> *Rookes* [1964] AC 1129, 1230.

<sup>29</sup> Ibid 1228.

disregard of another's rights.'<sup>30</sup> This contrasts with the experience in England where no consistent language was adopted. The use of the word 'in' links the necessary 'contumelious disregard' to the wrongdoing which is alleged to found the cause of action. That is, poor conduct disconnected from the wrong is not to be taken into account.

In *Gray v Motor Accident Commission* the majority said that 'exemplary damages are awarded rarely'<sup>31</sup> and only for the purpose of recognising and punishing fault, 'but not every finding of fault warrants their award. Something more must be found.'<sup>32</sup>

In looking for that 'something more' the majority doubted that a single formula was applicable, but recognised that Knox CJ's approach from *Whitfeld* of 'conscious wrongdoing in contumelious disregard of another's rights' 'describes at least the greater part of the relevant field'<sup>33</sup>

#### *D A Flexible Standard*

Clearly, the Australian 'test' contains some flexibility and courts retain a broad discretion.<sup>34</sup> The flexibility was particularly apparent in *Uren v John Fairfax & Sons Pty Ltd*.<sup>35</sup> There the High Court considered the appropriate application of exemplary damages in light of the House of Lords' decision in *Rookes v Barnard*.<sup>36</sup> The Court held that *Rookes v Barnard* is not to be followed in Australia,<sup>37</sup> and that on the facts it was not open to make an award of exemplary damages.<sup>38</sup>

Four of the five Justices cited and adopted Knox CJ's language in *Whitfeld*, asking whether the defendant acted in contumelious disregard of the plaintiff's rights.<sup>39</sup>

<sup>30</sup> *Whitfeld* (1920) 29 CLR 71, 77 (Knox CJ), cited with approval; *Uren* (1966) 117 CLR 118, 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 470 (Brennan J); *Lamb* (1987) 164 CLR 1, 13; *Gray* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>31</sup> *Gray* (1998) 196 CLR 1, 6 [12] (Gleeson CJ, McHugh, Gummow, Hayne JJ).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* 7 [14], see also 9 [20] that exemplary damages are exceptional and arise 'chiefly if not exclusively' in cases where this is satisfied.

<sup>34</sup> *Uren* (1966) 117 CLR 118, 129 (Taylor J), 160-1 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 463 (Gibbs CJ) regarding a broad discretion for the Court of Appeal.

<sup>35</sup> (1966) 117 CLR 118.

<sup>36</sup> [1964] AC 1129.

<sup>37</sup> *Uren* (1966) 117 CLR 118, 123 (McTiernan J), 139 (Taylor J), 147 (Menzies J), 161 (Owen J); see also 154 (Windeyer J): that *Rookes* did not exhaustively identify the cases in which exemplary damages may be allowed.

<sup>38</sup> *Uren* (1966) 117 CLR 118, 129 (Taylor J), 154 (Windeyer J), 157 (Owen J); *Contra* 125 (McTiernan J), 147-8 (Menzies J).

<sup>39</sup> *Ibid* 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J).

McTiernan J adopted the materially similar approach stated in *Mayne & McGregor on Damages*:

Such damages are variously called punitive damages, vindictive damages, exemplary damages and even retributory damages. They can apply *only* where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights.<sup>40</sup>

The members of the Court split on the application of the unanimously accepted test, perhaps demonstrating its uncertain meaning. The majority considered that the conduct was not sufficiently egregious to justify an award, whilst the minority considered contumelious disregard was present. Members of both the majority and minority used similar language to describe the defendant's conduct. Justice Menzies, in dissent in the result, labelled the defendant's conduct as 'malicious, wilful and reprehensible' stating that 'the defendant recklessly and arrogantly attacked the plaintiff's reputation'.<sup>41</sup> Justice Taylor spoke of conduct which had been 'high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights'.<sup>42</sup> Whilst this differentiation might cause concern, Taylor J expressly recognised that the existing test in Australia was certain but permitted flexibility in application.<sup>43</sup>

#### *E Focus on Conduct of Wrongdoer in the Commission of the Tort*

The majority in *Gray* emphasised that any inquiry into exemplary damages focuses on the conduct of the wrongdoer.<sup>44</sup> Importantly, in the context of considering the availability of exemplary damages in negligence, the majority emphasised the element of conscious wrongdoing, stating: 'exemplary damages could not properly be awarded in a case of alleged negligence in which there was no *conscious wrongdoing* by the defendant.'<sup>45</sup>

In *Lamb v Cotogno*<sup>46</sup> the High Court considered an argument that exemplary damages were inappropriate because the conduct triggering the award was not connected to the tortious act.<sup>47</sup>

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<sup>40</sup> Ibid 122–3 (emphasis added).

<sup>41</sup> Ibid 143.

<sup>42</sup> Ibid 129.

<sup>43</sup> Ibid.

<sup>44</sup> *Gray* (1998) 196 CLR 1, 7 [15], 12 [30] (Gleeson CJ, McHugh, Gummow, Hayne JJ).

<sup>45</sup> Ibid 9 [22] (Gleeson CJ, McHugh, Gummow, Hayne JJ) (emphasis added).

<sup>46</sup> (1987) 164 CLR 1.

<sup>47</sup> Ibid 12.

The plaintiff in *Lamb* sued for trespass to the person, arising out of the defendant attending the plaintiff's premises to serve a summons. The plaintiff threw himself on the bonnet of the defendant's car. The defendant drove in such a manner as to throw the plaintiff off and cause him serious injuries, before driving off, leaving the injured plaintiff on the roadside. The plaintiff was awarded \$203,570 damages including \$5000 exemplary damages.<sup>48</sup>

In the appeal, the defendant argued that the conduct which justified exemplary damages was the defendant leaving the plaintiff on the roadside, which occurred after the tort was complete. The tort, trespass, involved only the act of hitting the plaintiff with the car. It was argued that leaving the plaintiff did not constitute a separate tort, was not part of the established trespass, and therefore could not justify exemplary damages.<sup>49</sup> The Court rejected that submission. It was not necessary to view separately the act of leaving the plaintiff on the road. The Court considered that it was able to have regard to all of the circumstances of the commission of the tort:

It was open to the master [sic] to regard the conduct of the defendant in abandoning the plaintiff in the manner in which he did as displaying a cruel or reckless disregard for the welfare of the plaintiff and an indifference to his plight and as colouring the whole of the conduct of the defendant, including the assault which was found to have been made upon the plaintiff. So regarded, the tort of which the defendant was guilty was committed in circumstances amounting to an insult to the plaintiff.<sup>50</sup>

At first instance, the Master had held that the defendant had not acted with malice, describing the act of leaving the plaintiff as 'callous.' It was argued that this was insufficient to support the award of exemplary damages. The Court construed the Master's reasons to find the 'necessary' intent or recklessness to justify an award, stating:

... the use of the word [callous] is, we think, sufficient in its context to indicate that the master saw the defendant as having behaved in a humiliating manner and in wanton disregard of the plaintiff's welfare. Elsewhere in his reasons he described the whole incident as "horrendous". *In those circumstances, the absence of actual malice did not disentitle the plaintiff to exemplary damages.* Whilst there can be no malice without intent, *the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word:* Street, [Principles of the Law of Damages, (1982)], pp 30-31. It is clear that the master formed the view that the defendant's conduct warranted an award of exemplary damages to mark the disapprobation of the Court and in so doing it cannot be said that he exceeded the bounds of his function.<sup>51</sup>

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<sup>48</sup> Ibid 5.

<sup>49</sup> Ibid 12.

<sup>50</sup> Ibid 13.

<sup>51</sup> Ibid (emphasis added).

The Court identified a close connection between the tort and the circumstances justifying the exemplary damages. Further, it considered that whilst malice is not necessary to justify an award of exemplary damages, contumelious behaviour requires some intent or recklessness as to the plaintiff's rights.

*F Conduct After the Tort has Evidential Value*

Mere disapproval of the defendant's conduct is not sufficient to trigger exemplary damages.<sup>52</sup> Evidence of the contumelious behaviour in the tort is required to satisfy the trier of fact of the relevant conduct.<sup>53</sup> A court can consider conduct occurring after the wrong as evidence of malice in the commission of the wrongdoing.

In *NSW v Ibbett* two New South Wales police officers wearing plain clothes attended Mrs Ibbett's home in the middle of the night to arrest her son. They did not have lawful authority to attend. One of the police officers dived under a closing roller door and drew his revolver, pointed it in the direction of the son. Mrs Ibbett heard the commotion, entered the garage through a side door and told the officer to leave. The police officer pointed the revolver at Mrs Ibbett briefly, demanding that the door be opened for his fellow officer, before turning the gun back on the son. The police officers arrested the son and conducted a strip search on him in the vicinity of Mrs Ibbett. The trial judge and the Court of Appeal allowed Mrs Ibbett aggravated and exemplary damages. The High Court<sup>54</sup> unanimously refused the appeal, finding that the State was vicariously liable for the conduct of its officers.<sup>55</sup> In reaching its conclusion the Court took into account evidence of a re-education program that was conducted sometime after the arrest of the plaintiff.<sup>56</sup> It was evidence against the State (as a defendant) as to its attitude to the conduct and provided evidence of the officers' attitudes at the time of the wrong.<sup>57</sup>

Similarly, in two defamation cases, the *Herald and Weekly Times Ltd v McGregor*<sup>58</sup> and *Triggell v Pheeney*<sup>59</sup> the High Court accepted that subsequent conduct might provide evidence of malice at the time of the relevant publication and justify an award of exemplary damages.<sup>60</sup> Isaacs J in *Herald and Weekly Times* emphasised

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<sup>52</sup> *Uren* (1966) 117 CLR 118, 153 (Windeyer J).

<sup>53</sup> *Ibid* 154 (Windeyer J).

<sup>54</sup> *New South Wales v Ibbett* [2005] NSWCA 445 ('*Ibbett NSWCA*') (note that the authorised report (2005) 65 NSWLR 168, 172, 175, 185 omits significant parts of the exemplary damages discussion); *Ibbett HCA* (2006) 229 CLR 638.

<sup>55</sup> Note, the *Law Reform (Vicarious Liability) Act 1983* (NSW) modified the common law principles regarding vicarious liability.

<sup>56</sup> *Ibbett HCA* (2006) 229 CLR 638, 654–655 [60].

<sup>57</sup> *Ibbett NSWCA* [2005] NSWCA 445, [75] (Spigelman CJ), cited in *Ibbett HCA* (2006) 229 CLR 638, 14–15 [60].

<sup>58</sup> (1928) 41 CLR 254 ('*Herald and Weekly Times*').

<sup>59</sup> (1951) 82 CLR 497 ('*Triggell*').

<sup>60</sup> *Herald and Weekly Times* (1928) 41 CLR 254, 267; *Triggell* (1951) 82 CLR 497, 518.

(in dissent but agreeing with the majority on this point) that subsequent conduct must be connected to the conduct complained of by actual malice in order to trigger exemplary damages. This was picked up by the majority in *Triggell*<sup>61</sup> who stated the settled law that:

the conduct of the defence [in the litigation] may be taken into consideration not only as evidencing malice at the time of publication or afterwards, as, for instance, in filing a plea, but also as improperly aggravating the injury done to the plaintiff, if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable.<sup>62</sup>

### *G The Defendant's Financial Circumstances*

When considering an award of exemplary damages, evidence of the tortfeasor's means are admissible and relevant to quantum because they are material to his ability to satisfy a judgment; to infer that he acted in contumelious disregard by taking advantage of his wealth; and to assess the quantum that will provide a sufficient deterrent to repeated conduct.<sup>63</sup>

### *H Provocation*

In *Fontin v Katapodis*<sup>64</sup> the Court held that provocation by the plaintiff is mitigatory and may reduce or prevent an award of exemplary damages. In so doing it implicitly recognised the defendant's fault as relevant to the award. It is further implicit that it considered exemplary damages to serve a retributive purpose.

### *I Vicarious Liability*

As discussed above, the High Court held in *Ibbett HCA* that the State was liable for exemplary damages awarded for a police officer's tort.<sup>65</sup> The State had admitted it was vicariously liable pursuant to legislation.<sup>66</sup> Accordingly, the Court did not consider in detail the basis for exemplary damages applying, and did not consider the general policy question of why an employer could be vicariously liable for exemplary damages.

There is some tension arising from an employer's vicarious liability for exemplary damages. Vicarious liability has long provided difficult considerations in relation

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<sup>61</sup> (1951) 82 CLR 497.

<sup>62</sup> *Ibid* 514.

<sup>63</sup> *XL Petroleum* (1985) 155 CLR 448, 461 (Gibbs CJ), 472 (Brennan J).

<sup>64</sup> (1962) 108 CLR 177 (*'Fontin'*).

<sup>65</sup> *Ibbett HCA* (2006) 229 CLR 638, 654 [56], albeit questions remain about the inquiry to demonstrate vicarious liability. See Paul Walker, 'Vicarious liability for exemplary damages: A Matter of Strict Liability?' (2009) 83 *Australian Law Journal* 548, 549, 563.

<sup>66</sup> *Ibbett HCA* (2006) 229 CLR 638, 649 [39]–[40].

to exemplary damages.<sup>67</sup> Traditionally, courts recognised the retributive purpose of exemplary damages by restricting vicarious liability for exemplary damages to cases where the employer participated in or ratified the tort.<sup>68</sup> The position was modified, at least in the United States, in favour of extending vicarious liability for exemplary damages to employers regardless of their fault.<sup>69</sup>

If the purpose of exemplary damages is to punish the defendant (an employer) for their wrongdoing, and the employee acted without specific authorisation of the employer, on what basis is the employer liable? If the employer did not authorise the conduct, the punishment is not deserved. As Giliker has postulated, ‘why should a party without fault be liable for a punitive award of damages in circumstances where the actual culprit avoids payment.’<sup>70</sup> To answer that broad question, it may be argued that courts could only justify vicarious liability for exemplary damages if the purpose of exemplary damages includes vindicating the rule of law.<sup>71</sup> Arguably, making an employer vicariously liable for exemplary damages will encourage closer supervision and control of employees to comply with the civil law. If the exemplary damages award exists to vindicate the rule of law in that way, it may be appropriate for an employer who has otherwise met the Salmond vicarious liability test,<sup>72</sup> to pay the award.

However, the better view is that the long unsettled policy underpinning vicarious liability has conflated questions of fault in exemplary damages awards. Historically, it has not been clear whether courts had to look for fault by the employer in order to hold them vicariously liable.<sup>73</sup> Although still the subject of debate,<sup>74</sup> the High Court now considers vicarious liability to be premised on a strict liability basis where liability is imposed on the employer for the employee’s wrong.<sup>75</sup> Accordingly there

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<sup>67</sup> Rice, above n 2, 318.

<sup>68</sup> Charles T McCormick, ‘Some Phases of the Doctrine of Exemplary Damages’ (1929) 8 *North Carolina Law Review* 129, 143.

<sup>69</sup> *Ibid* 145.

<sup>70</sup> Paula Giliker, ‘Vicarious Liability in Tort: A Comparative Perspective’ (2010) 3 *Journal of European Tort Law* 18.

<sup>71</sup> *Ibbett HCA* (2006) 229 CLR 638, 649-650 [39]–[40].

<sup>72</sup> *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 149 [42] (French CJ, Kiefel, Bell, Keane, Nettle JJ): consider whether the act (a) is authorised by the employer; or (b) is an unauthorised mode of doing some other act authorised by the employer. Their Honours went on further to explain that an employer would also be liable for unauthorised acts provided that they are ‘so connected’ with authorised acts that they may be regarded as modes, although improper modes, of doing them.

<sup>73</sup> Judge Douglas J McGill, ‘Exemplary Damages and Vicarious Liability’ (Speech delivered at the Queensland Law Society Symposium, Law Society House, 30 March 2012) <<http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/djmcgill/papers/1>>.

<sup>74</sup> See, eg, Giliker, above n 70, 1, 17.

<sup>75</sup> *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 [39] (French CJ, Kiefel, Bell, Keane, Nettle JJ).

is no need to look for fault on the part of the employer. The ability to hold employers vicariously liable for exemplary damages, in the absence of employer's fault, reflects the strict liability that underpins vicarious liability. Consequently, an employer's vicarious liability for exemplary damages does not represent any diminution of the fault required to award exemplary damages.

Exemplary damages are a different type of damages than compensatory damages. The overarching questions regarding vicarious liability for exemplary damages are better addressed by considering the proper basis for vicarious liability, rather than examining the specific requirements for exemplary damages. The questions regarding vicarious liability for exemplary damages are similar to vicarious liability for compensatory damages arising from an intentional tort. In each case there remains a significant lack of clarity regarding the basis of vicarious liability where there is egregious intentional wrongdoing by an employee.

#### *J Exemplary Damages are Separate from Aggravated Damages*

Aggravated and exemplary damages may be awarded in the same action, provided that appropriate care is taken not to double count.<sup>76</sup>

### III CONSCIOUSNESS OF WRONGDOING

As identified above, Australian courts have inquired whether the defendant engaged in 'conscious wrongdoing in contumelious disregard of the plaintiff's rights'<sup>77</sup> before awarding exemplary damages. That reflects the historical assumption that 'an element of conscious wrongdoing was always required.'<sup>78</sup> Currently, there is some doubt in Australian intermediate courts, derived from New Zealand authority, as to whether consciousness of wrongdoing is necessary to trigger exemplary damages.

#### *A New Zealand's Approach — Consciousness is Required*

##### *1 A v Bottrill — The Majority*

In *A v Bottrill*<sup>79</sup> the Privy Council held, by majority on an appeal from the New Zealand Court of Appeal, that: 'Intentional wrongdoing or conscious recklessness is

<sup>76</sup> *Ibbett HCA* (2006) 229 CLR 638, 648 [35]–[36].

<sup>77</sup> *Whitfeld* (1920) 29 CLR 71, 77 (Knox CJ), citing *Uren* (1966) 117 CLR 118, 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 470 (Brennan J); *Lamb* (1987) 164 CLR 1, 13; *Gray* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>78</sup> Silvia M Demarest and David E Jones, 'Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?' (1986-7) 18 *St Mary's Law Journal* 797, 814.

<sup>79</sup> [2003] 1 AC 449 ('*Bottrill*').

not an essential pre-requisite to an order for payment of exemplary damages. Legal principle does not require that the court's jurisdiction should be limited in this way.<sup>80</sup>

The decision was by a slim majority and featured a strong dissent from Lords Hutton and Millett. The majority limited its decision to cases of negligence.<sup>81</sup> The majority and minority disagreement on the purpose of an award of exemplary damages was the significant reason for the difference in the result.

Unique attributes of New Zealand law had a significant impact on the decision. First, New Zealand has implemented a no fault accident compensation legislative regime. As a consequence of that scheme persons who suffer personal injury have no right to sue, except for exemplary damages.<sup>82</sup> A claim for exemplary damages is the only cause of action available for those plaintiffs focussed on vindicating their suffering using formal court processes. It could be argued that this has created increased focus on the availability of exemplary damages in New Zealand than elsewhere.

Second, the Privy Council applied the New Zealand common law test for exemplary damages of 'truly outrageous conduct'.<sup>83</sup> This is not the same as the Australian approach discussed above. The 'outrageous' test implies that the Court must be enraged at the conduct,<sup>84</sup> which distorts the assessment of damages by focussing on the court's view of the conduct rather than the defendant's culpability.

In considering the legal principles, the majority commenced its inquiry with the rationale of the jurisdiction to award exemplary damages. The majority explained its concern that a requirement of subjective advertence could lead to different treatment in different cases of equivalent outrageous conduct. The Court stated:

In principle the limits of the court's jurisdiction to award exemplary damages can be expected to be co-extensive with this broad-based rationale. ... It could not be right that certain types of outrageous conduct as described above should attract the court's jurisdiction to award exemplary damages and other types of conduct, satisfying the same test of outrageousness, should not, unless there exists between these types a rational distinction sufficient to justify such a significant difference in treatment.<sup>85</sup>

In making that statement, the Privy Council did not focus on the defendant's conduct from the defendant's perspective. Rather, it focussed on the outrageousness of the conduct viewed from the court or the plaintiff's perspective. The Privy Council

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<sup>80</sup> Ibid 461 [50] (Lord Nicholls, delivering the majority decision).

<sup>81</sup> Ibid 451 [2].

<sup>82</sup> *Bottrill* [2003] 1 AC 449, 461 [53]; see, eg, *Donselaar v Donselaar* [1982] 1 NZLR 97.

<sup>83</sup> *Bottrill* [2003] 1 AC 449, 452 [4], 456 [23]–[25].

<sup>84</sup> David G Owen, 'Problems in Assessing Punitive Damages Against Manufacturers of Defective Products' (1982) 49 *University of Chicago Law Review* 47.

<sup>85</sup> *Bottrill* [2003] 1 AC 449, 455–6 [22].

assumed that subjective advertence is not a controlling factor to assess whether conduct is outrageous.

Although noting the ‘different forms of words [that] have been used, each with its own shades of meaning’<sup>86</sup> to describe the rationale of exemplary damages, the majority expressly relied upon a condemnation and retributive (or punishment) rationale.<sup>87</sup> However the majority decision is clearly premised on the condemnatory rationale having more significance. The critical part of the majority decision relied on the fact that a conscious or advertent mental state was not necessary to fulfil a condemnatory rationale.<sup>88</sup> In applying its reasoning, the majority said:

if the judge decides that ... the defendant’s conduct satisfies the outrageous test *and condemnation is called for*, in principle the judge has the same power to award exemplary damages as in any other case [where conscious wrongdoing is found] satisfying this test.<sup>89</sup>

Although earlier referring to the retributive rationale, the majority gave it no emphasis in deciding whether conscious wrongdoing was necessary. The majority considered arguments that exemplary damages required conscious conduct because the criminal law requires subjective advertence did not assist consideration of the issue.<sup>90</sup> In particular, because ‘criminal law is not exclusively confined to cases of advertent conduct’,<sup>91</sup> it could not provide a principled basis to identify when punishment was necessary.<sup>92</sup>

The underlying reason for the majority’s decision was that there was no sound basis to limit judicial discretion.<sup>93</sup> If the test of outrageous conduct was met, it was not appropriate to prevent the Court from exercising its outrage at that conduct by requiring conscious wrongdoing. In reaching that conclusion, the majority emphasised that exemplary damages are for exceptional cases only.<sup>94</sup> Further, it identified that ordinarily to satisfy the outrageousness test, ‘misconduct will be of a subjectively advertent nature.’<sup>95</sup>

In addition to questions of principle, the majority considered questions of policy, particularly whether a test of conscious wrongdoing would limit the number of

<sup>86</sup> Ibid 455 [20].

<sup>87</sup> Ibid.

<sup>88</sup> Ibid 458 [37].

<sup>89</sup> Ibid (emphasis added).

<sup>90</sup> Ibid 457 [30].

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 457 [29]–[30].

<sup>93</sup> Ibid 456–7 [26]–[28]. Their Honours had regard to the idea that “‘never say never’ is sound judicial admonition’: 456–7 [27].

<sup>94</sup> Ibid 456 [25].

<sup>95</sup> Ibid; see also 456 [24], 463–4 [64].

unsuccessful claims for exemplary damages.<sup>96</sup> That is an important access to justice issue. If the exemplary damages test is uncertain or difficult to apply it creates an unstable foundation for liability which might make settlements difficult, complicate the provision of advice, and cause delays and unpredictable decision making in the legal system. The majority considered that a test of conscious wrongdoing would not provide any additional certainty in the identification of those cases properly justifying exemplary damages.<sup>97</sup> If claimants were prepared to prove the outrageous criterion, it ‘would seem unlikely’ to deter them from seeking to persuade the court of a subjective advertence criterion.<sup>98</sup>

### 2 A v Bottrill — *The Minority*

The minority, Lords Hutton and Millett, expressly disavowed the condemnatory purpose of exemplary damages, in preference for the retributive purpose.<sup>99</sup> In so doing they were in direct disagreement with the majority. As a consequence, they held that the defendant could only be punished if there was a consciousness of wrongdoing. They said:

if the primary purpose of exemplary damages is to punish, it follows that punishment should not be imposed unless the defendant has intended to cause harm to the plaintiff or has been subjectively reckless as to whether his conduct will cause harm.<sup>100</sup>

The minority relied on ‘well-established principle’<sup>101</sup> to reach this point, namely: ‘the notion that some guilty mind is a constituent part of crime and punishment [which] goes back far beyond our common law.’<sup>102</sup>

The minority also disagreed with the majority on the uncertainty point. They considered that uncertainty in the law would be increased if there was no threshold test of intent or recklessness as outrageous conduct was not a certain threshold.<sup>103</sup>

For reasons that follow, it is argued that the minority’s view is more consistent with the High Court’s approach to exemplary damages and legal principle.

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<sup>96</sup> Ibid 462 [54].

<sup>97</sup> Ibid 463 [59].

<sup>98</sup> Ibid.

<sup>99</sup> Ibid 466 [77].

<sup>100</sup> Ibid 465–6 [76].

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, citing *Sweet v Parsley* [1970] AC 132, 156 (Pearce LJ).

<sup>103</sup> *Bottrill* [2003] 1 AC 449, 466 [81].

### B *Uncertainty — New South Wales Court of Appeal*

The New South Wales Court of Appeal has expressed diverging views about whether consciousness of wrongdoing is required to award exemplary damages.

#### 1 *New South Wales v Riley*

In *New South Wales v Riley*<sup>104</sup> Hodgson JA, for the New South Wales Court of Appeal, suggested that conduct which was less than conscious wrongdoing could justify an award of exemplary damages. His Honour said:

In my opinion, as made clear in *Gray*, while “conscious wrong-doing in contumelious disregard of another’s rights” describes the greater part of the field in which exemplary damages may properly be awarded, it does not fully cover that field. Similarly malice is not essential: *Lamb v Cotogno*. Conduct may be high-handed, outrageous, show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing. However, ordinarily conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the court’s disapproval or (in cases where the defendant stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage of the wrong-doer.<sup>105</sup>

The Court of Appeal concluded there was no basis to award exemplary damages.<sup>106</sup> The case was pursued as one of conscious wrongdoing by the police in applying excessive force during the arrest and knowingly acting in excess of power. These obiter comments purported to comment on a matter not in issue and deduce a principle from the decisions in *Gray* and *Lamb*. Hodgson JA adopted the language of Lord Devlin in *Rookes*, and looked for conduct other than conscious wrongdoing in contumelious disregard. This focus was clearly on the condemnatory purpose of exemplary damages rather than the retributive purpose.

#### 2 *NSW v Ibbett — New South Wales Court of Appeal*

In *New South Wales v Ibbett*<sup>107</sup> the New South Wales Court of Appeal considered the basis underpinning the award of exemplary damages. The High Court decision in this matter is discussed above, however, the limited grounds of appeal did not deal with these questions regarding consciousness of wrongdoing. Mrs Ibbett pursued causes of action in both assault and trespass to land. Each member of the Court of Appeal dealt with the two causes of action separately and made separate findings of fact in relation to the police officers’ states of mind for the different causes of action.

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<sup>104</sup> (2003) 57 NSWLR 496.

<sup>105</sup> *Ibid* 530 [138].

<sup>106</sup> *Ibid* 531 [141]–[143].

<sup>107</sup> (2005) 65 NSWLR 168.

The Court awarded exemplary damages for the assault on the basis that the defendant had acted consciously in contumelious disregard of the plaintiff's rights.<sup>108</sup> The factual finding was that in drawing his gun the officer intended to cause the plaintiff to apprehend immediate personal violence.<sup>109</sup>

Trespass to land was more complicated. A majority (Ipp and Basten JJA) required there to be a consciousness of wrongdoing before exemplary damages could be awarded.<sup>110</sup> However, a differently constituted majority awarded exemplary damages on the facts. Chief Justice Spigelman awarded exemplary damages for the trespass to land on the basis that consciousness of wrongdoing was not required, and on his view of the facts there was no consciousness in this case.<sup>111</sup> Justice of Appeal Basten awarded exemplary damages for the trespass to land on the basis that a finding of consciousness of wrongdoing was open on the facts.<sup>112</sup> Justice of Appeal Ipp, in dissent on the result, declined to award exemplary damages for the trespass to land on the basis that there was no conscious (deliberate or reckless) wrongdoing.<sup>113</sup>

*(a) The Majority's View — Consciousness is Required*

Justice of Appeal Basten, with whom Ipp JA agreed on this point,<sup>114</sup> emphasised that exemplary damages, however the scope of the power be described, 'fastens on ... the state of mind of the tortfeasor'.<sup>115</sup> In requiring consciousness of wrongdoing, he explained that: 'to say that the conduct has some 'objective' element is apt to mislead if it is intended to identify some element of severity or seriousness, absent a particular state of mind.'<sup>116</sup>

Further, Basten JA considered that conscious wrongdoing in contumelious disregard is a composite phrase, and care ought to be taken not to break it down into parts, which obscure its meaning. Accordingly, the proper meaning does not require 'consciousness of each of the elements of a crime or tort.'<sup>117</sup>

*(b) Chief Justice Spigelman's View — Consciousness Not Required*

Chief Justice Spigelman considered that 'subjective advertence to or knowledge of actual wrongdoing is not ... essential before exemplary damages can be awarded.'<sup>118</sup>

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<sup>108</sup> *Ibbett NSWCA* [2005] NSWCA 445, [28] (Spigelman CJ), [137] (Ipp JA), [244] (Basten JA).

<sup>109</sup> *Ibid* [137] (Ipp JA).

<sup>110</sup> *Ibid* [177], [180]–[181] (Ipp JA), [233]–[257] (Basten JA).

<sup>111</sup> *Ibid* [59]–[60], [102].

<sup>112</sup> *Ibid* [257].

<sup>113</sup> *Ibid* [177]–[178], [182].

<sup>114</sup> *Ibid* [177]–[178], [181].

<sup>115</sup> *Ibid* [233].

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid* [234].

<sup>118</sup> *Ibid* [44].

In reaching this view, his Honour cited *Riley* discussed above. His Honour reasoned that recklessness is not necessarily conscious,<sup>119</sup> that ‘high handed conduct’ is not necessarily knowingly wrongful,<sup>120</sup> and that the purpose of condemnation embodied in exemplary damages does not necessarily require subjective advertence of wrongdoing.<sup>121</sup> His Honour echoes the majority’s view in *Bottrill*, discussed above.

Chief Justice Spigelman does not clearly state the test to determine an award of exemplary damages but appears to accept the position that ‘outrageous’ conduct can be sufficient. This is not consistent with High Court authority which, by requiring contumelious disregard of a plaintiff’s interests, focuses clearly on the defendant’s attitude to the plaintiff. It requires an assessment of the defendant’s subjective state of mind and their conduct towards the plaintiff. ‘Outrageous conduct’ is an objective test. It focuses the inquiry on whether the Court is outraged by the conduct, rather than specifically looking at the defendant’s state of mind about the conduct towards the plaintiff.

Moreover, in reaching this view, his Honour did not give weight to the orthodox approach stated by the High Court in *Gray*, discussed below. His reasoning does not properly reflect the meaning of ‘recklessness’ which necessarily entails some element of subjective advertence, also discussed further below. Despite his views referred to above, his Honour nevertheless recognises that although a finding of conscious wrongdoing is not dispositive of a case for exemplary damages, it is ‘of considerable significance in that regard’.<sup>122</sup>

### *C The High Court — Earlier Decisions Contrary*

In *Gray* the joint judgment identified the ‘greater part of the field’ being ‘conscious wrongdoing in contumelious disregard.’<sup>123</sup> Later the joint judgment suggested that although it was unnecessary to decide, the test embracing the composite phrase of consciousness of wrongdoing in contumelious disregard, may be almost exclusive.<sup>124</sup> In dealing with the question of whether exemplary damages were available in the tort of negligence, the joint judgment stated:

First, exemplary damages *could not properly be awarded* in a case of alleged negligence in which there *was no conscious wrongdoing* by the defendant. ... But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff.<sup>125</sup>

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<sup>119</sup> Ibid [42].

<sup>120</sup> Ibid.

<sup>121</sup> Ibid [40].

<sup>122</sup> Ibid [55].

<sup>123</sup> *Gray* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>124</sup> Ibid 9 [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>125</sup> Ibid 9–10 [22] (emphasis added).

Accordingly, in cases framed in negligence, conscious wrongdoing is necessary. *Gray* did not address the contention that conscious wrongdoing is not required — the Court did not need to on the facts. Although pleaded in negligence *Gray* was conducted as a case of conscious wrongdoing. The plaintiff sued the third party insurer in respect of injury caused by the driver of the motor vehicle who had been convicted of intentionally causing grievous bodily harm in relation to the same incident. There are no Australian High Court cases where exemplary damages have been awarded for less than conscious conduct.

The majority in *Bottrill* relied on *Gray*, suggesting that it has left open the possibility of exemplary damages in cases where there is no conscious wrongdoing.<sup>126</sup> However *Gray* is an example of judicial caution, deciding only the case before it, whilst signalling very clearly that conscious wrongdoing is required. There is nothing to suggest that any cases outside the ‘field’ of Knox CJ’s test are inadvertent conduct. Such a result is inconsistent with the retributive purpose of the award, discussed in further detail below.

One issue considered in *Lamb* was whether the Court could allow exemplary damages where the master described the relevant conduct as ‘callous’ against a finding that there was no actual malice in the relevant conduct. The Court concluded that the conduct in the whole of the incident justified exemplary damages. It considered leaving the plaintiff on the side of the road in combination with the immediately preceding tort (battery using the car). After noting that there was no finding of malice, the Court said:

Whilst there can be no malice without intent, *the intent or recklessness necessary* to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word.<sup>127</sup>

In stating ‘intent or recklessness [is] necessary to justify ... exemplary damages’ the Court required conscious wrongdoing. Interestingly, Spigelman CJ in *Ibbett NSWCA* suggested that the reference to recklessness in *Lamb* did not extend to ‘conscious recklessness’ and recklessness did not require ‘consciousness of wrongdoing.’<sup>128</sup> However, he did not explain why that was so. Recklessness is a legal term. It is a subjective state of mind, requiring actual knowledge of risk on the part of the defendant. It is accepted that: ‘conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his actions and he displays indifference as to whether or not those consequences occur.’<sup>129</sup>

Reckless conduct, being subjective, is properly within the class of conscious wrongdoing.

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<sup>126</sup> *Bottrill* [2003] 1 AC 449, 460 [45].

<sup>127</sup> *Lamb* (1987) 164 CLR 1, 13 (emphasis added).

<sup>128</sup> *Ibbett NSWCA* [2005] NSWCA 445, [41].

<sup>129</sup> *R v Nuri* [1990] VR 641, 643 citing *R v Crabbe* (1985) 156 CLR 464.

### D *The Meaning of 'Contumelious'*

The meaning of 'contumelious' further indicates that the court ought to be looking at a subjective state of mind in order to award exemplary damages. The Macquarie Dictionary defines 'contumely' to mean '1. insulting manifestation of contempt in words or actions; contemptuous or humiliating treatment' and '2. a humiliating insult.' Contempt is defined as 'the *feeling* with which one regards anything considered mean, vile or worthless'.<sup>130</sup> On the basis of the definitions, in order for a court to find that a defendant acted in contumelious disregard of a plaintiff's rights, it must be satisfied regarding the defendant's feelings or state of mind towards the plaintiff. The language of contumely, contempt and humiliation, focuses on subjective feelings.

This interpretation is consistent with the historical understanding of contumelious which was described to be conduct which is 'wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like.'<sup>131</sup>

### E *Purpose*

The argument about whether consciousness of wrongdoing is an essential element of exemplary damages comes down to an assessment of the proper purpose or rationale for exemplary damages. The Privy Council in *A v Bottrill* and the New South Wales Court of Appeal in *Ibbett*, each divided according to the purpose of the award of exemplary damages. Those judges who considered an award of damages might be awarded for inadvertent conduct, or conduct which did not amount to conscious wrongdoing, accepted that a condemnatory purpose of the award alone was sufficient to justify the power to award exemplary damages.<sup>132</sup> The judges who considered that exemplary damages were limited to conscious wrongdoing applied a retribution rationale.<sup>133</sup> Implicit in their reasoning, punishment would only be deserved if the plaintiff had a subjective mental state or conscious wrongdoing, to justify the imposition of punishment by the civil court. Consequently, the following part considers the proper purpose of an award of exemplary damages.

## IV PURPOSE OF POWER TO AWARD EXEMPLARY DAMAGES — CONTROLLING THE SCOPE OF THE AWARD

The foregoing parts demonstrate that the purpose of exemplary damages is stated differently in various cases. The stated purpose is critical to tying together the

<sup>130</sup> Susan Butler (eds), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009), 369, 373 (emphasis added).

<sup>131</sup> Harvey McGregor, 'Mayne & McGregor on Damages' (1963) 21 *Cambridge Law Journal* 144, 196, cited in *Uren* (1966) 117 CLR 118, 122–123 (Windeyer J).

<sup>132</sup> *Bottrill* [2003] 1 AC 449, 458 [37]; *Ibbett NSWCA* [2005] NSWCA 445, [40]–[44] (Spigelman CJ).

<sup>133</sup> *Bottrill* [2003] 1 AC 449, 465 [76]; *Ibbett NSWCA* [2005] NSWCA 445, [232]–[234] (Basten JA).

application of the test and identifying the proper scope of the remedy.<sup>134</sup> It can be expected that the ‘limits of the court’s jurisdiction to award exemplary damages ... be co-extensive with [its] broad-based rationale.’<sup>135</sup> If a court relies upon the condemnatory aspect of punishment, it can broaden the application of exemplary damages to conduct less than conscious wrongdoing.

### *A Effects of Exemplary Damages — Aspects of Punishment*

The punishment purpose for exemplary damages is a common theme of exemplary damages cases. Different cases rely upon different effects of the imposition of the penalty when discussing the purpose of exemplary damages.

Punishment is the imposition of a penalty on the defendant, or can also specifically refer to the ‘retributive’ aspect of the imposition of punishment.<sup>136</sup> In the case of exemplary damages the retributive aspect is the imposition of the pecuniary penalty in addition to any compensatory damages awarded to the plaintiff. In criminal contexts there are other types of punishments imposed such as imprisonment or a criminal record. Australian cases have used the retributive aspect as the rationale for exemplary damages.<sup>137</sup> Inherent in the imposition of a penalty is the recognition of fault or conduct which justifies penalty,<sup>138</sup> or to ensure that the defendant has their just deserts.

In addition to the retributive aspect, courts often justify a punishment by reference to the effects of the imposition of a penalty in the context of formal court proceedings. The following four categories of the effects of punishment are consequences derived from the imposition of a penalty and could not occur to the same extent without a penalty being imposed.<sup>139</sup>

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<sup>134</sup> *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 145 [64]–[68] (‘*Kuddus*’); Jason N E Varuhas, ‘Exemplary Damages: ‘Public Law’ Functions, Mens Rea and Quantum’ (2011) 70 *Cambridge Law Journal* 284, 285–6; Joanna Manning, ‘Exemplary Damages and Criminal Punishment in the Privy Council’ (1999) 7 *Torts Law Journal* 1, 5.

<sup>135</sup> *Bottrill* [2003] 1 AC 449, 455–6 [22].

<sup>136</sup> Retributive function reflects criminal sentencing language. See, eg, Michele Cotton, ‘Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment’ (2000) 37 *American Criminal Law Review* 1313, 1315, 1361.

<sup>137</sup> See, eg, *Whitfeld* (1920) 29 CLR 71, 81 (Isaacs J); *Herald and Weekly Times* (1928) 41 CLR 254, 266 (Isaacs J), 272 (Higgins J); *Fontin* (1962) 108 CLR 177; *Uren* (1966) 117 CLR 118, 123–127 (McTiernan J), 130–131 (Taylor J), 145 (Menziez J), 149 (Windeyer J), 158 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 462–3 (Gibbs CJ), 471 (Brennan J); *Lamb* (1987) 164 CLR 1, 9; *Gray* (1998) 196 CLR 1, 6 [12] (Gleeson CJ, McHugh, Gummow, Hayne JJ), 28–29 [86] (Kirby J).

<sup>138</sup> See, eg, the minority in *Bottrill* [2003] 1 AC 449.

<sup>139</sup> A similar approach was adopted in Recent Development, ‘The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages’ (1966) 41 *New York University Law Review* 1158.

Firstly, the penalty imposed may deter the defendant from conducting similar wrongs in future — specific deterrence. Some Australian judges have justified an award of exemplary damages on the basis of specific deterrence.<sup>140</sup> For example, in *XL Petroleum (NSW) Pty Ltd v Caltex Oil* Brennan J considered that an award of exemplary damages ‘is intended to punish the defendant ... and to deter him from committing like conduct again.’<sup>141</sup>

Secondly, a punishment imposed on a defendant may deter others in the community from undertaking similar wrongs in future. This is known as general deterrence. Some Australian judges have used general deterrence to justify an award of exemplary damages.<sup>142</sup>

Some cases do not clearly distinguish between specific deterrence or general deterrence.<sup>143</sup> The two are closely linked. Whatever penalty operates to deter a specific wrongdoer also creates a threat to future potential wrongdoers in the community.<sup>144</sup> However, where specific deterrence is the rationale for exemplary damages, certain matters would be taken into account on an assessment of damages, for example the defendant’s capacity to meet the award. If general deterrence were to be the sole rationale, then there would be no basis to consider the defendant’s capacity to meet the award.<sup>145</sup>

Thirdly, an award of exemplary damages in civil proceedings and the consequent windfall gain provides the plaintiff with some personal vindication beyond the finding of liability. The plaintiff is vindicated by the court recognising the defendant’s wrongdoing, laying blame on the defendant and providing the plaintiff with the fruits of the court’s recognition of that blame, the exemplary damages. In other words the plaintiff’s interest in retribution is satisfied by both the process and the ‘windfall’ gain, vindication of the plaintiff. Rarely have courts justified exemplary damages on this basis.<sup>146</sup> Vindication of the plaintiff is one of the most controversial

<sup>140</sup> *Uren* (1966) 117 CLR 118, 149 (Windeyer J), 158 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 471 (Brennan J); *Lamb* (1987) 164 CLR 1, 9.

<sup>141</sup> *XL Petroleum* (1985) 155 CLR 448, 471; see also 462–3 (Gibbs CJ), referring to punishment as the basis to assess quantum of an award.

<sup>142</sup> See, eg, *Uren* (1966) 117 CLR 118, 158 (Owen J); *Lamb* (1987) 164 CLR 1, 9, 10; *Gray* (1998) 196 CLR 1, 7 [15] (Gleeson CJ, McHugh, Gummow, Hayne JJ); *Ibbett HCA* (2006) 229 CLR 638, 649 [40].

<sup>143</sup> See, eg, *Whitfeld* (1920) 29 CLR 71, 81 (Isaacs J); *Uren* (1966) 117 CLR 118, 130 (Taylor J), 158 (Owen J).

<sup>144</sup> John Smillie ‘Exemplary Damages and the Criminal Law’ (1998) 6 *Torts Law Review* 1, 2.

<sup>145</sup> Allan Beever, ‘The Structure of Aggravated and Exemplary Damages’ (2003) 23 *Oxford Journal of Legal Studies* 87, 101–2; see also Michael J Legg, ‘Economic Guidelines for Awarding Exemplary Damages’ (2004) 30 *Monash University Law Review* 303, 312.

<sup>146</sup> See, eg, *Herald and Weekly Times* (1928) 41 CLR 254, 266 (Isaacs J); *Uren*, (1966) 117 CLR 118, 148–150 (Windeyer J); *Lamb* (1987) 164 CLR 1, 9.

stated rationales for exemplary damages, having been rejected by some authors as having any proper role.<sup>147</sup> The High Court has acknowledged that it remains, despite having less force than it had in the past.<sup>148</sup> In at least some cases, it is the personal vindication arising from exemplary damages which motivates a plaintiff to pursue proceedings which might not otherwise be pursued.<sup>149</sup>

Finally, there is a public denunciation or example made of the defendant, condemnation. The condemnatory purpose has been used to justify exemplary damages together with a retributive aspect.<sup>150</sup> Condemnation is naturally aligned with deterrence, where the public message deters others from acting in a similar way in the future.<sup>151</sup> Kirby J in *Gray* said:

But [punishment] is not the sole reason for the award of such damages. The more recent cases on the subject, including in this Court, have accepted that such damages may be recovered whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world.<sup>152</sup>

Although there is a general reference to ‘recent cases’ none are specifically identified. This recognises a different interest from punishment (imposing a penalty), namely disapprobation. When the court imposes an exemplary damages award, given the rare circumstances in which such awards are made, it makes a strong representation about its view regarding the severity of the defendant’s conduct. In this way, the imposition of the exemplary damages penalty facilitates the court marking its disapproval or making an example of the defendant. As identified above, in *Bottrill and Ibbett NSWCA*, the condemnation rationale justified an amendment to the scope of the application of exemplary damages. The retributive aspect of imposing a penalty in public court proceedings enables the public condemnation of the defendant which may have the effect of deterring future wrongs and vindicating the plaintiff.

#### B *Retributive vs Non-Retributive Purposes — Protecting Different Interests*

As punishment is more usually the province of criminal law<sup>153</sup> it is helpful to consider criminal law punishment theories and rationale. The proper purpose of

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<sup>147</sup> Hugh Evander Willis, ‘Measure of Damages when Property is Wrongfully taken by a Private Individual’ (1908–9) 22 *Harvard Law Review* 419, 420; Beever, above n 145, 97.

<sup>148</sup> *Lamb* (1987) 164 CLR 1, 9–10.

<sup>149</sup> McCormick, above n 68, 130.

<sup>150</sup> *Herald and Weekly Times* (1928) 41 CLR 254, 266 (Isaacs J); *Uren* (1966) 117 CLR 118, 127 (McTiernan J), 131 (Taylor J); *Lamb* (1987) 164 CLR 1, 10; *Gray* (1998) 196 CLR 1, 6 [12] (Gleeson CJ, McHugh, Gummow, Hayne JJ), 28–29 [86] (Kirby J).

<sup>151</sup> Rice, above n 2, 309.

<sup>152</sup> *Gray* (1998) 196 CLR 1, 28–29 [86].

<sup>153</sup> Glanville Llewelyn Williams and B A Hepple, *Foundations of the Law of Tort* (Butterworth, 1976) 2.

criminal punishment, to the extent that either retribution or condemnation prevails, is a complex sociological question subject to intense academic debate.

Whilst it is beyond the scope of this paper to delve into the arguments in any real depth, modern Australian sentencing practice reflects a strong emphasis on retribution. Proportionality to the offending is the guiding principle for criminal sentencing.<sup>154</sup> Although legislation requires courts to look beyond a strict retributive focus, and take into account factors such as deterrence and the defendant's circumstances to reach an appropriate sentence in applying the legislation, sentencing judges must impose a sentence proportionate to the offending.<sup>155</sup> Having regard to the protection of society is only one factor in imposing that sentence.<sup>156</sup> A court may not allow the protection of the society to predominate so as to impose preventative detention.<sup>157</sup> Thus Australian criminal law sentencing practice places significant importance on retribution and matters personal to the defendant, whilst maintaining as a secondary consideration the protection of society.

Australian criminal law sentencing practice is not directly transferable to questions of exemplary damages, where personal liberty is not in issue. However, the principles underlying criminal law sentencing provide helpful guidance.

This discussion demonstrates that as one moves away from retributive purposes towards the non-retributive purposes (such as general deterrence and condemnation) the individual defendant is removed from the consideration.<sup>158</sup> General deterrence and condemnatory purposes are both focussed on community needs and the court's communicative functions. The imposition of a penalty on the defendant is the means by which the community interests are pursued. Even specific deterrence is about protecting society from that defendant, not about ensuring that defendant is rehabilitated or receives their just deserts. If these communicative functions are the predominant basis for the imposition of the penalty, the rights of the defendant might be subordinated to the wider community interests.

C S Lewis has argued that the concept of fault by the defendant is the only way in which punishment can be just.<sup>159</sup> Similarly, Lords Hutton and Millet explained in *Bottrill* that fault or a 'mental element' by the defendant is the justification for any penalty being imposed.<sup>160</sup> The exemplary damages are provided to the plaintiff as

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<sup>154</sup> *Chester v The Queen* (1988) 165 CLR 611, 618, citing *Veen v The Queen [No 1]* (1979) 143 CLR 458, 467, 468, 482–483, 495; *Walden v Hensler* (1987) 163 CLR 561; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472–474, 485–486.

<sup>155</sup> See, eg, *Criminal Law Sentencing Act 1988* (SA) s 10.

<sup>156</sup> *Veen v The Queen (No 2)* (1979) 143 CLR 458, [9]–[10] (Mason CJ, Brennan, Dawson, Toohey JJ).

<sup>157</sup> *Ibid.*

<sup>158</sup> C S Lewis, 'The Humanitarian Theory of Punishment' [1954] *Res Judicatae* 224, 225.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Bottrill* [2003] 1 AC 449, 465 [76].

a windfall gain over and above compensation of their actual loss. If the significant departure from the compensatory purpose of tort law is to be justified, fault is a necessary component.

Further, fault enhances the specific deterrent value of the penalty. If a penalty is imposed for conscious wrongdoing and acts on the consciousness, it is a certain punishment. It seems to the defendant to be less arbitrary and more deserved if it attaches to their specific state of mind, as opposed to an external objective judgement of conduct.

### *C Australia's Recent Shift from Retributive Focus*

In *Gray*, the majority continued to emphasise retribution and deterrence as the rationale for exemplary damages.<sup>161</sup> The majority also emphasised that the focus of the inquiry is the defendant's wrongdoing<sup>162</sup> further enhancing the retributive aspect of exemplary damages.<sup>163</sup> However, complex and emotional factual situations have pushed the High Court's focus away from a retribution or deterrence rationale toward the community centred condemnatory focus.

In *Lamb*, the High Court unanimously relied on the plaintiff's vindication interest and the condemnatory effects of the penalty to justify awarding exemplary damages where the defendant was insured.<sup>164</sup> The defendant did not have to pay the exemplary damages award. Accordingly, concepts of retribution and imposing a proportionate penalty on the defendant were not relevant to the award because, in a practical sense, the insurer was to bear the liability.

*Ibbett HCA*, discussed above, imposed vicarious liability for exemplary damages. The statutory context in *Ibbett HCA* makes it difficult to extrapolate a general principle. Legislation transferred liability from the employee police officers to the State. As discussed above, whilst there is some retributive aspect to the award, insofar as the State's conduct was relevant to the liability for exemplary damages, that was not the stated basis for the finding of vicarious liability. The State had admitted it was vicariously liable pursuant to the legislation.<sup>165</sup> The Court considered exemplary damages were appropriate to vindicate the strength of the rule of law and to deter the conduct of other officers.<sup>166</sup> It appeared to apply community focused purposes of exemplary damages. This might be a signal, albeit not strong, of a shift away from a retributive purpose.

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<sup>161</sup> *Gray* (1998) 196 CLR 1, 7 [15] (Gleeson CJ, McHugh, Gummow, Hayne JJ).

<sup>162</sup> *Ibid.*

<sup>163</sup> Note that Kirby J in dissent referred to recent cases where curial disapprobation could justify an award of exemplary damages whatever the subjective intention of the tortfeasor: *Gray* (1998) 196 CLR 1, 28–29 [86].

<sup>164</sup> *Lamb* (1987) 164 CLR 1, 10.

<sup>165</sup> *Ibbett HCA* (2006) 229 CLR 638, 639.

<sup>166</sup> *Ibid* 649–650 [39]–[40].

## V CONCLUSION

Whilst the underlying purpose of torts within the common law system is a debated issue<sup>167</sup> the generally accepted principle is that the primary role is to compensate plaintiffs for harm incurred.

Exemplary damages do not fit into the compensatory framework, instead existing to punish the defendant for wrongdoing. This inconsistency has provided the underlying criticism of exemplary damages since at least the 1800s. Critics argue that punishment has no place in tort law and cannot justify a windfall gain to the plaintiff. Where the case law is unclear about the appropriate scope of exemplary damages, the potential windfall gain creates significant practical issues in resolving disputes prior to costly trials. Despite ongoing academic criticism of exemplary damages, courts have considered that they serve a valuable purpose, filling an ‘otherwise ... regrettable lacuna.’<sup>168</sup>

Some courts have recognised that, in addition to ensuring that the defendant is punished for their wrongdoing, an award of exemplary damages provides a tool to achieve community focussed ideals of communicating the court’s view of the conduct and deterring future wrongdoing. The communicative functions arise by the imposition of a penalty beyond the compensatory damages.

There is a difficult sociological question as to whether a civil law penalty can be justified where the primary purpose of the penalty is to achieve community based goals of condemnation of conduct or communication of a deterrent message. Australian law recognises a retributive purpose of exemplary damages. Australian courts have primarily focused on the quality of the conduct of the defendant in justifying the imposition of a penalty. Only in recent cases has there been a shift toward justifications based on condemnation or communication rationales.

Traditionally fault, in terms of subjective or conscious wrongdoing, justifies punishment. Without fault, societal interests are elevated above the defendant’s interests. In the absence of some consciousness of wrongdoing by the defendant, the windfall gain of exemplary damages is not justified. By allowing exemplary damages where there is less than conscious wrongdoing, the condemnatory or communicative functions of punishment prevail over the retributive effects so that the society’s interests are elevated to cause the plaintiff’s interests to prevail over the defendant’s interests. Accordingly, the inconsistency between the compensatory purpose of tort law and the punishment purpose of exemplary damages is minimised if conscious wrongdoing is a necessary precondition to trigger an award of damages.

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<sup>167</sup> See, eg, discussions of corrective justice and rights based theories in Carol Harlow, ‘A Punitive Role for Tort Law?’ in Carol Harlow, Linda Pearson, and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 247; Prue Vines, ‘Misfeasance in Public Office: Old Tort, New Tricks’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 211; John Murphy, ‘Misfeasance in a Public Office: A Tort Law Misfit’ (2012) 32 *Oxford Journal of Legal Studies* 51.

<sup>168</sup> *Kuddus* [2002] 2 AC 122, 145 [63] (Lord Nicholls); see also *Uren* (1966) 117 CLR 118.

*Samuel Tyrer\**

## **AN AUSTRALIA–INDONESIA ARRANGEMENT ON REFUGEES: EXPLORING THE STRUCTURAL, LEGAL AND DIPLOMATIC DIMENSIONS**

### ABSTRACT

Australia must engage cooperatively with its regional neighbours on asylum issues facing the region. A proposal for cooperation between Australia and Indonesia on refugees is explored as to its structural, legal and diplomatic dimensions. Obstacles to that arrangement are rigorously analysed. Useful recommendations are then made to move such an arrangement forward. The discussion shows that support from both countries for this arrangement can be developed. Critically though, this arrangement is between two countries and so cannot succeed to protect refugees on its own. Rather, cooperation between multiple countries is necessary to successfully protect refugees and thereby undermine irregular boat journeys to Australia and generally. Policy discussions in this area must continue, including as to what other concrete arrangements could be developed between states benefitting refugees in various ways. As Australia's existing arrangements for offshore processing with Papua New Guinea and Nauru, which see asylum seekers detained in facilities in those countries, are unravelling, finding alternative and principled policies is imperative.

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## I INTRODUCTION

We are where we are, however we got here. What matters is where we go next –  
Isaac Marion<sup>1</sup>

This article examines a specific proposal for a bilateral refugee arrangement between Australia and Indonesia. This arrangement has previously been mooted as an alternative to Australia's current policies towards asylum seekers arriving by boat,<sup>2</sup> namely arrangements with Nauru and Papua New Guinea ('PNG') for offshore processing, and return of asylum seeker vessels intercepted by Australian authorities. For reasons that will become apparent, the author favours Australia and Indonesia pursuing an arrangement. It is acknowledged, however, that references to this as an 'Indonesian solution'<sup>3</sup> are prone to deceive. No single bilateral arrangement can succeed in comprehensively addressing asylum issues impacting upon the entire Southeast Asian region<sup>4</sup> and Australia.<sup>5</sup> Issues span multiple countries, meaning that notwithstanding any bilateral arrangement that Australia enters into, the aim must be for broad engagement with, and between, neighbouring countries.

This article is divided into four parts. Part I is this Introduction. Part II details Australia's existing bilateral arrangements with each of Nauru and PNG. Together those arrangements constitute the 'Pacific Solution Mark II'.<sup>6</sup> The author reiterates a view that these arrangements are, at least from a refugee protection perspective, abysmal failures and are presently unravelling. Brief reference is made to the deal between Australia and the USA, which shows the need to find alternatives. This 'one-off' deal would see the USA take refugees from facilities on Nauru and PNG; beyond

<sup>1</sup> Isaac Marion, *Warm Bodies* (Vintage Books, 2013) 86.

<sup>2</sup> Frank Brennan, 'An Indonesian Solution? A Better Approach to Asylum Seeker Policy' (Paper presented at National Asylum Summit 2013, The University of South Australia, 27 June 2013). Regarding cooperation between Australia and Indonesia generally, see Paul Toohey, 'That Sinking Feeling: Asylum Seekers and the Search for the Indonesian Solution' (2014) *Quarterly Essay* 1; Alex Reilly, 'How Labor can Create a Humane Refugee Policy Without Reviving Boat Arrivals', *The Conversation* (online), 8 July 2015 <<http://theconversation.com/how-labor-can-create-a-humane-refugee-policy-without-reviving-boat-arrivals-44132>>.

<sup>3</sup> Brennan, above n 2; Toohey, above n 2.

<sup>4</sup> Southeast Asia is defined by the member countries of the Association of Southeast Asian Nations ('ASEAN'), which are currently Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. See Association of Southeast Asian Nations, *ASEAN Member States* <<http://www.asean.org/asean/asean-member-states>>.

<sup>5</sup> John Menadue, 'A Regional Cooperation Framework' (Speech delivered at the International Association of Refugee Law Judges Australian Chapter, Melbourne, 3 February 2012) <<https://cpd.org.au/2012/02/john-menadue-a-regional-cooperation-framework-international-association-of-refugee-law-judges-australian-chapter/>>.

<sup>6</sup> Refugee Action Coalition, *Refugee Action Coalition Fact Sheet: The Pacific Solution Mark II* <<http://www.refugeeaction.org.au/wp-content/uploads/2012/10/Pacific-Solution-II-fact-sheet.pdf>>.

this information, details were scant at the time of writing. Part III examines a new approach, which is a bilateral arrangement between Australia and Indonesia. The structural, legal and diplomatic dimensions of this arrangement are covered, including the core elements of the arrangement and international law issues arising. Alongside their emphasis on protection, these elements have a clear deterrence purpose. While deterrence aspects usually raise the most concern from a refugee protection perspective, these concerns can be managed. Next, diplomatic obstacles to this arrangement are canvassed. The author adopted a research methodology primarily comprising archival research, but supplemented this with several interviews. The research interrogated the viability of a bilateral arrangement between Australia and Indonesia. The ultimate conclusion from the research is that existing obstacles may be overcome to make this arrangement a reality. To be successful however, the arrangement must be pursued alongside the kinds of cooperative policies with other countries set out. Part IV sums up and recalls how crucial it is for Australia to develop alternative regional asylum policy.

## II THE PACIFIC SOLUTION

Australian government policy is that no asylum seekers arriving to Australia by boat without visa documentation, or indeed attempting such a journey, will ever be resettled in Australia.<sup>7</sup> Instead, persons are sent to Nauru or PNG for processing and, at least in theory, eventual local settlement (or, in limited cases, resettlement to a third country). From the Australian government's perspective, once persons are transferred they become the responsibility of Nauru or PNG (as the case may be). This is the Pacific Solution in a nutshell. Latterly, reference is made to the 'Pacific Solution Mark II' in recognition that Australia resurrected this approach in 2012,<sup>8</sup> following recommendations of a government-appointed Expert Panel.<sup>9</sup>

As to the legislative mechanics of the scheme, the *Migration Act 1958* (Cth) provides for persons to be taken offshore to Nauru or PNG as designated regional processing

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<sup>7</sup> See Department of Immigration and Border Protection, 'Operation Sovereign Borders' (Factsheet, Department of Immigration and Border Protection, 2017) 1: 'If your family and friends get on a boat without a visa they will not end up in Australia.'

<sup>8</sup> Both of these arrangements recommended in 2012, in a form very similar to their previous operation, hence the reference to the 'Pacific Solution Mark II'. See generally Mary Crock, 'Shadow Plays, Shifting Sands and International Refugee Law: Convergence in the Asia-Pacific', (2014) 63 *International and Comparative Law Quarterly* 247, 265–7; Refugee Action Coalition, above n 6.

<sup>9</sup> Angus Houston, Paris Aristotle and Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (Report, Expert Panel on Asylum Seekers, August 2012) 15–16. The Gillard Government appointed the Expert Panel on 28 June 2012. The Panel made 22 key recommendations to government on the policy options to 'prevent asylum seekers risking their lives on dangerous boat journeys to Australia': 9.

countries.<sup>10</sup> Section 198AD(2) requires an officer to take an ‘unauthorised maritime arrival’ from Australia to a ‘regional processing country’. The *Maritime Powers Act 2013* (Cth) may also be relied on to take persons to Nauru and PNG (or another place outside Australia) in circumstances where a person is not yet in Australia.<sup>11</sup> For example, where a person’s boat is intercepted on the high seas. This Australian domestic legislation is supplemented with separate bilateral arrangements with Nauru and PNG.

Under the original terms of those arrangements, Australia transferred persons to those countries’ facilities for processing.<sup>12</sup> PNG had agreed to locally settle *all* refugees it processed,<sup>13</sup> while Nauru agreed to settle a quota of refugees agreed upon each year with Australia during ministerial meetings.<sup>14</sup> Australia’s specific obligation is to assist Nauru ‘to settle in a third safe country’ refugees who exceed that quota.<sup>15</sup>

A litany of reasons can be given for why these existing bilateral arrangements with Nauru and PNG, the crux of the Pacific Solution Mark II, have failed. Principally, these arrangements have not worked as contemplated. PNG has not been able to settle *all* refugees under the arrangement with Australia. As such, the PNG Supreme Court decided in April 2016 that Manus Island transferees had been improperly denied their right to ‘personal liberty’ in violation of the PNG Constitution.<sup>16</sup> Both the Australian and PNG governments were ordered to:

<sup>10</sup> See *Migration Act 1958* (Cth) s 198AB(1): ‘The Minister may, by legislative instrument, designate that a country is a *regional processing country*’; Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Republic of Nauru as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 10 September 2012 (*MOU between Australia and Nauru*’); Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, 9 October 2012 (*MOU between Australia and PNG*’).

<sup>11</sup> *Maritime Powers Act 2013* (Cth) s 72(4).

<sup>12</sup> A subsequent development discussed below, namely the PNG Supreme Court decision in *Belden Norman Namah v Minister for Foreign Affairs & Immigrations* (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016) (*Namah v Pato*’), puts in issue the extent to which the PNG government still considers itself bound by the terms of the MOU between it and the Australian government.

<sup>13</sup> *MOU between Australia and PNG*, Preamble, cl 13.

<sup>14</sup> *MOU between Australia and Nauru*, Preamble, cls 12, 13, 14.

<sup>15</sup> *MOU between Australia and Nauru*, cls 12, 13.

<sup>16</sup> *Namah v Pato* (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016) [74(1)] (Kandakasi J); *Constitution of the Independent State of Papua New Guinea* s 42(1). Interestingly, less than three months earlier, the Australian High Court upheld the validity of the offshore detention in Nauru according to Australian law in *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (*Plaintiff M68*’). The essence of the Court’s reasoning is that no violation of the implied constitutional prohibition

forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights.<sup>17</sup>

Notwithstanding this ruling, no date has been set for closure of the Manus Island facility<sup>18</sup> and genuine refugees continue to be held there given that, understandably, only a few have accepted the PNG government's offers of resettlement to mainland PNG, where social conditions are notoriously dangerous.<sup>19</sup> A change is that Manus Island detainees have been allowed to leave the facility to visit the main town on the island. Their right to personal liberty continues to be limited, however, by the fact

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on extra-judicial detention could be attributed to the Australian government, because the Nauruan government was responsible for the plaintiff's treatment on Nauru. Chief Justice French, Kiefel and Nettle JJ held at 68–9 [36]:

Once it is understood that it was Nauru that detained the plaintiff, and that the Commonwealth did not and could not compel or authorise Nauru to make or enforce the laws that required that the plaintiff be detained, it is clear that the Commonwealth did not itself detain the plaintiff.

With respect, the reasoning in this decision is neat and apt to allow government avoidance of an important safeguard — the constitutional prohibition on extra-judicial detention — by means of similar offshore regimes: see David Hume, '*Plaintiff M68-2015 — Offshore Processing and the Limits of Chapter III*' on *AUSPUBLAW* (26 February 2016) <<https://auspublaw.org/2016/02/plaintiff-m68-2015/>>.

<sup>17</sup> *Namah v Pato* (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016) [74(6)] (Kandakasi J).

<sup>18</sup> The PNG Prime Minister announced that the centre would shut following the decision of the PNG Supreme Court. See, eg, Stephanie Anderson, 'Manus Island Detention Centre to be Shut, Papua New Guinea Prime Minister Peter O'Neill Says', *ABC News* (online), 27 April 2016 <<http://www.abc.net.au/news/2016-04-27/png-pm-oneill-to-shut-manus-island-detention-centre/7364414>>.

<sup>19</sup> Reports on the exact numbers of refugees resettled on mainland PNG vary, but it is clear that conditions there are unsafe and inappropriate for refugee resettlement. See, eg, Eric Tlozek, 'Manus Island: Asylum Seekers and Refugees No Longer in Detention, PNG Authorities Say', *ABC News* (online), 12 May 2016 <<http://www.abc.net.au/news/2016-05-12/png-authorities-say-manus-refugees-no-longer-in-detention/7407826>>; David Fedele, 'Resettling Refugees in Papua New Guinea: A Tragic Theatre of the Absurd', *The Guardian* (online), 20 May 2016 <<https://www.theguardian.com/commentisfree/2016/may/20/resettling-refugees-in-papua-new-guinea-a-tragic-theatre-of-the-absurd>>; Karen Jacobsen, 'The Forgotten Solution: Local Integration for Refugees in Developing Countries' (Working Paper No 45, United Nations High Commission for Refugees Evaluation and Policy Analysis Unit, 2001) 27. Jacobsen's work on local integration concludes that: 'Local integration will only work if it is acceptable to host governments, to the local community and to refugees. It should not be advocated if it threatens the security and stability of either the local community or the refugees.'

that they must sign an agreement accepting responsibility for their safety, and accept government arranged transport to and from the facility.<sup>20</sup>

On Nauru, refugee settlement has also been problematic. Refugees have been free to leave the Nauru detention centre since it was made an ‘open centre’ facility by the Nauruan government in October 2015.<sup>21</sup> However, local conditions on Nauru are not conducive to peaceful refugee settlement, with numerous reports of refugees being abused within the detention facility and in the local Nauruan community.<sup>22</sup> The conclusion to be drawn is that the arrangement with Nauru, like that with PNG, does not offer genuine prospects of refugee settlement.

An additional problem with the arrangement with Nauru is that Nauru has not agreed to settle every refugee it processes. As noted, Australia has an obligation to assist Nauru ‘to settle in a third safe country’ such refugees.<sup>23</sup> A deal had initially been brokered by Australia with Cambodia, whereby Cambodia agreed to resettle refugees.<sup>24</sup> Originally only four refugees elected to settle in Cambodia, all four of whom have since decided to leave Cambodia and return to their countries of origin in Iran and Myanmar.<sup>25</sup> A further two refugees were transferred to Cambodia in November 2015 and November 2016 respectively.<sup>26</sup> The Cambodian government had previously indicated in August 2015 that it would not accept further refugees for

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<sup>20</sup> Tlozek, above n 19.

<sup>21</sup> This decision was taken immediately prior to the Australian High Court hearing a challenge to the Australian government’s detention of refugees on Nauru: see *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42. See above n 16 for analysis of the decision. See also Tom Allard, ‘Nauru’s Move to Open its Detention Centre Makes it “More Dangerous” for Asylum Seekers’, *The Sydney Morning Herald* (online), 9 October 2015 <<http://www.smh.com.au/federal-politics/political-news/naurus-move-to-open-its-detention-centre-makes-it-more-dangerous-for-asylum-seekers-20151008-gk4kbt.html>>.

<sup>22</sup> See, eg, Australian Broadcasting Corporation, ‘The Forgotten Children: The Young Refugees Stranded on Nauru’, *Four Corners*, 17 October 2016 (Debbie Whitmont) <<http://www.abc.net.au/4corners/stories/2016/10/17/4556062.htm>>; Stephanie Anderson, ‘Nauru Police Launch Investigation after Claims Six-Year-Old Refugee Sexually Assaulted’, *ABC News* (online) 7 January 2016 <<http://www.abc.net.au/news/2016-01-07/refugee-child-allegedly-sexually-abused-on-nauru/7073452>>.

<sup>23</sup> *MOU between Australia and Nauru*, cls 12, 13.

<sup>24</sup> Two instruments constitute this arrangement with Cambodia: (1) *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees* (26 September 2014); and (2) *Operational Guidelines for the Implementation of the Memorandum of Understanding on Settlement of Refugees in Cambodia* (26 September 2014). See Madeleine Gleeson, ‘The Cambodia Agreement’ (Factsheet, Andrew & Renata Kaldor Centre for International Refugee Law, January 2017) 1 <<http://www.kaldorcentre.unsw.edu.au/publication/cambodia-agreement>>.

<sup>25</sup> Gleeson, above n 24.

<sup>26</sup> *Ibid.*

resettlement from Nauru.<sup>27</sup> More recently, in April 2016 a Cambodian government spokesperson described the arrangement as a ‘failure’.<sup>28</sup> These comments cast doubt over the Cambodia arrangement, which may mean that for some refugees on Nauru there is no country willing to accept them: Australia refuses their resettlement, Nauru may not locally settle them, and transfers to Cambodia under that deal may not be viable.

Conditions in facilities on Nauru and Manus Island have been found to breach international human rights law, providing a further basis on which to reject these arrangements. A United Nations (‘UN’) special rapporteur has found that Australia, by virtue of its control over the Manus Island facility, has violated the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>29</sup> Specifically noted are the detention of children, the detention conditions, and the failure to stop violence and tension in the facility.<sup>30</sup> On Nauru, the situation is not far different. As noted, reports of abuse of refugees have come to light.<sup>31</sup>

While these conditions and lack of settlement options may deter persons from journeying to Australia by boat, this has come at significant cost to human lives. As Hamilton properly puts it: ‘Because human dignity is inviolable and non-transferrable, any disrespect for ... human dignity cannot be justified by the benefits received by others involved in the policy.’<sup>32</sup> Additionally, as described, local conditions on Nauru and PNG are not conducive to refugee settlement, nor does it seem refugee processing. For these reasons, the Pacific Solution Mark II is an abysmal failure.

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<sup>27</sup> Ben Doherty, ‘Cambodia Deal Doomed after Just Four Nauru Refugees Resettled for \$55m’, *The Guardian* (online) 31 August 2015 <<http://www.theguardian.com/world/2015/aug/31/cambodia-has-no-plans-to-take-more-nauru-refugees-in-55m-australia-deal>>.

<sup>28</sup> Gleeson, above n 24; Lindsay Murdoch and Michael Koziol, ‘Australia’s Cambodia Refugee Resettlement Plan “a Failure”’, *The Sydney Morning Herald* (online), 3 April 2016 <<http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>>.

<sup>29</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 23 ILM 1027 (entered into force 26 June 1987).

<sup>30</sup> Juan E Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68/Add.1 (5 March 2015) [19], [26], [31].

<sup>31</sup> Australian Broadcasting Corporation, above n 22.

<sup>32</sup> Andrew Hamilton, ‘Ethical Demands of a Regional Solution’ on *Eureka Street* (29 June 2011) <<http://www.eurekastreet.com.au/article.aspx?acid=26997#Vq-FyY1id8Q>>. Note, these comments were made in the context of the so called ‘Malaysia Solution’. See below n 66 regarding the Malaysia Solution.

Australia must develop alternative bilateral arrangements before existing arrangements completely unravel.<sup>33</sup>

### III A NEW APPROACH? AUSTRALIA AND INDONESIA

Exploring a refugee arrangement between Australia and Indonesia makes good sense. It is in line with the Australian government-appointed Expert Panel's 2012 recommendation that 'bilateral cooperation on asylum seeker issues with Indonesia be advanced as a matter of urgency'.<sup>34</sup> Further, Indonesia and Australia are geographically proximate. This has facilitated asylum seekers travelling by boat from Indonesia to Australia, many having originated from countries such as Pakistan, Afghanistan and Iran. If Australia wants to manage these boat flows, then engagement with Indonesia, the country of departure, is imperative. Australia's overall goal must be to improve the situation for refugees and asylum seekers in Indonesia. Indeed, the majority of people arriving by boat to Australia have been found to be entitled to international protection.<sup>35</sup>

#### *A Core Elements*

The proposed arrangement between Australia and Indonesia would operate as follows.<sup>36</sup>

#### *1 Interception Operations by Australia*

Australia would, with Indonesia's consent, intercept asylum seeker boats en route from Indonesia to Australia. Australia has, if its existing (unilateral) maritime interception operations are a reliable indicator, existing capacity for this. Indonesia, on the other hand, does not have a strong naval capacity<sup>37</sup> and so probably does not have capacity presently to assume this obligation.

<sup>33</sup> At the time of writing, the Australian government had recently announced a 'one-off' deal with the USA whereby the USA would accept an unspecified number of refugees from Nauru and Manus Island for settlement. If the deal ultimately proceeds, it will address the issue of where to send some or all of the people currently in facilities on Nauru and Manus Island. It does not, however, provide a long-term response to the issue of asylum seeker boat arrivals to Australia. Ongoing regional asylum policies need to be developed to address this issue, including the how and where of those persons' processing and (re)settlement. The proposed Australia–Indonesia arrangement takes up these aspects.

<sup>34</sup> Houston, Aristotle and L'Estrange, above n 9, 15.

<sup>35</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016); Refugee Council of Australia, 'Government Figures Show Boat Arrivals are Not "Economic Migrants"' (Media Release, 1 March 2016) <<http://www.refugeecouncil.org.au/latest/6055/>>.

<sup>36</sup> Key elements discussed here are drawn from Brennan, above n 2.

<sup>37</sup> Toohey, above n 2, 77.

Under what circumstances Australia could validly intercept asylum seeker vessels consistent with international law is a technical legal question.<sup>38</sup> The location of an asylum seeker vessel will be key to determining whether Australia may lawfully intercept that vessel.<sup>39</sup> Subject to meeting specific requirements set out in the *United Nations Convention on the Law of the Sea* ('*LOSC*'), Australia may conduct asylum seeker boat interceptions consistent with international law in its territorial sea which is 12 nautical miles offshore from the mainland,<sup>40</sup> and in its contiguous zone which is 24 nautical miles offshore from the mainland.<sup>41</sup>

## 2 *Search and Rescue Operations*

Search and rescue operations would continue to take place, alongside interception operations, as is required under international law.<sup>42</sup> Key treaties impose a requirement on states to come to the aid of vessels in distress.<sup>43</sup> As between Australia and Indonesia, an existing bilateral arrangement establishes those countries' respective maritime search and rescue regions.<sup>44</sup> This arrangement, made pursuant to the *Search and Rescue Convention*,<sup>45</sup> recognises the need 'to collaborate and cooperate',<sup>46</sup> for

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<sup>38</sup> See generally Natalie Klein, 'Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 *Melbourne Journal of International Law* 414.

<sup>39</sup> *Ibid* 6.

<sup>40</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) arts 2–3, 19(1), 19(2)(g), 25(1), 27–8, cited in Klein, above n 38, 6.

<sup>41</sup> *LOSC*, art 33(1)(a), cited in Klein, above n 38, 6–7. See also Brennan, above n 2.

<sup>42</sup> Brennan does not explicitly note this element, probably because it is so obviously mandated by international maritime law: Brennan, above n 2.

<sup>43</sup> *LOSC*, arts 98(1)(a)–(b). See also *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) ('*Search and Rescue Convention*'); *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980) ('*SOLAS Convention*'). The *Search and Rescue Convention* paras 2.1.1 and 2.1.9 require that States provide assistance to persons who are or appear to be 'in distress at sea'. The *SOLAS Convention* annex ch V reg 10(a) requires masters of ships to assist 'persons in distress'.

<sup>44</sup> International Maritime Organization ('IMO'), *Area Search and Rescue Plans: Notification of an Arrangement on Search and Rescue Regions and Co-Ordination of Search and Rescue Services in Accordance with Paragraph 2.1.4 of the Annex to the International Convention on Maritime Search and Rescue, 1979, as Amended*, IMO Doc SAR.6/Circ.22, (13 April 2004) ('*Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services*').

<sup>45</sup> The *Search and Rescue Convention* requires specific search and rescue regions be established, either individually or in co-operation with other states (*Search and Rescue Convention*, annex para 2.1.4) and in respect of which states have specific responsibilities (*Search and Rescue Convention*, annex para 2.1.9).

<sup>46</sup> *Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services*, Preamble.

exchange of information concerning distress situations,<sup>47</sup> and for mutual assistance in search and rescue missions.<sup>48</sup> Special provisions also exist to determine which country is responsible for initiating search and rescue action.<sup>49</sup> These aspects would continue under the proposed arrangement regarding vessels, including those carrying asylum seekers.

### 3 *Transfer and Processing in Indonesia*

Australia would transfer asylum seekers from boats intercepted or rescued by it to Indonesia, after a brief screening process to check that those persons are not fleeing persecution in Indonesia.<sup>50</sup> Australia would rely on assurances from Indonesia that it will not engage in prohibited *non-refoulement* of transferred persons.<sup>51</sup> Taking this assurance from Indonesia is imperative; Indonesia is not presently a party to either the *Refugee Convention*,<sup>52</sup> which contains the Article 33 *non-refoulement* obligation, or the *Refugee Protocol*.<sup>53</sup>

Indonesia would provide temporary protection<sup>54</sup> to transferred persons, and assume legal responsibility for their processing. Refugee processing in Indonesia is currently

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<sup>47</sup> Ibid cl 2.1.

<sup>48</sup> Ibid cl 2.2.

<sup>49</sup> Ibid cl 5.

<sup>50</sup> Brennan, above n 2. This is necessary to ensure Australia is not *refouling* persons upon transferring them back to Indonesia, ie that such persons have not fled persecution in Indonesia.

<sup>51</sup> Ibid.

<sup>52</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*'). Neither is Indonesia a party to the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*').

<sup>53</sup> However, *non-refoulement* is considered, at least by some, to be a rule of customary international law and so is applicable to all states, regardless of whether they are party to the *Refugee Convention*. See, eg, Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 248 (emphasis in original):

The principle of non-refoulement can thus be seen to have crystallized into a rule of customary international law, the core element of which is the prohibition of *return in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction.

<sup>54</sup> For discussion of the idea of 'temporary protection', see Alice Edwards, 'Temporary Protection, Derogation and the 1951 *Refugee Convention*' (2012) 13 *Melbourne Journal of International Law* 595.

undertaken by the United Nations High Commission for Refugees ('UNHCR').<sup>55</sup> Documentation issued by the Office of the UNHCR in Indonesia is in practice recognised by the Indonesian government as a basis for not deporting an individual, but it is the UNHCR which assumes processing responsibility.<sup>56</sup> This would change under the arrangement, and Indonesia (not the UNHCR or Australia) would assume legal responsibility for processing persons transferred to it. This has to be the case for two main reasons. First, the UNHCR may not agree to continue responsibility for processing under such an arrangement between Australia and Indonesia. Traditionally the UNHCR has been reluctant to bear the processing responsibility under the transfer type arrangement envisaged here.<sup>57</sup> Concerns are not to assume state responsibilities or preclude the building of 'local asylum systems'.<sup>58</sup> Second, the UNHCR has limited resources which are already spread thinly.<sup>59</sup> Again, this suggests that the UNHCR may not agree to continue its current processing role in Indonesia under this arrangement.<sup>60</sup>

Neither should Australia, on an extra-territorial basis, assume processing responsibility in Indonesia. That would also undermine local asylum systems being built in Indonesia, and in any case Indonesia is unlikely to accept Australia applying its asylum laws within Indonesia.<sup>61</sup> It is not advisable that Australia conduct processing in Indonesia. This would expose Australia to uncertain international legal liability for any legal contraventions in Indonesia.<sup>62</sup> The informed view is that Indonesia, not Australia or the UNHCR, must assume processing responsibility. Australia should,

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<sup>55</sup> This follows from the fact, as noted, that Indonesia is not a party to the *Refugee Convention* or *Refugee Protocol*.

<sup>56</sup> The UNHCR issues letters verifying a person is seeking refugee status, and following the Refugee Status Determination process issues letters of determination of that refugee status to refugees. See Jesuit Refugee Service, *The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines* (Clung Wicha Press, 2012) 17; Crock, above n 8, 259–60.

<sup>57</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016). See also United Nations High Commission for Refugees, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers* (May 2013) 1: 'The primary responsibility to provide protection rests with the State where asylum is sought.'

<sup>58</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* However, Feller noted that the UNHCR has in recent times signalled a willingness to assume a more 'hands on role'.

<sup>61</sup> *Ibid.*

<sup>62</sup> United Nations High Commission for Refugees, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers* (May 2013) 3:

In addition, the transferring State may retain responsibility for other obligations arising under international and/or regional refugee and human rights law. This would be the case, for example, where the reception and/or processing of asylum-seekers in the receiving State is effectively under the control or direction of the transferring State.

however, with the UNHCR, provide significant financial and technical support to Indonesia to ensure it can properly assume this processing responsibility.<sup>63</sup>

#### 4 *Enhancing Protection in Indonesia*

Australia must also improve refugee protection in Indonesia as part of this arrangement.<sup>64</sup> Empirical research conducted by the author shows that conditions for refugees in Indonesia do not meet basic standards. Presently, asylum seekers in Indonesia elect to enter detention to receive appropriate material assistance and more timely access to status determination processes.<sup>65</sup> Outside of detention, there is less guarantee of these needs being met. Until conditions in Indonesia improve, the arrangement cannot properly proceed.<sup>66</sup> Asylum seeker transfers cannot proceed if international human rights law standards in Indonesia are not met.<sup>67</sup> The UNHCR *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum seekers* (May 2013), while not ruling out transfers of persons to Indonesia as proposed,<sup>68</sup> sets out guiding principles to assess their legality and appropriateness. Australia (as the transferring state) would be obliged to ensure conditions in

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<sup>63</sup> Indonesia does not currently have the administrative infrastructure or local laws necessary to support an asylum processing system: Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>64</sup> Brennan refers to Australia cooperating ‘more closely with Indonesia’ to provide ‘basic protection’, and to the negotiation of minimum safeguards for asylum seekers sent to Indonesia: Brennan, above n 2.

<sup>65</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>66</sup> On a related point, the Australian High Court has previously confronted the issue of whether asylum seeker transfers to another country, namely Malaysia, could lawfully proceed under Australian domestic law. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 it was held that the Minister lacked power under Australia’s migration legislation to effect transfers of asylum seekers to Malaysia in pursuance of a 2011 bilateral arrangement between those two countries. The court focussed on the lack of legal protections for transferred asylum seekers, preferring not to base its’ reasoning on material conditions for refugees within Malaysia. See further Michelle Foster, ‘The Implications of the Failed “Malaysia Solution”’: The Australian High Court and Refugee Responsibility Sharing at International Law’ (2012) 13 *Melbourne Journal of International Law* 395; Naomi Hart, ‘*Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011)’ (2011) 18 *Australian International Law Journal* 207.

<sup>67</sup> United Nations High Commission for Refugees, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers* (May 2013) 3: ‘transfer arrangements of asylum-seekers for asylum processing need to take into account and ensure that: applicable refugee and human rights law standards are met ...’.

<sup>68</sup> *Ibid* 1, noting that ‘asylum-seekers and refugees should *ordinarily* be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them’ (emphasis added).

Indonesia (as the receiving state) *in practice* meet, among other things, ‘accepted international standards’.<sup>69</sup> According to the Guidance Note, this means that transferees to Indonesia must be met with appropriate reception arrangements, access to health, education and basic services, safeguards against arbitrary detention and, if they have specific needs, assistance for these.

In Indonesia, improving refugees’ immediate needs for food, shelter and water, among other things, are priority needs.<sup>70</sup> Australia could quickly make a significant impact by improving material needs and other conditions — ensuring that the proposed arrangement may properly proceed. This is because the proportion of refugees in Indonesia is small compared to elsewhere in the region.<sup>71</sup> While Australia already funds the International Organization for Migration (‘IOM’) in Indonesia,<sup>72</sup> concerns exist that funding is being used for detention facilities in Indonesia.<sup>73</sup> Greater levels of funding for Indonesian refugees are also needed,<sup>74</sup> with the qualification that any funding must actually reach refugees in the form of having their basic needs met.

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<sup>69</sup> Ibid 2.

<sup>70</sup> Refugee Council of Australia, ‘Improving Refugee Protection in Asia-Pacific: How Australia Can Make a Practical Difference’ (Discussion Paper, Refugee Council of Australia, July 2015) 4 <<http://www.refugeecouncil.org.au/wp-content/uploads/2014/08/Australias-response-to-region-150720.pdf>>.

<sup>71</sup> There were 5957 refugees and 7591 asylum seekers residing in Indonesia in 2015: United Nations High Commission for Refugees, *Indonesia*, Global Focus <<http://reporting.unhcr.org/node/10335>>. In contrast, Malaysia was home to 94 030 refugees (as well as 60 415 asylum seekers) in 2015: United Nations High Commission for Refugees, *Malaysia*, Global Focus <<http://reporting.unhcr.org/node/2532>>.

<sup>72</sup> Department of Immigration and Border Protection, *Annual Report 2014–15* (Report, Department of Immigration and Border Protection, September 2015) 143:

Under the IOM Regional Cooperation Arrangements (RCA), the Department funded IOM to provide food, accommodation, emergency medical assistance and counselling to asylum seekers in the Indo-Pacific region, primarily in Indonesia in 2014–15. Under the RCA, IOM also provided assistance to people who wish to return voluntarily to their country of origin.

<sup>73</sup> See generally Savitri Taylor, ‘Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility’ (2010) 33 *UNSW Law Journal* 337; Amy Nethery and Carly Gordyn, ‘Australia–Indonesia Cooperation on Asylum-Seekers: A Case of “Incentivised Policy Transfer”’ (2014) 68 *Australian Journal of International Affairs* 177, 190:

the cooperation between Australia and Indonesia is one more bilateral relationship ... that works to undermine the refugee protection regime. The implications for asylum-seekers in the Asia-Pacific region are substantial: to seek asylum in the region is expensive, dangerous, damaging and a long process.

<sup>74</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016):

the funding [to Indonesia] is clearly not enough and it’s created this perverse set of conditions where people basically believe they need to be in detention to get access to

Indonesia, like many Southeast Asian states, is still developing. It will take time for protection conditions to improve, even with Australian support. Difficulty exists then in knowing exactly when conditions for refugees in Indonesia will be sufficient for this arrangement to proceed. One view is that transfers to Indonesia should only occur if conditions in Indonesia do not violate *any* human rights standards. Alternatively, and the author's view tends in this direction, there should initially be room for *some* flexibility.<sup>75</sup>

As a minimum, transfers may only proceed if refugees in Indonesia have their basic material needs met, are properly safe from *refoulement*, and have access to timely status determination. Beyond this, requiring conditions in Indonesia to *fully* satisfy other international human rights standards as a pre-condition to the arrangement proceeding may preclude the arrangement from ever lifting off. Beyond the minimum, protection conditions can continue to be levelled up once the arrangement is operational. It is more beneficial for arrangements, such as that proposed, to proceed as soon as possible to spark cultural change in Southeast Asia, a region that does not generally exhibit overt concern for refugees, who have particular needs distinct from other migrants.

To conclude, Australia must ensure adequate refugee protection conditions in Indonesia. This is necessary for it to transfer persons back to Indonesia in accordance with international law. Additionally, this would communicate to the Indonesian government that Australia is serious about sharing responsibility for refugees, thus improving prospects for Indonesia to cooperate to make the whole arrangement a reality.<sup>76</sup> Also, Australia should improve conditions for refugees in Indonesia as by doing so it would gain an immediate benefit. Refugees in Indonesia will be less likely to take a boat to Australia if their essential needs are met in Indonesia.<sup>77</sup>

### 5 Resettlement in Australia

Australia would permanently resettle refugees from Indonesia. Any resettlement places offered by Australia under the arrangement should be additional to Australia's

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support through IOM. You can see how ... those conditions come about. IOM's got a very limited budget so they decided to prioritise those in detention as those being in greatest need ...

<sup>75</sup> See Brennan, above n 2:

Just as people living in neighbouring countries do not have an entitlement from the Australian government to the same living standard as the poor and welfare dependent in Australia, Australia has no obligation to provide the same welfare assistance to asylum seekers resident in other countries.

<sup>76</sup> Keane Shum, 'A New Comprehensive Plan of Action: Addressing the Refugee Protection Gap in Southeast Asia through Local and Regional Integration' (2011) 1 *Oxford Monitor of Forced Migration* 60, 65.

<sup>77</sup> Refugee Council of Australia, above n 70, 4: 'If refugees are able to get their most pressing needs met, they are much more likely to remain where they are while durable solutions are developed.'

existing resettlement quota. If that were not the case, and the places were to come from the existing quota, the arrangement would merely reduce refugee protection elsewhere so as to enable Australian resettlement under this arrangement to proceed. Feller makes that point and considers that ‘from an international perspective’ a reduction in resettlement places in this way ‘would be very unfortunate.’<sup>78</sup> Such a reduction cannot be consistent with the overall goal of increasing refugee protection across multiple countries.

Resettlement is a particularly important aspect of this arrangement. Other ‘durable solutions’<sup>79</sup> may not be available for those found to be refugees, under this arrangement, in Indonesia.<sup>80</sup> Local integration on a permanent basis is not formally offered to refugees by most Southeast Asian states hosting refugees,<sup>81</sup> including Indonesia, something which is unlikely to change immediately. Similarly, safe repatriation to their country of origin is not an option for many refugees in the region. For refugees coming from Afghanistan and Myanmar, where protracted conflicts continue, that is the case. Resettlement by Australia is thus fundamental to this arrangement.

In terms of resettlement numbers, Australia is unlikely to resettle all persons who are refugees in Indonesia under this arrangement. A quota approach would most likely be taken, with Australia reassessing its numerical commitment each year. This means that Indonesia would need to explore local integration of refugees not resettled under the Australian commitment (or by other countries). In this way, the arrangement would not merely replicate the unsustainable patterns of the Comprehensive Plan of Action (‘CPA’) during the Indochinese refugee crisis,<sup>82</sup> whereby developed states such as Australia assumed the entire resettlement burden. Davies considers that the

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<sup>78</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>79</sup> Three durable solutions for refugees are outlined in Core Group on Durable Solutions, ‘Framework for Durable Solutions for Refugees and Persons of Concern’ (Framework, the United Nations High Commission for Refugees, May 2003) 5–6. These are: (1) local integration in country of asylum; (2) resettlement to a third country; and (3) safe repatriation in country of origin.

<sup>80</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>81</sup> Savitri Taylor, ‘Civil Society and the Fight for Refugee Rights in the Asia Pacific Region’ in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 35, 36.

<sup>82</sup> For a discussion of the Indochinese refugee crisis, see United Nations High Commissioner for Refugees, ‘Flight from Indochina’ in Mark Cutts (ed), *The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action* (Oxford University Press, 2000) 79:

The upheavals which followed the communist victories in 1975 in the former French colonies of Indochina — Viet Nam, Cambodia and Laos — caused more than three million people to flee these countries over the next two decades. The sustained mass exodus from the region and the massive international response to the crisis thrust UNHCR into a leading role in a complex, expensive and high profile humanitarian operation.

CPA ‘institutionalised non-compliance’ by Southeast Asian states with refugee law.<sup>83</sup> Southeast Asian states were able to compel the international community to provide resettlement places (via the CPA) by threatening non-compliance with refugee law.<sup>84</sup>

Seeking that Indonesia offer refugee local integration on a formal basis may be a significant hurdle to overcome. Financial aid (including for development) and resettlement places (offered by Australia here) could, it has been suggested, be linked to commitments by states to locally integrate refugees.<sup>85</sup> Depending on prevailing diplomatic and in-country conditions, the proposed arrangement could incorporate such trade-off aspects.

### *B Deterrence Alongside Protection*

Alongside the protection aspects discussed above, aspects of this arrangement seek to deter asylum seekers. The interception of persons travelling by boat from Indonesia to Australia, and transfer of these people back to Indonesia for processing, renders these journeys futile. These deterrence aspects are justified here.<sup>86</sup> Irregular boat journeys, and the people smuggler industry facilitating these, are particularly dangerous. The UNHCR considers that ‘mixed maritime movements in South-East Asia were three times more deadly than in the Mediterranean last year’.<sup>87</sup> Deterring these journeys does have a humanitarian basis.

Deterrence must not, however, come at the expense of refugee protection. The arrangement as proposed ensures that this is not the case through the improvement of refugee conditions in Indonesia (to enable transfers to proceed), and the resettlement of refugees in Australia. This sets it apart from Australia’s current arrangements with Nauru and PNG, which violate the dignity of hundreds of men, women and children by detaining persons in sub-human conditions and not offering genuine prospects for resettlement.<sup>88</sup>

Transfers of persons back to Indonesia for processing should not raise concerns, as long as the elements discussed above are implemented, especially that (i) Australia first sets about enhancing material conditions in Indonesia for refugees and asylum

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<sup>83</sup> Sara E Davies, *Legitimising Rejection: International Refugee Law in South East Asia* (Martinus Nijhoff Publishers, 2008) 188.

<sup>84</sup> *Ibid* 226.

<sup>85</sup> Shum, above n 76, 60; Anne McNevin, ‘Why We Would Gain from a Regional Approach to Refugee Protection’, *Inside Story* (online), 31 July 2013 <<http://insidestory.org.au/why-we-would-gain-from-a-regional-approach-to-refugee-protection>>.

<sup>86</sup> Brennan, above n 2.

<sup>87</sup> Andreas Needham, United Nations High Commission for Refugees, ‘UNHCR Calls for Safer Alternatives to Deadly Bay of Bengal Voyages’ (Press Briefing, 23 February 2016) <<http://www.unhcr.org/56cc51c76.html>>.

<sup>88</sup> See Brennan, above n 2: ‘There would be no need to try unprincipled, unworkable deterrents like offshore processing in Nauru or Manus Island or offshore dumping in Malaysia.’

seekers and offers significant resettlement places for Indonesian refugees; and (ii) Indonesia accepts legal responsibility for refugee processing. Transfers back to Indonesia should thus not involve the return of persons to persecution, noting that Indonesia is mostly a transit country for refugees to Australia (not a refugee source country), and to that extent transfers there should generally not enliven the *non-refoulement* obligation.<sup>89</sup>

### *C Distinguishing the EU–Turkey Deal*

Detractors may liken the proposed Australia–Indonesia arrangement (or indeed the Pacific Solution Mark II) to the problematic EU–Turkey deal entered into on 18 March 2016.<sup>90</sup> Under that deal, irregular migrants travelling from Turkey to the Greek Islands can, as of 20 March 2016, be returned to Turkey. The European Union (‘EU’) bears the costs of these returns, described as ‘a temporary and extraordinary measure which is necessary to end the human suffering and restore public order.’<sup>91</sup> The ultimate goal is ‘to end the irregular migration from Turkey to the EU.’<sup>92</sup>

Certainly there are similarities between the EU–Turkey deal and the Australia–Indonesia arrangement set out. Both envisage the transfer of asylum seekers by one country to another (from Australia to Indonesia, and from Greece to Turkey), as a way to deter irregular boat movement. These are the similar deterrence aspects. Both involve a wealthier partner agreeing to resettle refugees processed outside its territory (the EU agrees to resettle those certified to be refugees from Turkey,<sup>93</sup> just as Australia would from Indonesia under the proposal set out). Both arrangements also see financial or other support given by the wealthier partner to a less developed country temporarily hosting refugees. Turkey receives EU funding for refugees under that deal. An additional €3 billion from the EU to enhance material conditions in Turkey has been allocated, once an existing EU allocation of €3 billion under

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<sup>89</sup> Ibid.

<sup>90</sup> Jeff Crisp tweeted on 17 March 2016: ‘There’s a good essay to be written on the way that the EU–Turkey deal has been informed by Australia’s appalling refugee policy. Any takers?’ Jeff Crisp (17 March 2016) Twitter <<https://twitter.com/JFCrisp/status/71042001677318401>>.

<sup>91</sup> Council of the European Union, ‘EU–Turkey Statement’ (Media Release, 144/16, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

<sup>92</sup> Ibid.

<sup>93</sup> The EU will resettle one Syrian from Turkey for each Syrian it returns to Turkey under the transfer mechanism (up to a specified limit). As at 18 March 2016, 18 000 resettlement places remained from an earlier commitment by EU Member states. Further resettlement places will, if needed, similarly be offered on a voluntary basis, limited to 54 000 places. In selecting particular persons for resettlement, the UN Vulnerability Criteria are used. Priority is also ‘given to migrants who have not previously entered or tried to enter the EU irregularly’: Council of the European Union, above n 91.

the Facility for Refugees in Turkey is near exhausted.<sup>94</sup> Similarly, Australia would provide increased funding to Indonesia, as part of that proposed arrangement, to enhance conditions for refugees in Indonesia.

A main problem with the EU–Turkey deal is that conditions in Turkey are not adequate for EU transfers there to proceed.<sup>95</sup> The EU should not be returning persons with clear protection needs to Turkey while this is the case.<sup>96</sup> Persons returned to Turkey may not practically be safe from the risk of *refoulement*,<sup>97</sup> let alone have their basic material needs met. This major criticism cannot equally be levelled at the proposed Australia–Indonesia arrangement. Protection of refugees and asylum seekers in Indonesia is a key feature of that arrangement, and the context is entirely different.

With regard to context, the EU–Turkey deal responds to the Syrian refugee situation. By contrast, the Australia–Indonesia arrangement is not a direct response to any particular crisis or conflict. Refugee numbers in Indonesia thus pale in comparison to the numbers seeking to enter the EU recently via boat from Turkey to the Greek Islands.<sup>98</sup> Because of this difference, and as discussed, Australian efforts to improve conditions for refugees in Indonesia could make a sizeable impact relatively quickly.

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<sup>94</sup> Ibid.

<sup>95</sup> A recent decision of a ‘secondary appeals panel’ in Lesbos, Greece, casts doubt on whether the EU–Turkey deal can proceed in this way. The decision finds Turkey not to be ‘a safe third country to send refugees back to’: Jon Stone, ‘EU Plan to Send Syrian Refugees Back to Turkey Jeopardised by Greek Court’, *The Independent* (online), 20 May 2016 <<http://www.independent.co.uk/news/world/europe/refugee-crisis-eu-syrian-refugees-turkey-blocked-by-greek-court-a7039886.html>>. Whether the EU–Turkey deal is destined to fail on this basis remains to be seen.

<sup>96</sup> Amnesty International (‘AI’) refers to the deal as ‘horse trading with a country that has an inadequate record of respecting’ the right to seek asylum. According to AI, Turkey refuses to offer effective protection (as distinct from ‘temporary protection’) to non-Europeans and has ‘repeatedly pushed Syrians back into the war zone and closed borders to others seeking to flee’: Salil Shetty, Ken Roth and Catherine Woollard, *Say No to a Bad Deal with Turkey* (17 March 2016) Amnesty International <<https://www.amnesty.org/en/latest/news/2016/03/say-no-to-a-bad-deal-with-turkey/>>.

<sup>97</sup> Cf Council of the European Union, above n 91: ‘This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement.’

<sup>98</sup> Comments from the UNHCR support this argument. See Volker Türk, ‘Statement’ (Speech delivered at the 2<sup>nd</sup> Special Meeting on Irregular Migration in the Indian Ocean, Bangkok, 3–4 December 2015):

Compared to other parts of the world, it is important to keep things in perspective. By way of example, the total number of migrants and refugees in the Bay of Bengal and Andaman Sea in May and June 2015 is matched or even doubled in many parts of the Middle East and Europe every day. This suggests that the numbers we are seeing in this region can be managed. Only about 1,000 people have made the sea journey in the Bay of Bengal and Andaman Sea since September 2015.

Once this occurs, transfers there can justifiably proceed in accordance with the other elements of the arrangement set out earlier. Not so for EU transfers of persons to Turkey. Even with the overall €6 billion pledged by the EU, Turkey cannot properly be expected to sufficiently enhance conditions for the over 2 million refugees and asylum seekers living there,<sup>99</sup> such that people transfers back to Turkey become justifiable. This shows that both arrangements apply to vastly different refugee contexts and so should not be subject to the same critique. The Australia–Indonesia arrangement, as set out, is an ethically-sound policy response to those countries’ shared refugee issues.

### D *Obstacles*

The focus shifts now from the structural and legal dimension to the diplomatic dimension. Consideration is given to why no Australia–Indonesia arrangement has yet emerged. As will be shown, a number of obstacles exist to an Australia–Indonesia arrangement. As with matters of international law compliance generally, these relate to underlying state concerns which preclude action being taken.

#### 1 *A Perceived Lack of Incentive*

The greatest obstacle to this arrangement is states’ *perceived* lack of incentive to enter into it. States have freedom to choose which international arrangements to sign up to.<sup>100</sup> It follows that unless compelling incentive exists, states will typically not sign onto arrangements which may limit state sovereignty.

From Australia’s perspective, it may be argued that there is no incentive for it to enter an arrangement with Indonesia. Offshore processing on Nauru and PNG, and *unilateral* maritime interdiction, so the argument goes, serve Australia’s interests by stopping refugee boats from reaching Australia’s shores. If this analysis is accepted, there would appear to be no reason to seek an alternative arrangement with Indonesia. Underpinning this view is what Suhrke calls ‘the seductive logic of unilateral action’.<sup>101</sup> This logic holds that, unlike in a military context, in refugee matters cooperation with other states is unnecessary. States can respond to refugee matters without outside help. Suhrke states that even ‘small and weak’ states have been able to respond to refugees.<sup>102</sup> Australian policies appear to follow this logic by not cooperating with countries in the region with which Australia shares refugee problems.<sup>103</sup> To the extent it can be said that Australia adopts this logic, this operates as a significant

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<sup>99</sup> United Nations High Commission for Refugees, *Turkey*, Global Focus <<http://reporting.unhcr.org/node/2544?y=2016#year>>.

<sup>100</sup> This is referred to in international law as the Principle of Consent.

<sup>101</sup> Astri Suhrke, ‘Burden-Sharing during Refugee Emergencies: The Logic of Collective Versus National Actions’ (1998) 11 *Journal of Refugee Studies* 396, 403.

<sup>102</sup> *Ibid* 401.

<sup>103</sup> PNG and Nauru are not part of the region’s refugee problems in the sense that neither produces significant numbers of refugees, nor are they transit countries for refugees.

obstacle to Australia pursuing, and cooperating under, a bilateral arrangement with Indonesia.

From Indonesia's perspective, the arrangement with Australia may also be seen to lack incentive. At least four reasons can be identified for this. The first relates to how refugees, and refugee policy, are perceived in Indonesia. Indonesia's refugee population is small, relative to its overall population,<sup>104</sup> and compared to refugee populations elsewhere.<sup>105</sup> It follows that refugee policy may not be seen as significant enough politically within Indonesia so as to justify commitments under the envisaged arrangement.<sup>106</sup> More likely, refugees may not be perceived as worthy of attention at all. Negative perceptions of refugees in Indonesian society may also be an obstacle here. This includes perceptions that refugees and asylum seekers impact the national budget, and represent social and security problems.<sup>107</sup> The perspectives that refugees are an insignificant issue, or even persons likely to cause problems for the state, negate any incentives for an arrangement aimed at their protection.

Second, the Indonesian government may perceive asylum seekers and refugees as Australia's responsibility. Informing this particular view is the reality that the majority of asylum seekers are only in Indonesia to travel to Australia, and perceptions (admittedly not without basis) that armed conflicts Australia has participated in have made these persons refugees.<sup>108</sup> Similarly, Indonesia may consider that as a developing country it already does enough by affording refugees temporary protection pending resettlement.<sup>109</sup> For these reasons, Indonesia may view refugees

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<sup>104</sup> Veronica Koman, 'Indonesia Has Better Option for Refugee Issue', *The Jakarta Post* (online), 10 September 2015 <<http://www.thejakartapost.com/news/2015/09/10/indonesia-has-better-option-refugee-issue.html>>: 'The 13,170 refugees and asylum seekers currently present in Indonesia are a drop in our 250 million-strong ocean.'

<sup>105</sup> Cf Malaysia, a country which as previously noted was home to 94 030 refugees (as well as 60 415 asylum seekers) in 2015: United Nations High Commission for Refugees, above n 71.

<sup>106</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>107</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

<sup>108</sup> See Toohey, above n 2, 72 for a summary of the views of Indonesian law expert and academic Tim Lindsey:

Indonesia's leaders resented the view that they should be doing more to stop the boats, because asylum seekers were only in Indonesia to get to Australia; they saw it as hypocritical that we would not accept asylum seekers, yet expected they should; they resented our Fortress Australia mindset; they viewed the Afghanistan and Iraq wars, which Indonesia did not support, as having created an asylum problem within Indonesia; and furthermore, Lindsey argued, Indonesia was more interested in building its diplomatic ties elsewhere and didn't see great political value in assisting Australia.

<sup>109</sup> Taylor, 'Civil Society and the Fight for Refugee Rights in the Asia Pacific Region', above n 81, 51.

as Australia's responsibility, and thus be reticent to itself assume responsibility under the proposed arrangement.

Third, Indonesia may consider that the status quo adequately serves its interests, thereby ruling out any incentive for a new arrangement. Dave McRae, a former research fellow at the Lowy Institute for International Policy's East Asia Program, makes the point that 'boat departures [to Australia] have largely allowed Indonesia to bypass' finding durable solutions for refugees.<sup>110</sup> Australia's existing hard line asylum policies may also assist Indonesia to practically avoid its refugee responsibility.<sup>111</sup> Australia's policies of offshore processing in PNG and Nauru, refusal to resettle in Australia, and maritime interdiction effectively close off Australian borders to boat arrivals. Indonesia should then (eventually) become undesirable as a transit country en route to Australia because there would be no prospect of getting to Australia. For this reason, Indonesia may prefer the status quo, than to assume obligations under an arrangement.

Fourth, and finally, the arrangement may be seen by Indonesia as potentially damaging to its relations with other Southeast Asian states. Specifically, the arrangement may offend the non-interference principle,<sup>112</sup> which has operated to preclude discussion of refugees within ASEAN.<sup>113</sup> The principle holds that Southeast Asian states will not interfere in the affairs of other states.<sup>114</sup> Indonesia may be wary of an arrangement with Australia as (indirectly) offending the principle. This is because other Southeast Asian states may feel pressure to assume refugee responsibilities if Indonesia does so under the arrangement with Australia. Indonesia may thus consider the arrangement not to be in its broader regional interests and as a member of ASEAN.

In short, Australia and Indonesia both have reason to perceive minimal, or no incentive, to pursue the arrangement. This perception presents a significant obstacle to a successful arrangement.

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<sup>110</sup> Quoted in Toohey, above n 2, 71.

<sup>111</sup> Ibid 89: 'It was suggested by one commentator, Ross Taylor, the chairman of the WA-based Indonesia Institute, that Indonesia quietly saw itself as the beneficiary of the turn-back policy, because it was helping solve its own asylum-seeker problems.'

<sup>112</sup> For Davies, the potential for violation of the non-interference principle is seen as another reason for why Southeast Asian states have not committed to international refugee law: Davies, *Legitimising Rejection*, above n 83, 9.

<sup>113</sup> Bhatara Ibnu Reza, 'Challenges and Opportunities in Respecting International Refugee Law in Indonesia' in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 117, 132–3.

<sup>114</sup> *Charter of the Association of Southeast Asian Nations*, opened for signature 20 November 2007, (entered into force 15 December 2008) art 2(2)(a), whereby the members agree to 'respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States'. ASEAN was established on 8 August 1967. See above n 4 for its current Member States.

## 2 *Fear of an Arrangement Becoming a ‘Pull Factor’*

Another obstacle is a fear that this arrangement will serve as a ‘pull factor’.<sup>115</sup> Refugee protection will be enhanced under the arrangement. Indonesia is to assume processing responsibility. Australia would offer resettlement places to refugees processed in Indonesia,<sup>116</sup> and seek to improve conditions for asylum seekers in Indonesia. A fear is that these improvements will induce more refugees to seek the help of Australia and Indonesia under the arrangement.<sup>117</sup>

On the Indonesian side, this fear can be understood. Indonesia already struggles to deal with irregular migration from Malaysia.<sup>118</sup> The prospect that migration to Indonesia may increase under an arrangement would therefore likely concern the Indonesian government. Whether justifiable or not, concerns may relate to increased economic costs and threats to social cohesion from migration.<sup>119</sup> Also, without an established refugee status determination process, Indonesia cannot properly distinguish refugees from those who may lawfully be returned due to not qualifying for international protection. This compounds pull factor concerns.

Even if Indonesia were to implement a proper refugee status determination process, the fear of the pull factor may remain. Persons not found to be refugees under this arrangement, where they cannot be returned home, would have no option but to remain indefinitely in Indonesia. Feller points out:

it is not easy, it has not been easy for a long time to return people for different reasons, partly because of administrative obstacles put up in the way of return by their countries of origin themselves. Countries of origin are quite keen to have a lot of their population dispersed in a kind of diaspora which is sending back remittances and ... a number of countries have traditionally ... put a lot

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<sup>115</sup> Two interviewees perceived this as an obstacle to an arrangement: Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016); Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>116</sup> Cf Current Australian government policy which is that asylum seekers who are found to be genuine refugees by the UNHCR in Indonesia on or after 1 July 2014 will not be resettled in Australia: Department of Immigration and Border Protection, *Operation Sovereign Borders*, Australian Government <<http://osb.border.gov.au/en/In-Australia>>.

<sup>117</sup> The same fear cannot be said to exist in respect of Australia’s arrangements with each of Nauru and PNG, which have in practice not operated as a pull factor attracting refugees to those places. This is because those arrangements do not protect refugees, but rather are focussed on punitive deterrence. Conditions in PNG and Nauru may not be seen by refugees as holding out genuine possibility of a new life.

<sup>118</sup> Toohey, above n 2, 40.

<sup>119</sup> Davies offers these as general reasons for Southeast Asia’s lack of commitment to international refugee law: Davies, *Legitimising Rejection*, above n 83, 10–12.

of obstacles in the way of return of their nationals because they actually do not want them back. They want them to find work somewhere and send back money. Indonesia could fear that it would be left with a sizeable number of people for whom there is no solution, which will never be taken on resettlement, who cannot be returned ...<sup>120</sup>

This provides a further basis for Indonesia to be wary of the arrangement.

Pull factor concerns also arise on the Australian side. Potential for increased migration under the arrangement may translate into uncertainty around the number of resettlement places Australia may need to provide. As noted, most asylum seekers coming to Australia in the past have had clear protection needs.<sup>121</sup> Australia's fear of the arrangement may not be unfounded, given this reality. The above discussion shows pull factor concerns may operate as a disincentive for each country to pursue the arrangement.

### 3 *The Security Discourse*

The way refugees are perceived can also undermine successful refugee arrangements, especially when protection is the overall imperative. Kneebone traces the evolution of a discourse that sees refugees as a security threat to nation states; a so-called 'security discourse'.<sup>122</sup> This, and related characterisations of refugees as a political embarrassment, threat to sovereignty and social identity,<sup>123</sup> all underplay 'the refugee' as one in need of protection, and so are contrary to proposed arrangements, such as between Australia and Indonesia, to protect refugees.<sup>124</sup>

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<sup>120</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>121</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016). See also Refugee Council of Australia, 'Government Figures Show Boat Arrivals are not "Economic Migrants"' (Media Release, 1 March 2016) <<http://www.refugeecouncil.org.au/latest/6055/>>.

<sup>122</sup> Susan Kneebone, 'ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate, 2014) 295, 298–301.

<sup>123</sup> *Ibid* 297–8.

<sup>124</sup> Susan Kneebone, 'The Labelling Problem in Southeast Asia's Refugee Crisis', *The Diplomat* (online), 12 August 2015 <<http://thediplomat.com/2015/08/the-labeling-problem-in-southeast-asias-refugee-crisis/>> explains the 'regional securitized discourse' and how terms used by ASEAN such as 'irregular migration' create ambiguity as to which persons are properly entitled to protection as 'refugees'.

Important multilateral forums, such as ASEAN and the Bali Process,<sup>125</sup> have been infiltrated by the security discourse.<sup>126</sup> For example, ASEAN, of which Indonesia is a member, addresses refugee issues within the security arm known as the ASEAN Political-Security Community.<sup>127</sup> Refugees are mentioned there infrequently.<sup>128</sup> This is a significant obstacle given that both ASEAN and the Bali Process are key diplomatic channels through which an agreement such as that proposed could be pursued.

#### *4 Problems with the Bali Process*

The Bali Process is a key diplomatic forum in which Australia and other countries, including Indonesia, discuss forced migration challenges. Members have recently described the Bali Process ‘as a voluntary, inclusive, non-binding forum for policy dialogue, information sharing and capacity building’.<sup>129</sup> Since being established in 2002, membership has grown to 44 countries as well as non-state actors, including: the UNHCR, the IOM, and the UN Office on Drugs and Crime.

At the most recent Bali Process ministerial meeting in March 2016, recommendations exhibited a refugee protection focus, probably explained by the Southeast Asian refugee crisis having occurred only months earlier.<sup>130</sup> Ministers recognised the need to expand ‘safe, legal and affordable migration pathways’ to provide an alternative

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<sup>125</sup> The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (*The Bali Process*) is the main regional forum in which countries meet to discuss asylum issues. It was established in 2002 and Ministerial meetings occur every two years, with Australia and Indonesia as co-chairs. The Bali Process is a key, but non-binding, diplomatic forum in which Australia, Indonesia and other countries discuss forced migration challenges.

<sup>126</sup> Kneebone, ‘ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States’, above n 122, 300.

<sup>127</sup> *Ibid* 305.

<sup>128</sup> *Ibid* 306:

Refugees are mentioned within the ASEAN Community, only in the APSC Blueprint, and in the context of ‘post-conflict peace building’ (see B.3), and in particular under the heading at B.3.1., namely ‘Strengthen ASEAN humanitarian assistance’. Thus refugees are conceived doubly narrowly, both within a security paradigm and as ‘victims of conflict’, for whom ‘orderly repatriation’ and resettlement (as internally displaced persons) is promoted. There is no reference to basic principles of *non-refoulement* or asylum. It is also significant that despite the reference in the APSC Blueprint to promoting non-discrimination on the basis of race, or religion, there is no evidence of any understanding that refugees within the region suffer from such discrimination.

<sup>129</sup> ‘Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime’ (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 5.

<sup>130</sup> This contrasts with earlier meetings, which have focussed on security issues and the criminalisation of people smuggling and trafficking.

to people smuggler-facilitated journeys.<sup>131</sup> Encouragement was given to consider opening up labour migration opportunities for those with international protection needs.<sup>132</sup>

While it remains to be seen if the recommendations from the March 2016 meeting will result in significant policy changes, history does not provide a basis for optimism.<sup>133</sup> Past Bali Process developments, such as the Regional Cooperation Framework<sup>134</sup> and the Regional Support Office,<sup>135</sup> have so far not produced any significant bilateral or multilateral arrangements that benefit refugees in concrete ways.<sup>136</sup> To say that the Bali Process has provided states with a smokescreen for inaction, masking a general disinclination of its members towards actions for refugee protection, would not be baseless. The Bali Process thus presents something of an obstacle to achieving an effective refugee protection arrangement between Indonesia and Australia. It may also be ineffective at achieving this where the ‘security discourse’<sup>137</sup> masks refugee protection needs,<sup>138</sup> and where its broad membership could inhibit close cooperation between nearby states, such as Australia and Indonesia.

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<sup>131</sup> ‘Co-Chairs’ Statement’ (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 2.

<sup>132</sup> Sam Tyrer, ‘As the Pacific Solution Unravels, Bali Provides a Lead’ (2 November 2016) *Inside Story* (online) <<http://insidestory.org.au/as-the-pacific-solution-unravels-bali-provides-a-lead>>. This article provides further detailed analysis and an overview of key recommendations made at the March 2016 ministerial meeting.

<sup>133</sup> *Ibid.*

<sup>134</sup> The Regional Cooperation Framework (‘RCF’) dates to 2011 and is described by Bali Process members as ‘an inclusive but non-binding regional cooperation framework’: ‘Co-Chairs’ Statement’ (Fourth Ministerial Conference of the Bali Process, Bali, 29–30 March 2011) 3.

<sup>135</sup> The Regional Support Office (‘RSO’) dates to 2012 and exists to develop ‘practical measures to implement the RCF’: see generally ‘Bali Process Steering Group Note on the Operationalisation of the Regional Cooperation Framework in the Asia Pacific Region’ (Fifth Meeting of Bali Process Ad Hoc Group Senior Officials, Sydney, 12 October 2011) 1–2, which recommended the establishment of the RSO; ‘Co-Chairs Statement’ (Fifth Meeting of Bali Process Ad Hoc Group Senior Officials, Sydney, 12 October 2011) 3; ‘Co-Chairs’ Statement’ (Sixth Meeting of Bali Process Ad Hoc Group Senior Officials, Bali, 1 June 2012) 4.

<sup>136</sup> Tyrer, above n 132.

<sup>137</sup> Kneebone, ‘ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States’, above n 122, 298–301.

<sup>138</sup> Sara Davies, ‘Time to Protect Southeast Asia’s Refugees’, *The Diplomat* (online) 12 September 2015 <<http://thediplomat.com/2015/09/time-to-protect-southeast-asias-refugees/>>:

In practice, systems based on deterrence are not likely to deliver the protection that is needed to erode the people smugglers’ business model. Only the facilitation of safe and legitimate avenues for protection can do that. This is what plagues the current Bali Process, and other regional frameworks such as the Bangkok Declaration. All too often regional cooperation has focused more on transference of the problem than on the need for protection solutions.

### 5 Existing Australian Policies

Australia's existing policies damage prospects for an Australia–Indonesia arrangement (and Australian engagement with the region generally). Those policies run counter to cooperation between countries, which in other regions has led to successful regional arrangements.<sup>139</sup> Other countries may believe that Australia is not committed to refugee protection and responsibility sharing in the region.<sup>140</sup> Offshore processing on Nauru and PNG, neither of which have significant refugee problems of their own, sends the message Australia will not engage properly with other countries in the region.<sup>141</sup> One view is that, through those arrangements, Australia shields itself from having to resettle refugees from the region.<sup>142</sup> Mathew and Harley write: 'Australia has inverted the moral responsibility for resettling refugees by sending asylum seekers to developing countries in order to evade the hard legal obligations of allowing unauthorised boat arrivals to seek asylum in Australia.'<sup>143</sup> Similarly, by closing its border to refugees from Indonesia,<sup>144</sup> Australia has created particular difficulties for Indonesia in finding solutions for refugees. An asylum seeker processing backlog has increased in Indonesia.<sup>145</sup> These policies may give Indonesia (and other countries) cause to doubt Australia's bona fides, and thus feed a reluctance to pursue future arrangements with Australia.

Indeed, empirical research confirms that these policies have already impacted diplomatic relations with Indonesia. The Indonesian government perceives Australia's unilateral interception of asylum seeker boats as a violation of Indonesian sovereignty and breaking diplomatic relations.<sup>146</sup> The Indonesian public also takes a view that Australia has breached Indonesian sovereignty.<sup>147</sup> Such negative sentiments generated in Indonesia by Australia's policies suggest the Indonesian government will be unlikely to promote an arrangement with Australia, a country that is domestically unpopular in Indonesia because of its existing asylum policies. In that sense, Australia's policies are a material obstacle to this arrangement.

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<sup>139</sup> See generally Penelope Mathew, 'Responsibility, Regionalism and Refugees: What Lessons for Australia?' in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 13.

<sup>140</sup> Ibid 32.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar, 2016) 10.

<sup>144</sup> Department of Immigration and Border Protection, above n 116.

<sup>145</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

<sup>146</sup> Ibid. The interviewee was informed by a conversation with a member of the Indonesian Ministry of Foreign Affairs.

<sup>147</sup> Ibid.

### E *Ways to Move Forward*

The obstacles discussed do not rule out an Australia–Indonesia arrangement becoming a reality. It is possible to develop the necessary incentives for each country to cooperate, to overcome pull factor concerns, and to counter the security discourse. As will become clear though, to achieve these things the Australia–Indonesia bilateral arrangement must be approached as part of a broader strategy of regional engagement, including negotiations and commitments vis-a-vis other states.

#### 1 *Developing the Necessary Incentives*

Perceptions that there is no incentive for this arrangement are just that — perceptions. This means they can change, and that they may not be entirely accurate. Betts, an international relations theorist, has made significant contributions here as regards developing effective refugee arrangements. As he explains: ‘States have not contributed to refugee protection for its own sake but have done so insofar as contributing to this global public good has simultaneously offered linked private benefits in other areas.’<sup>148</sup> By identifying ‘states’ perceived interests in areas such as migration, security, development, and peacebuilding’ and linking those to the ‘refugee issue’, progress can be made to achieve cooperative arrangements among states.<sup>149</sup> In other words, explicit identification of otherwise ‘hidden’ reasons for states to enter refugee arrangements is a way to develop incentives for action. Betts acknowledges this is not the only way to achieve successful arrangements, but the significance of the analysis should not be ignored.<sup>150</sup>

Applying Betts’ analysis to the present context, finding incentives for the proposed Australia–Indonesia bilateral arrangement may not be as difficult as one might think. On the Australian side, the clear incentive to enter such an arrangement with Indonesia is that it is a preferable means of managing migration flows. Detaining asylum seekers in Nauru and PNG, and unilateral boat tow backs, has not served Australia’s interests. Human rights violations, economic expense and strained diplomatic relations make these arrangements ‘unprincipled, unworkable deterrents’ of irregular migration.<sup>151</sup> And as noted, the arrangement with the PNG government for Australia to transfer asylum seekers there may no longer apply following the PNG Supreme Court’s decision in *Namah v Pato*<sup>152</sup> and the subsequent announcement by the PNG Prime Minister that the Manus Island processing facility will close. Australia’s long-term future relationships with Southeast Asian countries will also benefit from Australia sharing responsibility for refugee protection under arrangements such

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<sup>148</sup> Alexander Betts, ‘North–South Cooperation in the Refugee Regime: The Role of Linkages’ (2008) 14 *Global Governance* 157, 174–5.

<sup>149</sup> *Ibid* 174.

<sup>150</sup> *Ibid* 175.

<sup>151</sup> Brennan, above n 2.

<sup>152</sup> (Unreported, Supreme Court of Justice of Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ, 26 April 2016).

as with Indonesia.<sup>153</sup> Good diplomatic relations should be enough of an incentive for the Australian government to embrace this refugee arrangement and share burdens, especially given Indonesia's current negative perception of Australia discussed above.

On the Indonesian side, locating the necessary incentives is more difficult. As discussed, a small refugee population combined with the status quo appearing to benefit Indonesia negates any incentives Indonesia may otherwise have had for an arrangement with Australia. An arrangement may fail were Indonesia to seek significant concessions from Australia in other areas to compensate for the lack of incentive,<sup>154</sup> should Australia refuse to give these. While this is a possibility, one must not be so quick to assume such a nihilistic result. The Australia–Indonesia relationship extends beyond refugee issues. Both countries value cooperation on criminal and security matters. In August 2014, for example, both countries reaffirmed the *Lombok Treaty*,<sup>155</sup> which focuses on cooperation in the areas of defence, law enforcement, counter-terrorism, intelligence, maritime security, aviation safety and security and proliferation of weapons of mass destruction.<sup>156</sup> This reveals that a strong relationship exists between the two countries, at least in respect of these areas.

Admittedly, relations between the countries have been at a low ebb in recent years. The execution of Australians Andrew Chan and Myuran Sukumaran by the Indonesian state for drug offences in 2015 and the trespassing upon Indonesia's territory resulting from Australia's asylum seeker boat turn back operations have had their impact. Yet, it appears the relationship is entering a new period. Australia and Indonesia are currently in talks to strengthen economic ties via a free trade agreement referred to as the 'Indonesia–Australia Comprehensive Economic Partnership Agreement' ('IA-CEPA'). The Australian government's Department of

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<sup>153</sup> Power sees the success of Australia's diplomatic relationships as linked to responsibility sharing, commenting in interview:

If the driving focus of Australian policy remains on deterrence, then we may be able to deter some people in some ways for particular periods of time but the fundamental problems are not being addressed and either we will see movement towards Australia manifested in new ways in the future or *we may see much greater pressure on neighbouring countries which will then become a political problem for Australia because there will be a sense that Australia has helped to create these circumstances by not playing its role in the sharing of responsibility within the region.*

Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016) (emphasis added).

<sup>154</sup> Lindsey states that 'Indonesia would not enter into such an arrangement lightly or quickly. There would need to be serious inducements made. Significant money and resources need to be offered': quoted in Toohey, above n 2, 72.

<sup>155</sup> See *Joint Understanding on a Code of Conduct between the Republic of Indonesia and Australia in Implementation of the Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation* (signed and entered into force 28 August 2014); *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, signed 13 November 2006, 2649 UNTS 103 (entered into force 7 February 2008) ('*Lombok Treaty*').

<sup>156</sup> *Lombok Treaty*, art 3 (Areas and Forms of Cooperation).

Foreign Affairs and Trade website explained, as at January 2017, that the ‘IA-CEPA will help bring Southeast Asia’s two largest economies closer together forming a key part of Australia’s regional economic integration. Indonesia is already a significant economic and regional partner for Australia.’<sup>157</sup> According to Australian Minister for Trade, Tourism and Investment, Steven Ciobo MP, negotiations are expected to conclude at the end of 2017.<sup>158</sup> Both countries stand to gain significant economic benefits under any free trade agreement.

If Australia could cause Indonesia to see the proposed refugee arrangement with Australia as worthwhile to a successful diplomatic relationship in these other areas (albeit possibly not having much further significance to Indonesia beyond this), Indonesia may then have some incentive for an arrangement with Australia.<sup>159</sup> The question that follows is this: is Australia doing what it can to enhance the Indonesian relationship such that Indonesia would countenance the proposed refugee arrangement in aid of good overall diplomatic relations? That is not possible to answer definitively, but policymakers and diplomats, especially those involved in the IA-CEPA, should take note that there is scope for Australia to create the incentive for Indonesia to enter a refugee arrangement by aligning other areas of the relationship with that goal.

The discussion has shown that an Australia–Indonesia arrangement can be in both countries’ respective national interests, depending on how the relationship is progressed in other areas to create the necessary incentives.

## 2 *Overcoming Pull Factor Concerns*

The pull factor concern that refugee flows will *drastically* increase because of this arrangement is an oversimplification that ignores local context. Southeast Asia’s refugees and asylum seekers are in many cases integrated into local populations. Malaysia is a case in point, where refugees may form part of an irregular

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<sup>157</sup> Department of Foreign Affairs and Trade, *Indonesia–Australia Comprehensive Economic Partnership Agreement*, Australian Government <<http://dfat.gov.au/trade/agreements/iacepa/pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx>>.

<sup>158</sup> Mark Kenny, ‘Canberra and Jakarta to Push Ahead on Trade Deal’, *The Age* (online), 6 November 2016 <<http://www.theage.com.au/federal-politics/political-news/canberra-and-jakarta-to-push-ahead-on-trade-deal-20161106-gsj5ap.html>>.

<sup>159</sup> Power suggests that there may be little other bases on which Indonesia may be interested in pursuing an arrangement with Australia, stating:

‘I haven’t really seen too much evidence that there has been much Indonesian interest in addressing the issue [of an arrangement with Australia] except in relation to the relationship with Australia’ and ‘it appears to me as being overwhelming, or almost exclusively viewed from the perspective of the relationship with Australia’.

Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

workforce given their lack of legal work rights.<sup>160</sup> With employment, these refugees in Malaysia (and many others like them elsewhere) may be reluctant to travel further afield. A desire by refugees to remain close to their country of origin also tends against onward travel. For example, for non-Rohingya minority ethnic groups from Myanmar, this means staying in nearby Malaysia and not moving elsewhere.<sup>161</sup> Refugees' desire to one day return home, and to remain in paid employment, both operate as a disincentive to travel to countries far away from their country of origin or first refuge, such as Australia. An Australia–Indonesia arrangement will simply not be a pull factor for *all* refugees in the region, and so this cannot properly be seen by countries as an obstacle to the arrangement.

Even to the extent refugee numbers increase, there are ways for Indonesia and Australia to properly manage this, including through broad regional engagement. Seeking commitments from other states to accept refugees for resettlement would directly address concerns that Indonesia and Australia may not be able to handle increased numbers.<sup>162</sup> Malaysia particularly stands out as one of the more economically developed states<sup>163</sup> that could be approached to offer resettlement places (either as a third party to an Australia–Indonesia arrangement, or via separate but related commitments). Outside the region, the United States, Canada and New Zealand could offer resettlement places as part of 'a joint strategy which actually addresses refugee protection needs in Southeast Asia and South Asia much more effectively'.<sup>164</sup>

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<sup>160</sup> Crock, above n 8, 258–9. For a historical overview of Malaysia's reliance on migration as a labour source for its rubber and tin industries, see Amarjit Kaur, 'Migration and the Refugee Regime in Malaysia: Implications for a Regional Solution' (2007) 18 *UNEAC Asia Papers* 77, 79 <<http://pandora.nla.gov.au/pan/10530/20071020-0006/www.une.edu.au/asiacenter/No18.pdf>>:

Malaya had vast quantities of mineral resources and land suitable for large-scale plantation agriculture, but only a small population. The global connecting of Malaya with industrialised Britain and the West through imperialism, technological change and modern capital investment led to the development of the tin and rubber industries and saw the entry of thousands of migrant workers, primarily from China, India and Java to work in these industries.

<sup>161</sup> Based on conversations with community representatives in Malaysia, Power comments, 'it seems to me as though the general wish amongst refugees from Eastern ethnic states of Burma who are in Malaysia is that they'd be able to return home at some point soon': Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

<sup>162</sup> Brennan, above n 2: 'Both governments could negotiate with other countries in the region to arrange more equitable burden sharing in the offering of resettlement places for those proved to be refugees.'; Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016): 'if Australia is to have a positive influence across more than one or two countries in terms of the refugee protection environment then we need to be working closely with other resettlement nations ...'.

<sup>163</sup> Refugee Council of Australia, above n 70.

<sup>164</sup> Interview with Paul Power, CEO of the Refugee Council of Australia (Telephone Interview, 29 February 2016).

Another option is for Indonesia and Australia to develop readmission agreements with other countries in the region.<sup>165</sup> Under these agreements countries agree to the return of their nationals found not to be refugees. This overcomes the undesirable prospect from governments' perspectives that such persons may not be returned by Australia or Indonesia, due to their country of origin refusing to accept them.<sup>166</sup> As a mechanism, these arrangements should offset pull factor concerns.

For clarity, readmission agreements are different to voluntary return programs which help persons return home, but do not secure countries' agreement to return of their nationals.<sup>167</sup> The *Voluntary Return Support and Reintegration Assistance for Bali Process Member States* is an example of a voluntary return program. The program

provides a regional mechanism to assist the voluntary, safe and dignified return of irregular migrants. It also supports asylum seekers and refugees wishing to voluntarily return to their country of origin on the basis of an informed decision and in accordance with established UNHCR principles and procedures.<sup>168</sup>

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<sup>165</sup> For general discussion on readmission agreements, see Goodwin-Gill and McAdam, above n 53, 407–8. Readmission arrangements already operate in the Southeast Asian region, however to what extent, and between which countries, is not immediately clear. See United Nations High Commission for Refugees, *Bay of Bengal and Andaman Sea – Proposals for Action* (May 2015) <<http://www.unhcr.org/55682d3b6.html>>: 'Effective bilateral arrangements are already in place among some of the affected countries to facilitate the return of such individuals in conditions of safety and dignity.' These country to country arrangements 'waive administrative penalties for vulnerable groups, to facilitate return to their country of origin.' Bali Process members have recently recognised these agreements, noting their link to the 'integrity and efficiency' of orderly migration. See 'Co-Chairs' Statement' (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 2: 'Ministers agreed that a Technical Experts Group would be established to exchange best practices with respect to returns and reintegration. Model readmission agreements would also be developed for use by interested member states.' This followed recommendations of the Bali Process Roundtable on Returns and Reintegration on 3–4 December 2015. See also 'Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime' (Sixth Ministerial Conference of the Bali Process, Bali, 23 March 2016) 9, where members have recently expressly recognised 'that timely, safe and dignified return of those found not to be entitled to international protection is an important element of orderly migration' and encouraged members to 'recognise the responsibility of states to accept the return of their nationals.'

<sup>166</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>167</sup> For further discussion of Assisted Voluntary Return programs, see generally United Nations High Commission for Refugees, 'The Return of Persons Found Not to be in Need of International Protection to their Countries of Origin: UNHCR's Role' (Protection Policy Paper, November 2010) 14.

<sup>168</sup> See The Bali Process, *Regional Support Office Activities* <<http://www.baliprocess.net/regional-support-office/activities>>. The IOM implements this project, which according to the RSO website saw 482 persons returned in the first two years. For further discussion of Assisted Voluntary Return programs, see Helen Morris and

Depending on the circumstances, a further response is to engage with refugee source countries to explore ways to reduce refugee outflows. The plight of many Rohingya caught in the 2015 Southeast Asian refugee crisis links to ongoing minority persecution in Myanmar. Engaging with Myanmar to address this may enable refugees scattered across the region to return home and ensure that this situation does not put undue pressure on a future Australia–Indonesia arrangement.<sup>169</sup> In this way, a bilateral arrangement between Australia and Indonesia should, as noted at the outset, be approached as part of a strategy of broad regional engagement.

To summarise here, pull factor concerns tend to be overstated. Not all refugees will travel to avail themselves of protection arrangements. Even to the extent refugee numbers increase, there are responses that Australia and Indonesia can pursue with other countries to appropriately manage this protection issue.

### *3 Promoting Solidarity*

Mathew recommends that ‘Australia needs to do more to focus on solidarity within the region’.<sup>170</sup> This has to be useful to progressing a cooperative arrangement with Indonesia because, as discussed above, Australia’s existing policies run counter to cooperation with Indonesia. In particular, unilateral maritime interception is seen to violate Indonesian sovereignty.<sup>171</sup> Australia may improve solidarity by ensuring it shares refugee burdens and is itself committed to refugee protection. Immediately finding appropriate resettlement opportunities for refugees on PNG and Nauru would communicate Australia’s commitment to protecting refugees.

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Machiel Salomons, ‘Difficult Decisions: A Review of UNHCR’s Engagement with Assisted Voluntary Return Programmes’ (Report PDES/2013/11, United Nations High Commissioner for Refugees Policy Development and Evaluation Service, July 2013) 1. These programs are seen by states as beneficial as they obviate the alternative ‘expensive, unworkable and unpalatable response’ of states detaining, then forcibly deporting individuals. However, such programs raise a number of concerns, as discussed therein. See also United Nations High Commission for Refugees, *Bay of Bengal and Andaman Sea — Proposals for Action* (May 2015) <<http://www.unhcr.org/55682d3b6.html>>: ‘IOM manages several Assisted Voluntary Return and Reintegration programmes that provide additional capacity for the return of individuals who are found not to be in need of international protection.’

<sup>169</sup> Peter Browne, ‘The Asylum-Seeker Plan that Keeps Disappearing over the Horizon’, *Inside Story* (online), 9 April 2014 <<http://insidestory.org.au/the-asylum-seeker-plan-that-keeps-disappearing-over-the-horizon>>:

The other target for Australian action should be the countries from where asylum seekers are fleeing – or at least those where our efforts are likely to bring about gains in security for minority groups. The obvious starting point is Myanmar, a country Australia can seek to influence through its own diplomacy and with the help of neighbouring countries.

<sup>170</sup> Mathew, above n 139, 32.

<sup>171</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

In refugee emergencies, Australia could do far more than it did in response to the Southeast Asian refugee crisis of 2015. Its contribution of humanitarian aid represented a limited response. If Australia had promptly offered persons asylum, it is possible that other states in the vicinity of the stranded persons would have rescued the asylum seekers sooner and also offered asylum. This greater Australian contribution would have helped allay any fear held by other states that they would be left with all the responsibility for providing asylum.<sup>172</sup> It would also have sent the message to other states, including Indonesia, that Australia is committed to working with its regional neighbours to address the shared challenges of forced migration.

#### 4 *Countering the Security Discourse*

Civil society organisations can counter the security discourse. As noted, the security discourse undermines refugee protection arrangements by obscuring refugee protection needs. Instead, that discourse emphasises refugees as a security threat.<sup>173</sup> Civil society, through relevant advocacy campaigns both in Australia and Indonesia, can counter that refugees have legally recognised protection needs. This may garner support for an arrangement such as that proposed between Australia and Indonesia.

SUAKA<sup>174</sup> is an example of a national civil society organisation operating in Indonesia.<sup>175</sup> SUAKA's stated mission is to protect and promote human rights for refugees and asylum seekers in Indonesia, including by '[r]aising public awareness' and '[a]dvocating for policies' consistent with the mission.<sup>176</sup> SUAKA has targeted public awareness campaigns to particular groups such as students and academics.<sup>177</sup> The presumed logic here is that these persons are more likely to occupy influential positions and, once made aware of refugees' protection needs, may be more likely to promote state policies consistent with refugee protection. Feller considers there is

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<sup>172</sup> Suhrke, above n 101, 412 makes reference to ensuring 'no individual, participating state would therefore become sole host — and tempted to close its borders — in a refugee emergency'.

<sup>173</sup> Kneebone, 'ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States', above n 122, 299–301.

<sup>174</sup> For an explanation of SUAKA's origins, see SUAKA, *About Suaka*, Indonesian Civil Society Network for Refugee Rights Protection <<http://suaka.or.id/about/>>:

'SUAKA' is the *Bahasa Indonesia* word for asylum. The network came together in October 2012 when a group of like-minded individuals and organisations realised that there was a gap in providing legal assistance and human rights advocacy for asylum seekers and refugees in Indonesia.

<sup>175</sup> As distinct from those which are global. Jesuit Refugee Service and Amnesty International are examples of global civil society organisations (of course, these operate through local branches in countries). See Taylor, 'Civil Society and the Fight for Refugee Rights in the Asia Pacific Region', above n 81, 38 (citations omitted).

<sup>176</sup> SUAKA, above n 174.

<sup>177</sup> Interview with Rizka Argadianti Rachmah, Secretariat Coordinator of SUAKA, (Telephone Interview, 11 March 2016).

‘a possibility to build up in civil society’, with ‘entities now which are working with governments which are tolerated and which have a broader understanding’.<sup>178</sup>

#### IV CONCLUSIONS

This article has considered the structural, legal and diplomatic dimensions of a bilateral arrangement between Australia and Indonesia. That arrangement would see asylum seekers travelling to Australia by boat, from Indonesia, returned to Indonesia for claims processing. If found to be refugees, these persons would be resettled in Australia (or other countries). Eventually, some persons would also be locally integrated in Indonesia where appropriate. This arrangement would deter dangerous boat journeys to Australia, while at the same time protect refugees in Indonesia by requiring Australia to first improve refugee protection conditions in Indonesia.

Obstacles exist to an Australia–Indonesia arrangement succeeding. Both countries may perceive there to be no incentive, and fear the arrangement will be a pull factor for more refugees. Research has highlighted ways to overcome these obstacles. With sufficient political will, the arrangement might yet succeed. For Australia, this arrangement is a way to share refugee burdens with an important ally, and improve that diplomatic relationship. And surely it presents a more humane alternative to existing arrangements with Nauru and PNG.<sup>179</sup> Undoubtedly, it will be more effective too.

It is an ideal time to pursue this arrangement. Australia and Indonesia are making diplomatic inroads towards a free trade agreement. Regional asylum policy could be negotiated alongside this economic partnership and may thus be more readily seen by both as necessary to improving the overall diplomatic relationship. Similarly, Australia’s Pacific Solution is fast unravelling, in part prompted by the PNG Supreme Court’s decision that found detention of persons on Manus Island in the manner that had been occurring was illegal in violation of that country’s constitution. That consideration provides a further basis for Australia to examine this refugee arrangement. The Bali Process may have provided a smokescreen for inaction on refugee protection previously, but it is obvious that, at least from Australia’s perspective, this cannot continue.

Critically, an Australia–Indonesia bilateral arrangement is not a ‘solution’ to the refugee issues facing the whole region. Rather, it should be seen by Australia and Indonesia as one part of what must be a broader strategy of regional engagement. Additional resettlement places will need to be sought from other countries to help Australia and Indonesia manage refugee numbers and lessen any pull factor fears. Readmission agreements should similarly be secured with neighbouring countries. It is clear that all countries must continue to work together on forced migration issues to make this arrangement a reality.

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<sup>178</sup> Interview with Erika Feller, former Assistant High Commissioner of the UNHCR (Telephone Interview, 4 March 2016).

<sup>179</sup> Brennan, above n 2.

The hope in writing this article is that it prompts further consideration of the kinds of arrangements that could be developed to protect refugees and deter dangerous boat journeys. From Australia's perspective, it is at a crossroads in terms of future regional asylum policy. Australia must seriously consider which countries to engage with and how refugee responsibilities should be shared. Perhaps this quote best describes the sense of it: 'We are where we are, however we got here. What matters is where we go next.'<sup>180</sup>

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<sup>180</sup> Marion, above n 1.



*Liam Elphick\**

## **SEXUAL ORIENTATION AND ‘GAY WEDDING CAKE’ CASES UNDER AUSTRALIAN ANTI-DISCRIMINATION LEGISLATION: A FULLER APPROACH TO RELIGIOUS EXEMPTIONS**

### ABSTRACT

Freedom from discrimination and religious freedom have long clashed in the context of religious exemptions to anti-discrimination legislation. Historically rooted in debates over gender and race, this legal battleground has largely turned to sexual orientation in recent years. This has been particularly borne out in various ‘gay wedding cake’ disputes in overseas jurisdictions, where bakery owners have been sued for refusing to bake a cake for a same-sex wedding on religious grounds. Though the continued definition of marriage as being between a man and a woman has so far precluded these cases from arising in Australia, an in-depth examination of how such gay wedding cake cases would be decided under Australia’s varying anti-discrimination laws remains lacking. Furthermore, existing approaches have tended to focus on the external morality of law and human rights, facing the difficult task of balancing freedom from discrimination with religious freedom. To avoid the uncertainty typical of external morality debates this article suggests an alternative approach, arguing that an application of Lon L Fuller’s natural law theory, and in particular his eight ‘excellencies’ of law making, could provide a path forward for this debate in the pursuance of the *internal* morality of law. This approach would suggest an expansion of the current definitions of sexual orientation in Australian anti-discrimination legislation, the application of religious exemptions to religious organisations and religiously-affiliated bodies but not to individuals, and a shift to a quasi-subjective test to determine religious beliefs under such exemptions. This would provide a clearer path forward for lawmakers and judicial decision makers in an area of law rife with uncertainty and inconsistency.

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## I INTRODUCTION

In July 2012, David Mullins and Charlie Craig visited the Masterpiece Cakeshop near Denver, Colorado to order a wedding cake. The owner of the store, Jack Phillips, informed the couple that because of his religious beliefs the store would not provide a cake for a same-sex couple’s wedding. In reliance on Colorado’s anti-discrimination legislation, which prohibits refusal of service on the ground of sexual orientation, Mullins and Craig filed complaints with the Colorado Civil Rights Division (‘CCRD’). The CCRD ruled that Phillips had illegally discriminated against the couple — a verdict subsequently upheld by the Colorado State Supreme Court.<sup>1</sup> This decision ignited a vitriolic public debate over the role of religion in secular Western societies, with the LGBTI+ community<sup>2</sup> advocating for freedom from discrimination, and religious adherents advocating for the right to freely exercise their beliefs.<sup>3</sup> This infamous ‘gay wedding cake’ incident, which the U.S. Supreme Court has now agreed to hear on appeal,<sup>4</sup> also became the catalyst

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<sup>1</sup> See *Craig v Masterpiece Inc* 370 P 3d 272 (Colo Ct App, 2015); American Civil Liberties Union, *Colorado Supreme Court Refuses to Hear Case of Bakery That Turned Away Gay Couple* (25 April 2016) <<http://aclu-co.org/colorado-supreme-court-refuses-hear-case-bakery-turned-away-gay-couple/>>.

<sup>2</sup> The term ‘LGBTI+’ is used throughout this article, and stands for lesbian (women attracted to women), gay (men attracted to men), bisexual (individuals attracted to both men and women), transgender (individuals who do not identify with their biological sex, or who are beyond the boundaries of gender expression), intersex (a person who is born with a reproductive or sexual anatomy that does not fit the typical definitions of being either female or male), + (any other persons who may question their sexual orientation or gender identity or do not fall within traditional concepts of either, including pansexual persons, asexual persons and queer persons). The term ‘queer’ is used interchangeably to broadly refer to LGBTI+ persons and/or those who prefer not to use labels but who identify somewhere along the LGBTI+ spectrum. For example, many LGB people (approximately 30.5% of young persons according to the Youth Affairs Council of Victoria) refer to themselves as ‘same-sex attracted’ rather than ‘homosexual’, ‘gay’ or ‘lesbian’: see Australian Human Rights Commission, ‘Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination’ (Consultation Report, 2011) 23 <[https://www.humanrights.gov.au/sites/default/files/document/publication/SGI\\_2011.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/SGI_2011.pdf)>. For more on the ‘queer’ umbrella term, see Samantha Hardy, Olivia Rundle and Damien W Riggs, *Sex, Gender, Sexuality and the Law* (Thomson Reuters, 2016) 20. As this article is about the prohibited ground of sexual orientation, it is explicitly acknowledged that transgender and/or intersex persons may indeed be heterosexual, however they are included in the LGBTI+ acronym for completeness — especially as many transgender and/or intersex persons may identify with a diverse sexual orientation.

<sup>3</sup> See, eg, James D Esseks, ‘Another Day, Another Victory: Courts are Weighing Religious Claims to Discriminate and Finding Them Wanting’ on James D Esseks, *HuffPost: The Blog* (13 August 2015) <[http://www.huffingtonpost.com/james-d-esseks/another-day-another-victo\\_b\\_7984736.html](http://www.huffingtonpost.com/james-d-esseks/another-day-another-victo_b_7984736.html)>.

<sup>4</sup> At the time of writing, this case had not yet been heard: see Adam Liptak, ‘Justices to Hear Case on Religious Objections to Same-Sex Marriage’, *The New York Times* (online), 26 June 2017 <<https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html>>.

for other similar disputes in overseas jurisdictions.<sup>5</sup> Such cases subvert any claims that marriage will be the last remaining bastion of conflict between religious rights and LGBTI+ rights,<sup>6</sup> and suggest that the focus of the same-sex marriage debate in Australia will eventually turn to anti-discrimination laws.

Recent discourse indicates that this pivot has already begun. The Victorian Government, for instance, rejected calls to allow religious exemptions under new adoption laws that would have allowed organisations to refuse to place children in the care of same-sex couples.<sup>7</sup> By contrast, the Tasmanian Government has proposed a new anti-discrimination exemption for public acts done for religious purposes.<sup>8</sup> The federal government's plan for a plebiscite on same-sex marriage would also have expanded religious exemptions in anti-discrimination legislation to 'conscientious objectors',<sup>9</sup> potentially causing significant constitutional law problems.<sup>10</sup> This plan

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<sup>5</sup> See, eg, *Lee v McArthur* [2017] IRLR 69 (Northern Ireland Court of Appeal); *Lee v Ashers Baking Co Ltd* [2015] NICTy 2 (Northern Ireland County Court); *Eweida v United Kingdom* [2013] I Eur Court HR 37; *Elane Photography LLC v Willock*, 309 P 3d 53 (NM, 2013); *Bull v Hall* [2014] HRLR 4 (Supreme Court of the United Kingdom); Henry McDonald, "'Gay Cake" Row: Born-Again Christian Bakers Lose Court Appeal', *The Guardian* (online), 24 October 2016 <<https://www.theguardian.com/uk-news/2016/oct/24/born-again-christian-ashers-bakery-lose-court-appeal-in-gay-cake-row>>.

<sup>6</sup> See generally Kristen Walker, 'The Same-Sex Marriage Debate in Australia' (2007) 11 *International Journal of Human Rights* 109; Elizabeth Keogh, 'The Practical Implications of Marriage Inequality' (2015) 27(3) *Legaldate* 2.

<sup>7</sup> Farrah Tomazin, 'Gay Adoption Could be Hindered over Push for Religious Exemptions', *The Age* (online), 13 September 2015 <<http://www.theage.com.au/victoria/gay-adoption-could-be-hindered-over-push-for-religious-exemptions-20150912-gjl2jz.html>>.

<sup>8</sup> Richard Baines, 'Tasmania Seeks to Protect "Freedom of Religion" Ahead of Gay Marriage Debate', *ABC News* (online), 17 August 2016 <<http://www.abc.net.au/news/2016-08-17/revamp-flagged-for-discrimination-act-ahead-of-gay-marriage-vote/7751322>>; Anti-Discrimination Amendment Bill 2016 (Tas) cl 4.

<sup>9</sup> George Brandis, (Attorney-General for Australia), Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (10 October 2016) sch 1, pt 1 <<https://www.attorneygeneral.gov.au/MediaReleases/Documents/Exposure-Draft-Marriage-Amendment.pdf>>; Paul Karp, 'Marriage Equality: Law Would Protect "Conscientious Objectors" Who Reject Same-Sex Weddings', *The Guardian* (online), 14 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/14/marriage-equality-law-would-protect-conscientious-objectors-who-reject-gay-weddings>>.

<sup>10</sup> These exemptions were to be contained in the *Marriage Act 1961* (Cth) rather than in anti-discrimination legislation. An additional proposed amendment to the *Sex Discrimination Act 1984* (Cth) was to ensure that actions undertaken in reliance on these 'conscientious objector' clauses would be exempt from prohibitions against discrimination on the ground of sexual orientation. However, state and territory anti-discrimination legislation would continue to apply, which could create inconsistency that may be resolved by section 109 of the *Australian Constitution*. The operation of section 109 is, intriguingly, limited in regards to state and territory anti-discrimination laws: see *Sex Discrimination Act 1984* (Cth) s 10(3); *Marriage*

drew the support of Australian Christian Lobby director Lyle Shelton, who argued, in a nod to the gay wedding cake cases that, ‘[p]eople should be free to live out your beliefs — not just if you’re a minister but also if you’re [a] photographer or own a wedding reception venue.’<sup>11</sup>

While high rates of discrimination against LGBTI+ persons are reported in Australia,<sup>12</sup> the current definition of Australian marriage accommodating only opposite-sex couples has meant that ‘gay wedding cake’ cases have yet to arise.<sup>13</sup> In moving forward, the following question is therefore crucial to law makers at federal, state and territory levels: to what extent should religious exemptions to anti-discrimination legislation apply to the ground of sexual orientation?<sup>14</sup> This article applies a natural law ‘internal morality’ framework to provide recommendations that may help lawmakers in resolving this question, and proceeds in three parts.

Part II will examine in detail Australia’s federal, state and territory anti-discrimination laws to determine how LGBTI+ individuals are protected from discrimination and how religious exemptions operate to exclude liability for such discrimination. This Part will posit that current legal approaches to this issue in Australia have created inconsistency, ambiguity and uncertainty. While various commentators have already undertaken international comparative approaches,<sup>15</sup> and scrutinised overseas

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*Act 1961 (Cth) s 6.* For an example of how these inconsistencies may play out in a state or territory jurisdiction, see *Equal Opportunity Act 1984 (WA) s 69(1)(a)*; *Interpretation Act 1984 (WA) s 5*.

<sup>11</sup> Karp, above n 9.

<sup>12</sup> See, eg, Ian Smith, Lindsay Oades and Grace McCarthy, ‘The Australian Corporate Closet, Why it’s Still so Full: a Review of Incidence Rates for Sexual Orientation Discrimination and Gender Identity Discrimination in the Workplace’ (2013) 9 *Gay and Lesbian Issues and Psychology Review* 51; Human Rights and Equal Opportunity Commission, ‘Stories of Discrimination Experienced by the Gay, Lesbian, Bisexual, Transgender and Intersex Community’ (Inquiry Report, October 2007) <<https://www.humanrights.gov.au/publications/stories-discrimination>>.

<sup>13</sup> At the time of writing, marriage in Australia is still defined as being exclusively between a man and a woman, however changes to incorporate same-sex marriage appear imminent: see Joe Kelly and Rachel Baxendale, ‘Gay Marriage “Imminent”, Say Advocates’, *The Australian* (online), 10 July 2017 <<http://www.theaustralian.com.au/national-affairs/gay-marriage-imminent-say-advocates/news-story/fd7c6b7b41c5341aaaf62076e6be29c8>>.

<sup>14</sup> While gender identity has also become a prominent point of contention between LGBTI+ activists and religious advocates, the focus of this article will be on sexual orientation. On gender identity debates, see, eg, Hadley Malcolm, ‘More than 700 000 Pledge to Boycott Target over Transgender Bathroom Policy’, *USA Today* (online), 28 April 2016 <<http://www.usatoday.com/story/money/2016/04/25/conservative-christian-group-boycotting-target-transgender-bathroom-policy/83491396/>>.

<sup>15</sup> See, eg, Neil Foster, ‘Freedom of Religion and Balancing Clauses in Discrimination Legislation’ (2016) 5 *Oxford Journal of Law and Religion* 385; Anthony Gray, ‘The Reconciliation of Freedom of Religion with Anti-Discrimination Rights’ (2016)

domestic laws in depth,<sup>16</sup> a comprehensive examination and comparison of Australia's anti-discrimination laws and religious exemptions is lacking.

Part III will outline and interpret Lon L Fuller's internal morality approach to law,<sup>17</sup> particularly in regards to Fuller's eight 'excellencies' of generality, promulgation, non-retroactivity, clarity, avoidance of contradiction, avoidance of laws requiring the impossible, constancy of law, and congruence between official action and declared rule. These excellencies provide a way to strive towards good law making. It will be argued that Fuller's internal morality approach could provide a different perspective to a debate that has largely focused on the external morality of law, in particular human rights.<sup>18</sup> These external morality approaches will be outlined to understand how a Fullerian internal morality analysis can provide a viable and alternative path forward for religious exemptions. While Fuller makes many claims about the intersections between morality and law, this article will focus on his eight excellencies. Indeed, though others have critiqued Fuller's theory,<sup>19</sup> it is not the task of this article to defend his claims,<sup>20</sup> but rather to interpret and apply them.

In Part IV, Fuller's treatise will be applied to religious exemptions to sexual orientation under anti-discrimination legislation to consider an ideal approach to

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42 *Monash University Law Review* 72, 77-90; Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208.

<sup>16</sup> See, eg, Thomas C Berg, 'What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common' (2010) 5 *Northwestern Journal of Law and Social Policy* 206; Douglas NeJaime, 'Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination' (2012) 100 *California Law Review* 1169; Roger Severino, 'Or for Poorer: How Same-Sex Marriage Threatens Religious Liberty' (2006) 30 *Harvard Journal of Law and Public Policy* 939.

<sup>17</sup> Premised upon Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969).

<sup>18</sup> See, eg, Gray, above n 15; Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287; Julia Crandell, *Freedom to Discriminate: Finding the Balance Between Freedom of Religion and Non-discrimination in the Provision of Services by Religious Bodies and Individuals to LGBTI Service Users in Australia* (Honours Thesis, University of Western Australia, 2015).

<sup>19</sup> See, eg, H L A Hart, 'Book Review: The Morality of Law' (1965) 78 *Harvard Law Review* 1281; Peter P Nicholson, 'The Internal Morality of Law: Fuller and His Critics' (1974) 84 *Ethics* 307; Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 83 *New York University Law Review* 1059; David Luban, 'The Rule of Law and Human Dignity: Re-Examining Fuller's Canons' (2010) 2 *Hague Journal on the Rule of Law* 29.

<sup>20</sup> Many others have done this: see, eg, Dan Priel, 'Reconstructing Fuller's Argument against Legal Positivism' (2013) 26 *Canadian Journal of Law and Jurisprudence* 399; Kristen Ann Rundle, 'Fuller's Internal Morality of Law' (2016) 11 *Philosophy Compass* 499, 500.

help minimise inconsistency and uncertainty in the Australian context. Applying a theoretical perspective focusing on internal characteristics of law, rather than existing rights-based approaches focusing on external characteristics, could forge a different path for socio-legal debates on this issue. Though Fuller’s internal morality cannot formulate an ideal phrasing for religious exemptions,<sup>21</sup> this framework can be used to provide key recommendations in moving the debate forward in Australia. This application of Fuller’s eight ideal characteristics of excellent law leads to three key recommendations: broadening the prohibited ground of sexual orientation; allowing religiously-affiliated bodies to rely on exemptions but not individuals; and shifting the requisite belief test from an objective standard to a quasi-subjective standard. These recommendations provide clear guidance for future jurisprudence.

## II SEXUAL ORIENTATION AND RELIGIOUS EXEMPTIONS UNDER AUSTRALIAN ANTI-DISCRIMINATION LEGISLATION

Religion has historically held an important place in law. The origins of contemporary Western legal tradition can be traced back to the Roman Catholic Church first establishing its legal unity nearly a millennium ago.<sup>22</sup> The common law tradition partly arose from the collection and interpretation of rules applied from a range of churches into one ‘common’ place.<sup>23</sup> In this regard, many elements of Western legal tradition are rooted in Judeo-Christian religious and moral beliefs.<sup>24</sup> Indeed, since Australia’s inception, the Commonwealth has been constitutionally proscribed from making any law to prohibit the free exercise of religion.<sup>25</sup> In more recent years, religious exemptions have formed a key part of anti-discrimination laws. Discourse around such exemptions has historically focused on race and gender, but has turned to sexual orientation in recent years,<sup>26</sup> perhaps due to the increasingly controversial relationship between religiosity and sexuality.<sup>27</sup>

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<sup>21</sup> Cf Luban, above n 19, 33–9.

<sup>22</sup> Harold J Berman, ‘Religious Foundations of Law in the West: An Historical Perspective’ (1983) 1 *Journal of Law and Religion* 3, 5.

<sup>23</sup> Gray, above n 15, 72–3.

<sup>24</sup> Berman, above n 22, 3.

<sup>25</sup> Or to establish a religion or impose religious observance: see *Australian Constitution* s 116.

<sup>26</sup> Contrasting, for example, Mortensen, above n 15, 221–7 with Gray, above n 15. At 232, Mortensen noted that: ‘The ... application of sex discrimination laws in questions like the ordination of Catholic priests or Presbyterian ministers would be an extremely serious attempt to destroy the internal life of religious groups that do not accept gender equality without qualification.’

<sup>27</sup> The relatively modern addition of sexual orientation as a universally prohibited ground in anti-discrimination legislation in Australia may also be relevant, as the Commonwealth only added this prohibited ground in 2013: see *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

Religious exemptions under Australia's anti-discrimination laws on the ground of sexual orientation have only been considered peripherally,<sup>28</sup> with little examination of the variations between federal, state and territory laws. This Part explains the current state of these laws and concludes with three key questions that must be answered in order to clarify the ideal scope of religious exemptions: who should be protected by the sexual orientation prohibited ground; to whom should religious exemptions apply; and how should the requisite religious beliefs be tested? Owing both to a dearth of relevant case law and the Fullerian emphasis on written law, legislation will be the focus.

### *A Defining Discrimination*

Before ascertaining how religious exemptions apply to sexual orientation, the idea of discrimination itself must first be understood. The nine federal, state and territory anti-discrimination laws pertinent to sexual orientation operate nearly identically in defining discrimination. Direct discrimination occurs when a person (Person A) treats another person (Person B) less favourably than they would have treated a different person (Person C) in the same circumstances because of a characteristic of Person B (prohibited ground) that Person C does not possess.<sup>29</sup> Indirect discrimination occurs when Person A imposes a condition on Person B that is likely to disadvantage Person B because of the characteristic(s) that they possess.<sup>30</sup> While a range of

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<sup>28</sup> With public discussions on LGBTI+ issues largely focused on the same-sex marriage debate or the Safe Schools program: see, eg, Michael Safi, 'Alan Jones Rejects Potentially "Divisive" Same-Sex Marriage Plebiscite', *The Guardian* (online), 8 March 2016 <<http://www.theguardian.com/australia-news/2016/mar/08/alan-jones-rejects-same-sex-marriage-plebiscite>>; Craig Cook, 'Outspoken Senator Cory Bernardi Says Safe Schools Program Bullies Heterosexual Children', *The Advertiser* (online), 28 February 2016 <<http://www.adelaidenow.com.au/news/south-australia/outspoken-senator-cory-bernardi-says-safe-schools-program-bullies-heterosexual-children/news-story/083a86ba9c4b3d63fa3d8e0e6903f39a>>.

<sup>29</sup> *Sex Discrimination Act 1984* (Cth) s 5A(1); *Discrimination Act 1991* (ACT) s (2); *Anti-Discrimination Act 1977* (NSW) s 49ZG(1)(a); *Anti-Discrimination Act 1992* (NT) s 20(2)(a); *Anti-Discrimination Act 1991* (Qld) s 10(1); *Equal Opportunity Act 1984* (SA) s 29(2)(a); *Anti-Discrimination Act 1998* (Tas) s 14; *Equal Opportunity Act 2010* (Vic) s 8; *Equal Opportunity Act 1984* (WA) s 35O(1). For further interpretation of the requirements for direct discrimination, see *JM v QFG* [2000] 1 Qd R 373; *Bates v BDG Properties Pty Ltd* [2013] NSWADT 285.

<sup>30</sup> *Sex Discrimination Act 1984* (Cth) s 5A(2); *Discrimination Act 1991* (ACT) s 8(3); *Anti-Discrimination Act 1977* (NSW) s 49ZG(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1); *Equal Opportunity Act 1984* (SA) s 29(2)(b); *Anti-Discrimination Act 1998* (Tas) s 15; *Equal Opportunity Act 2010* (Vic) s 9; *Equal Opportunity Act 1984* (WA) s 35O(3). The Northern Territory does not have a specific provision dealing with direct discrimination. For further interpretation of the requirements for indirect discrimination, see *Li v Edith Cowan University (No 3)* [2013] WASCA 277; *Lindisfarne R & SLA Sub-Branch v Buchanan* [2004] TASSC 73; *Garriock v Football Federation Australia* [2016] NSWCATAD 63. Unfavourable treatment because of a

prohibited grounds are protected, including race, religion and age, the focus of this article is on sexual orientation.<sup>31</sup>

The prohibition of sexual orientation discrimination also encompasses discrimination on the ground of any characteristics that generally appertain to or are imputed to persons of a particular sexual orientation.<sup>32</sup> As such, discrimination against any person due to their ‘sexual attraction’ or sexual acts would inescapably fall under the sexual orientation prohibited ground.<sup>33</sup> The areas in which discrimination is prohibited ordinarily include employment, health services, education, accommodation, goods and services, insurance, superannuation, and governmental programs.<sup>34</sup>

### B Defining Sexual Orientation

All nine jurisdictions now protect some form of sexual orientation from discrimination. The Australian Capital Territory, Victoria and Western Australia each define ‘sexual orientation’ or ‘sexuality’ as ‘heterosexuality, homosexuality, lesbianism or bisexuality’.<sup>35</sup> Queensland legislation protects only heterosexual, homosexual and bisexual persons, with no explicit mention of lesbian persons,<sup>36</sup> while the Tasmanian legislation contains the same list but leaves it open-ended.<sup>37</sup> Until last year, South Australia similarly defined ‘sexuality’ — but now protects ‘sexual orientation’ without

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relative who possesses a prohibited ground is also considered discrimination in some jurisdictions: *Anti-Discrimination Act 1977* (NSW) s 49ZG(1)(a); *Equal Opportunity Act 1984* (SA) s 29(2)(d); *Equal Opportunity Act 1984* (WA) s 35O(2).

<sup>31</sup> Some anti-discrimination laws contain a specific prohibition on discrimination on the ground of sexual orientation: see, eg, *Sex Discrimination Act 1984* (Cth) s 5A. Others contain a general prohibition of discrimination on any prohibited grounds (which includes sexual orientation by definition): see, eg, *Anti-Discrimination Act 1998* (Tas) ss 14, 15. These differences in construction are trivial and in practice they operate in the same way.

<sup>32</sup> *Sex Discrimination Act 1984* (Cth) ss 5A(1)(b), (c); *Discrimination Act 1991* (ACT) s 7(2); *Anti-Discrimination Act 1977* (NSW) s 49ZG(2); *Anti-Discrimination Act 1992* (NT) ss 20(2)(b), (c); *Anti-Discrimination Act 1991* (Qld) s 8; *Equal Opportunity Act 1984* (SA) s 29(2)(c); *Anti-Discrimination Act 1998* (Tas) s 14(2); *Equal Opportunity Act 1984* (WA) ss 35O(1)(b), (c).

<sup>33</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615, 630–31 (Maxwell P) (‘*Christian Youth Camps*’).

<sup>34</sup> See, eg, *Anti-Discrimination Act 1977* (NSW) ss 49ZH–ZR; *Anti-Discrimination Act 1992* (NT) ss 28–49; *Equal Opportunity Act 1984* (SA) ss 30–40.

<sup>35</sup> Western Australia expands this beyond actual sexual orientation to also include imputed sexual orientation: *Discrimination Act 1991* (ACT) Dictionary (definition of ‘sexuality’); *Equal Opportunity Act 2010* (Vic) s 4 (definition of ‘sexual orientation’); *Equal Opportunity Act 1984* (WA) s 4 (definition of ‘sexual orientation’).

<sup>36</sup> *Anti-Discrimination Act 1991* (Qld) s 4 (definition of ‘sexuality’).

<sup>37</sup> Due to the use of the word ‘includes’: *Anti-Discrimination Act 1998* (Tas) s 3 (definition of ‘sexual orientation’).

a legislative definition of this ground.<sup>38</sup> The Northern Territory defines ‘sexuality’ as meaning ‘the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality’.<sup>39</sup> New South Wales provides protection only to ‘homosexuals’.<sup>40</sup> Though defined in the New South Wales legislation as ‘male or female homosexuals’,<sup>41</sup> the term ‘homosexuality’ has previously been considered to mean only male same-sex attraction.<sup>42</sup> It has been read more expansively in recent times to include bisexual persons where such persons identify as being same-sex attracted.<sup>43</sup> Of course, not all bisexual persons will identify this way so strictly,<sup>44</sup> and as such New South Wales’ definition remains the narrowest.

The Commonwealth legislation defines ‘sexual orientation’ as meaning a person’s sexual orientation towards: persons of the same sex; persons of a different sex; or persons of the same sex and persons of different sex.<sup>45</sup> This is theoretically broader than state and territory definitions since the Commonwealth legislation refers to ‘a different sex’ rather than ‘the opposite sex’. This could, under an expansive reading, include any person that feels sexual attraction regardless of gender identity or sexuality.<sup>46</sup> The avoidance of labels thus captures for instance men who have sex with men but who do not identify as being homosexual,<sup>47</sup> and broadens the scope of the prohibited ground. Indeed, it was explicitly recognised in the relevant explanatory memorandum that the use of ‘different’ rather than ‘opposite’ was a deliberate attempt to expand the scope of the provision.<sup>48</sup>

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<sup>38</sup> Equal Opportunity Act 1984 (SA) pt 3; Statutes Amendment (Gender Identity and Equality) Act 2016 (SA) s 14(3).

<sup>39</sup> Despite ‘transsexuality’ more accurately being described as a gender identity than a sexual orientation: *Anti-Discrimination Act 1992* (NT) s 4 (definition of ‘sexuality’).

<sup>40</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZF.

<sup>41</sup> *Ibid* s 4.

<sup>42</sup> See generally Anna Chapman, ‘Australian Anti-Discrimination Law and Sexual Orientation: Some Observations on Terminology and Scope’ (1996) 3 *Murdoch University Electronic Journal of Law* 21.

<sup>43</sup> *Owen v Menzies* [2013] 2 Qd R 327, 333 [5] (de Jersey CJ), 355 [86] (McMurdo P), 357 [101] (Muir JA). McMurdo P noted that ‘an essential aspect of bisexuality is a sexual feeling for a person of the same sex, that is, homosexuality. It follows that vilification of homosexuals is also vilification of bisexuals at least where, like [the appellant], the bisexual person identifies with homosexuals’: at 355 [86].

<sup>44</sup> See Juliet Richters et al, ‘Sexual Identity, Sexual Attraction and Sexual Experience: the Second Australian Study of Health and Relationships’ (2014) 11 *Sexual Health* 451, 454.

<sup>45</sup> *Sex Discrimination Act 1984* (Cth) s 4 (definition of ‘sexual orientation’).

<sup>46</sup> Cf *Bunning v Centacare* (2015) 293 FLR 37, as will be discussed in Part IV.

<sup>47</sup> See Theodore Bennett, ‘Orientations and “Deviations”’: Sexuality in Anti-Discrimination Law’ (2016) 42 *Monash University Law Review* 15, 26.

<sup>48</sup> Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) cl 14.

These definitions could therefore be placed into three categories in reference to their prohibited ground of sexual orientation or sexuality, which are set out in table 1.<sup>49</sup>

**Table 1: A categorisation of the protection of ‘sexual orientation’ or ‘sexuality’ in Australian anti-discrimination legislation, excluding South Australia as it does not legislatively define ‘sexual orientation’.**

Jurisdiction	Ground of protection	Categorisation
NSW	Homosexuality	<b>Narrow</b>
ACT, NT, Qld, Tas, Vic, WA	Heterosexuality, homosexuality (whether explicitly or impliedly including lesbianism), bisexuality	<b>Moderate</b>
Cth	A person’s sexual orientation towards persons of either the same sex, or a different sex, or persons of the same sex or different sex	<b>Broad</b>

### *C General Religious Exemptions*

Though discrimination on the ground of sexual orientation is prohibited in all jurisdictions in Australia, some exceptions to this prohibition apply, including, pertinently, religious exemptions. These provisions operate to exclude liability for discriminatory acts if certain criteria are met.<sup>50</sup> Religious exemptions are structured somewhat similarly across federal, state and territory anti-discrimination legislation, and could broadly be categorised in the following three ways: specific religious exemptions, educational religious exemptions, and general religious exemptions. Specific religious exemptions apply for the appointment and training of priests and ministers and attract little attention in regards to sexual orientation,<sup>51</sup> while

<sup>49</sup> As already noted, the additional ‘transsexual’ protection in the NT’s definition of ‘sexual orientation’ is more accurately described as gender identity and is therefore not pertinent to this article.

<sup>50</sup> While it must be noted that religious exemption provisions usually operate broadly to all prohibited grounds, the focus of this article is on discriminatory acts on the ground of sexual orientation. As such, religious exemptions will only be examined to the extent they that apply to this prohibited ground.

<sup>51</sup> Subject to very minor syntactical differences, similar specific exemptions are found in all jurisdictions in Australia: *Sex Discrimination Act 1984* (Cth) s 37(1); *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1992* (NT) s 53; *Anti-Discrimination Act 1991* (Qld) s 90; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) s 82(1); *Equal Opportunity Act 1984* (WA) s 72. The SA legislation has one slight variation, adding an exemption for the ‘administration’ of bodies established for religious purposes: *Equal Opportunity Act 1984* (SA) s 50(ba).

educational religious exemptions apply to religiously-affiliated schools.<sup>52</sup> The focus of this article, however, is on general religious exemptions.

All Australian anti-discrimination laws contain a general religious exemption, which remains the greatest source of disagreement and debate. This general religious exemption excludes liability for discrimination on the ground of sexual orientation in all jurisdictions except for Tasmania.<sup>53</sup> This two-limbed exemption typically requires that any other act or practice of a body established for religious purposes either:

- 1 conforms to the doctrines, tenets or beliefs of the religion; or
- 2 is necessary to avoid injury to the religious susceptibilities of adherents of that religion.<sup>54</sup>

Therefore, the typical 'baseline' test only requires that one of these two limbs be satisfied. Some variants exist in the legislation: for example, South Australian legislation refers to religious 'precepts',<sup>55</sup> while Victorian legislation refers to 'principles'.<sup>56</sup> These differences are terminological and largely immaterial. However, more critical differences in the legislation create substantial inconsistencies. Victoria, for example, adds the requirement that the necessity to avoid injury to religious susceptibilities be 'reasonable',<sup>57</sup> enshrining a more rigid objective test. Victoria and Tasmania also provide a general religious exemption to individuals, utilising the same two-limb test.<sup>58</sup> Tasmania's individual religious exemption does not, however,

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<sup>52</sup> *Sex Discrimination Act 1984* (Cth) s 38; *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1984* (WA) s 73. Broader exemptions apply in Victoria and NSW: *Anti-Discrimination Act 1977* (NSW) ss 4, 49ZO(3); *Equal Opportunity Act 2010* (Vic) s 83(1). Narrower exemptions apply in SA and the NT: *Anti-Discrimination Act 1992* (NT) s 37A; *Equal Opportunity Act 1984* (SA) s 34(3). Tasmania and Queensland do not have educational religious exemptions: see *Anti-Discrimination Act 1991* (Qld) s 109(2); *Anti-Discrimination Act 1998* (Tas) ss 16(o), (p), 52. See generally Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392; John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian *Charter of Human Rights and Responsibilities Act* to Achieve the Right Balance' (2011) 36 *Monash University Law Review* 16.

<sup>53</sup> *Anti-Discrimination Act 1998* (Tas) s 52(d).

<sup>54</sup> *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Anti-Discrimination Act 1977* (NSW) s 56(d).; *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Anti-Discrimination Act 1998* (Tas) s 52(d); *Equal Opportunity Act 1984* (WA) s 72(d).

<sup>55</sup> *Equal Opportunity Act 1984* (SA) s 50(1)(c).

<sup>56</sup> *Equal Opportunity Act 2010* (Vic) s 82(2)(a). Beyond this, Tasmanian legislation exempts actions that are 'carried out in accordance with the doctrine of a particular religion' and are 'necessary to avoid offending the religious sensitivities of any person of that religion': *Anti-Discrimination Act 1998* (Tas) s 52(d) (emphasis added).

<sup>57</sup> *Equal Opportunity Act 2010* (Vic) s 82(2)(b).

<sup>58</sup> *Ibid* s 84; *Anti-Discrimination Act 1998* (Tas) s 52.

apply to sexual orientation.<sup>59</sup> New South Wales requires that the body be ‘established to propagate religion’,<sup>60</sup> which is more narrow than the usual requirement. Contrastingly, the Northern Territory exemption is broader, requiring only that the act is done ‘as part of any religious observance or practice’.<sup>61</sup> Tasmania, the Australian Capital Territory and Queensland require that an act both conforms to the beliefs of the religion *and* is necessary to avoid injury to the religious susceptibilities of adherents,<sup>62</sup> rather than only requiring one of these two limbs. Finally, Queensland’s exemption does not apply in regards to employment or education,<sup>63</sup> while the Commonwealth’s exemption does not apply to Commonwealth-funded aged care facilities.<sup>64</sup> These variants are outlined in table 2, with the minor variations at the top increasing gradually to the major variations at the bottom:

In addition to this patchwork of inconsistencies across jurisdictions, the vagueness of the key phrase ‘avoid injury to the religious susceptibilities of adherents’ is problematic. Carolyn Evans and Leilani Ujvari argue that ‘this type of exemption is questionable both in terms of legal clarity and the principled justification supporting it.’<sup>65</sup> Case law seems to confirm this, especially where religious adherents may be divided on an issue — such as their support of or opposition towards same-sex attraction.<sup>66</sup> Though it is apparent that this second limb is an objective test,<sup>67</sup> it is unclear whether the first limb is subjective or objective in nature.

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<sup>59</sup> The individual religious exemption applies only to discrimination on the grounds of religious belief or affiliation, or religious activity. Tasmanian legislation does not provide a separate exemption to bodies established for religious purposes, though they are likely encapsulated by the phrasing of ‘person’ in the individual exemption: see *Anti-Discrimination Act 1998* (Tas) s 52.

<sup>60</sup> *Anti-Discrimination Act 1977* (NSW) s 56(d).

<sup>61</sup> *Anti-Discrimination Act 1992* (NT) s 51(d).

<sup>62</sup> *Discrimination Act 1991* (ACT) s 32(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Anti-Discrimination Act 1998* (Tas) ss 52(d)(i)–(ii).

<sup>63</sup> This explains why Queensland has no educational religious exemption, as religious exemptions are excluded from the broad field of education whether the school is religiously-affiliated or not. See *Anti-Discrimination Act 1991* (Qld) s 109(2).

<sup>64</sup> Excluding the employment of persons to provide such care: *Sex Discrimination Act 1984* (Cth) s 37.

<sup>65</sup> Carolyn Evans and Leilani Ujvari, ‘Non-discrimination Laws and Religious Schools in Australia’ (2009) 30 *Adelaide Law Review* 31, 53.

<sup>66</sup> See the discussion directly below; see especially *Christian Youth Camps* (2014) 308 ALR 615, 672–73.

<sup>67</sup> See Chris Sidoti, ‘Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Sexual Preference’ (HRC Report No 6, Australian Human Rights Commission, March 1998) 22–3.

**Table 2: An outline of the variation of religious exemption clauses in Australian anti-discrimination legislation from the typical two-limbed test outlined above.**

Jurisdiction	Variation(s) from typical two-limbed test	Area of variation (scope of exemption; first limb; second limb; requiring both limbs)
WA, SA	None	None
Cth	Excludes the exemption from Commonwealth-funded aged care facilities	Scope of exemption
NSW	Applies religious exemptions only to bodies 'established to propagate religion'	Scope of exemption
NT	Requires only that the act is done 'as part of any religious observance or practice'	First limb and second limb
ACT	Requires that both limbs be satisfied	Requiring both limbs
Qld	Requires that both limbs be satisfied, and excludes the exemption from employment and education	Scope of exemption and requiring both limbs
Vic	Adds a further objective requirement to the second limb, and provides a general religious exemption to individuals	Scope of exemption and second limb
Tas	Requires that both limbs be satisfied, provides a general religious exemption to individuals, and does not apply the exemption to sexual orientation	Scope of exemption and requiring both limbs

#### *D Case Law on Religious Exemptions: Sparse and Inconsistent*

While the various federal, state and territory anti-discrimination legislation displays inconsistency across jurisdictions, the case law demonstrates further discrepancies within jurisdictions. The case law considering either religious exemptions to anti-discrimination legislation and/or the prohibited ground of sexual orientation is sparse due to the expense of litigation, the resolving of most matters through private conciliation, and the under-reporting of discrimination.<sup>68</sup> Earlier discrimination cases tended to focus on how a person could establish that they were homosexual,<sup>69</sup> or whether anti-discrimination protections should be extended to industrial awards.<sup>70</sup>

<sup>68</sup> Hardy, Rundle and Riggs, above n 2, 130; see, eg an allegation of discrimination on the ground of sexual orientation in employment was dismissed in *Thomson v KPMG* [2015] FWC 1212 due to the lateness of the relevant application.

<sup>69</sup> See, eg, *Hope v NIB Health Funds Ltd* (1995) EOC 92–716; *Wilson v Qantas Airways Ltd* (1985) EOC 92–141.

<sup>70</sup> See, eg, *Review of Principles for Approval of Enterprise Agreements* (2000) 101 IR 332; *State Personal/Carer's Leave Case* (1998) 84 IR 416.

More recently, many decisions of the various tribunals that exercise original jurisdiction over anti-discrimination legislation are not reported. Of those decisions reported, nearly all concern matters of procedure or evidence and do not substantively discuss discrimination.<sup>71</sup> It is therefore very difficult to find contemporary case law concerning the specific application of religious exemptions to a particular prohibited ground. However, the seminal case law that does exist in this area reflects growing inconsistencies and differences in applying anti-discrimination legislation. While some commentators have contended that religious exemptions have been applied very narrowly,<sup>72</sup> others have levelled the criticism that the exemptions are unbounded in their breadth.<sup>73</sup> In reality, the jurisprudence fits somewhere between these two polar views.

Only two seminal cases provide an in-depth examination of general religious exemptions on the ground of sexual orientation in contemporary anti-discrimination legislation. By far the most cited case is the *Christian Youth Camps* decision in 2014.<sup>74</sup>

### 1 *Christian Youth Camps*

This decision concerned the refusal of operators of a youth camp to allow the campsite to be hired by a youth suicide prevention group that focused particularly on same-sex attracted youth. The youth camp was associated with the Christian Brethren Church, and thus it was argued that they fell under both of Victoria’s ‘religious body’ and ‘individual’ general religious exemptions to anti-discrimination law. The Victorian Court of Appeal majority (2:1), with Neave JA agreeing with Maxwell P’s findings,<sup>75</sup> upheld the Victorian Civil and Administrative Tribunal’s decision that the youth camp was not a ‘body established for religious purposes’, because the purpose of the youth camp was to provide camping facilities for the community.<sup>76</sup> The fact that the camp

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<sup>71</sup> This is the case both at the tribunal level and at the appellate court level: See, eg, *Owen v Menzies* [2010] QCA 137; *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55; *Hehir v Smith* [2002] QSC 092; *Hesford v Integrated Group Ltd* [2008] WASAT 22; *Bates v BDG Properties Pty Ltd* [2013] NSWADT 285; *Campagnolo v Bonnie Doon Football Club Inc* [2010] VCAT 647; *Hecimovic v Victoria Police* [2005] VCAT 870; *Garcia v Miles* [2012] VCAT 262. Other cases were summarily dismissed or dismissed on appeal: see, eg, *Forrester v Aims Corp* [2004] VSC 506; *Loizou v University of Melbourne* [2000] VSC 1.

<sup>72</sup> Charlotte Baines, ‘A Delicate Balance: Religious Autonomy Rights and LGBTI Rights in Australia’ (2015) 10 *Religion & Human Rights* 45, 59; see also Gray, above n 15, 108.

<sup>73</sup> See, eg, Alastair Lawrie, ‘What’s Wrong with Western Australia’s Equal Opportunity Act 1984’ on *Alastair Lawrie* (23 October 2016) <<https://alastairlawrie.net/2016/10/23/whats-wrong-with-western-australias-equal-opportunity-act-1984/>>.

<sup>74</sup> *Christian Youth Camps* (2014) 308 ALR 615; Hardy, Rundle and Riggs, above n 2, 114; Gray, above n 15.

<sup>75</sup> Agreeing to all the major points that will be discussed in this article: *Christian Youth Camps* (2014) 308 ALR 615, 691 (Neave JA).

<sup>76</sup> *Ibid* 666–9 (Maxwell P).

operators aspired for the facilities to be managed in a Christian spirit did not render it a religious body.<sup>77</sup> President Maxwell noted that an activity that is secular does not become religious purely because it is done for a religious purpose; the purpose behind the act must ‘have an essentially religious character’.<sup>78</sup>

Turning, in any case, to apply the general two-limb religious exemption test noted above, the majority found that the camp failed to satisfy either of these limbs. President Maxwell held that the camp could not rely on passages in the Bible as establishing a religious belief that sexual activity between members of the same sex is against God’s will, as the applicability of this doctrine was variable and changeable over time.<sup>79</sup> In particular, it was noted that many religious adherents accepted the non-literal and historical nature of various Bible passages.<sup>80</sup> According to his Honour, any act falling under the first limb must be of an ‘intrinsically religious character’ and be based upon a ‘fundamental doctrine’ of the religion, such that it gives ‘the person no alternative but to act (or refrain from acting) in the particular way’ that they did.<sup>81</sup> Though the sincerity of the camp operators’ belief that homosexuality was prohibited by Christian scripture was not doubted,<sup>82</sup> disagreement amongst religious adherents as to the prohibition of homosexuality meant this could not be considered a ‘religious doctrine’.<sup>83</sup> Thus, it is clear that an objective test was applied to the first limb in this instance.<sup>84</sup>

His Honour also found the discriminatory act failed to fall under the second limb. Assessed objectively, this requires that not doing the discriminatory act in question ‘would be an affront to the reasonable expectation of adherents that the body be able to conduct itself in accordance with the doctrines to which they subscribed’.<sup>85</sup> As there was no evidence the camp had asked any previous renters if they were homosexual, Maxwell P held that the discrimination did not have a ‘real and direct impact on the religious sensitivities’ of religious adherents nor ‘caus[ed] real harm’ to their religious sensitivities.<sup>86</sup> Due to the failure to fall under either of these two

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<sup>77</sup> Especially as nothing the youth camp distributed or published online restricted who could book their facilities: *ibid* 669 (Maxwell P).

<sup>78</sup> See *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 132 (Dixon J), quoted in *ibid* 665 (Maxwell P).

<sup>79</sup> *Christian Youth Camps* (2014) 308 ALR 615, 673–74.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* 671, 673, 675.

<sup>82</sup> *Ibid* 673, quoting *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613, [307] (Hampel J).

<sup>83</sup> *Christian Youth Camps* (2014) 308 ALR 615, 674–75 (Maxwell P).

<sup>84</sup> Even if it were a religious doctrine, Maxwell P held that there was no evidence that an obligation to interfere with another person’s sexual orientation was required in order for religious adherents to act ‘in conformity’ with such a doctrine: *ibid* 675.

<sup>85</sup> *Ibid* 678–79.

<sup>86</sup> *Ibid* 678, quoting *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* (Anti-Discrimination) [2010] VCAT 1613 [332] (Hampel J) (emphasis altered).

limbs, the camp could not rely on Victoria’s individual general religious exemption either.

Considering the criticism levelled at the majority decision,<sup>87</sup> the dissenting judgment in this case is worth considering. While agreeing that the camp was not a body established for religious purposes,<sup>88</sup> Redlich JA employed a subjective test to what was considered necessary to conform to religious beliefs and thereby found, contrary to the majority decision, that the individual general religious exemption was in fact applicable.<sup>89</sup> This test required an ‘action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs’.<sup>90</sup> While his Honour conceded that at times there may be a clear religious prescription for how an adherent should act, in its absence the varied individual interpretations of religious teachings should not be excluded from the general religious exemption.<sup>91</sup> Thus, as the adherents in this case genuinely believed that refusing the booking was necessary to comply with their own religious doctrines, this fell within the first limb of the exemption.<sup>92</sup> It was irrelevant whether the adherents had ‘properly interpreted’ such religious beliefs.<sup>93</sup> Though the youth camp appealed the decision, the High Court refused special leave.<sup>94</sup> Thus, it is clear there are significant divides even within jurisdictions in applying general religious exemption provisions.

## 2 *OW and OV*

A seminal New South Wales case also occurred at a similar time but attracted far less academic attention. In *OW and OV*, a same-sex couple contacted a foster care facility, Wesley Dalmar Child and Family Care (‘Wesley Dalmar’), to enquire about becoming foster carers of children.<sup>95</sup> Wesley Dalmar informed the couple they could not become foster carers through their organisation due to their homosexuality.<sup>96</sup> At first instance the Equal Opportunities Division of the New South Wales Administrative

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<sup>87</sup> See, eg, Neil J Foster, *Australia: Christian Youth Camp Liable for Declining Booking From Gay Support Group* (24 April 2014) Law and Religion UK <<http://www.lawandreligionuk.com/2014/04/24/australia-christian-youth-camp-liable-for-declining-booking-from-gay-support-group/>>.

<sup>88</sup> *Christian Youth Camps* (2014) 308 ALR 615, 713 (Redlich JA).

<sup>89</sup> *Ibid* 733.

<sup>90</sup> *Ibid* 732.

<sup>91</sup> *Ibid* 733.

<sup>92</sup> *Ibid* 744–45.

<sup>93</sup> *Ibid* 744.

<sup>94</sup> See High Court of Australia, *Results of Applications for Special Leave to Appeal: Melbourne* (12 December 2014) <<http://www.hcourt.gov.au/assets/registry/special-leave-results/2014/12-12-14MelbRes.pdf>>.

<sup>95</sup> *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [4].

<sup>96</sup> *Ibid*.

Decisions Tribunal ('EOD') held that the general religious exemption did not apply,<sup>97</sup> but the Appeal Panel then set aside this decision.<sup>98</sup> OW and OV then appealed to the New South Wales Court of Appeal, who set aside the Appeal Panel decision and remitted the matter back to the EOD with guidance.<sup>99</sup> Adopting this guidance, the EOD found that Wesley Dalmar did in fact fall within the general religious exemption, freeing them from liability for discrimination.<sup>100</sup> Pertinently, the Tribunal held that compliance with a belief of the particular Wesley Mission ('the Mission') to which this foster care organisation was attached was sufficient.<sup>101</sup> Compliance with a belief of the overarching Uniting Church was not required to fall under this exemption.<sup>102</sup> This was in accordance with the Court of Appeal guidance that beliefs practiced by only particular denominations of a church still fall within the scope of the exemption.<sup>103</sup> This appears to apply a much lower threshold than the *Christian Youth Camps* decision, which required broader doctrinal agreement on the belief across the religion,<sup>104</sup> though this test still seems to be quasi-objective in nature. Therefore, despite some disagreement as to the Mission's views on homosexuality, it was sufficient to establish that the Mission believed monogamous heterosexual partnerships to be the norm of human sexuality and that allowing same-sex couples to foster children would conflict with this.<sup>105</sup>

The second limb — that the discriminatory act was necessary to avoid injuring the religious susceptibilities of adherents — was also satisfied, through an affidavit of the CEO of the Board of the Wesley Mission Council. This affidavit stated that if the Mission were required to appoint homosexual foster carers, this would make the Mission's provision of foster care services 'unacceptable to those who support the ethos of Wesley Mission.'<sup>106</sup> This suggests the application of a subjective test. Indeed, the earlier Court of Appeal decision noted that a numerical assessment of how many adherents must be affected is inappropriate; rather it must be a 'significant

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<sup>97</sup> *OVr v WZ[No 2]* [2008] NSWADT 115 (1 April 2008).

<sup>98</sup> *Members of the Board of the Wesley Mission Council v OV [No 2]* [2009] NSWADTAP 57 (1 October 2009).

<sup>99</sup> See *OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606.

<sup>100</sup> *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010).

<sup>101</sup> *Ibid* [33]–[34].

<sup>102</sup> *Ibid* [32]–[35].

<sup>103</sup> *OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606, 618 [41].

<sup>104</sup> Indeed, it should be noted that the Tribunal in *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) decided not to have regard to the *Christian Youth Camps* case at the time as it was subject to appeal (and indeed was later appealed): at [36].

<sup>105</sup> *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [18], [34]–[35].

<sup>106</sup> *Ibid* [18], [34].

proportion’ of the religion’s adherents whose religious susceptibilities are injured.<sup>107</sup> Therefore, even without any further breadth of jurisprudence available, the vast judicial disagreement and inconsistency in interpreting then-similar general religious exemption provisions in Victoria and New South Wales is evident.

### *E Legal Inconsistencies*

Using a hypothetical scenario in Australia where same-sex marriage is legalised, it is clear to see how such inconsistencies would cause significant legal and practical problems. If, for example, a same-sex couple wanted to marry in Victoria, they may wish to use a civil celebrant. This civil celebrant would be legally permitted to refuse them service on the ground of their sexuality if it can be established objectively that this refusal was reasonably necessary to comply with their own religion or was reasonably necessary to avoid offending the religious sensitivities of adherents of that religion. However, if the couple wished to conduct this ceremony in New South Wales instead, the celebrant would be legally barred from refusing service on the ground of sexuality since New South Wales contains no individual religious exemption. The purchase of a wedding cake from a bakery that is owned by a church may encounter the same inconsistencies. In Victoria, such a bakery may be established for religious purposes, but in New South Wales a bakery surely cannot be established to *propagate* religion.<sup>108</sup> A bakery in Queensland would need to comply with both limbs of the test, rather than only one limb in Victoria or New South Wales. Considering this uncertainty, how could everyday citizens understand their rights under anti-discrimination laws when it comes to religious exemptions and sexual orientation?<sup>109</sup>

Beyond the same-sex marriage hypothetical, consider if today a church decides to impose a policy that it will only hire cleaners who are heterosexual. If this was found to be necessary to avoid injury to the religious susceptibilities of its adherents but was not necessary to adhere to the church’s religious beliefs, the church would be acting legally in Western Australia, South Australia, New South Wales and perhaps Victoria,<sup>110</sup> but would be acting illegally in Queensland, Tasmania, Northern Territory and the Australian Capital Territory. It is apparent therefore that the current inconsistencies in federal, state and territory religious exemptions can, and do, cause

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<sup>107</sup> *OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606, 611 [12].

<sup>108</sup> Though it should be noted that the foster care facility that was established by and part of the Wesley Mission was deemed to be a body established to propagate religion in *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010), [17].

<sup>109</sup> If there was an ordering of services across jurisdictional boundaries, extra-territorial application of anti-discrimination legislation may also be problematic: see *Litynski v Ansett International Ltd* [1996] EoTribNSW 109/95 (20 December 1996).

<sup>110</sup> Whether this practice was legal in Victoria would depend upon a more objective test than that applied in the other seven state and territory jurisdictions, as discussed above.

complex legal and practical problems such that the outcome in any given dispute may be determined not by the merits of the case at hand but by its geographical location.

Thus it is clear that three key questions require far greater clarification, and remain inconsistently answered across Australia:

- 1 Who should be protected under the ‘sexual orientation’ prohibited ground?
- 2 To whom should general religious exemptions apply?
- 3 How should the requisite religious beliefs be tested?

### III EXTERNAL MORALITY, INTERNAL MORALITY AND THE EIGHT EXCELLENCIES

An application of Fuller’s internal morality approach to law to these three key questions first requires an understanding and interpretation of his theory. This Part will begin by examining external morality approaches to law that have been applied to the issue of religious exemptions towards sexual orientation to foreshadow the merits of an internal morality approach. It will then proceed to a detailed interpretation of Fuller’s internal morality and his eight excellencies.

#### *A External Morality and Religious Exemptions*

External morality of law refers to the substance or moral ends of law. This framework is most often considered in law reform: for example where reform is suggested to better protect the rights of a certain group of people. Indeed, rarely is the internal morality approach to law considered. This approach entails an intrinsic examination of whether the law itself complies with procedural and functional elements. Put simply, external morality refers to the human consequences of law and the rights that are affected by law, whereas internal morality refers to the procedural and functional operation of laws such that the quality of the law-making and legislative construction is the focus.<sup>111</sup>

Whether explicitly or not,<sup>112</sup> almost all scholars who have examined religious exemptions to sexual orientation ground their approach in external morality — in particular, utilising a human rights framework. This external morality literature can be categorised in three ways: those who advocate for a balanced case-by-case approach; those who believe religious freedom trumps freedom from discrimination; and those who believe freedom from discrimination trumps religious freedom. Despite such approaches creating greater transparency and discussion, the difficulty in objectively determining which of these rights should prevail over the other has led to an impasse

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<sup>111</sup> See generally Rundle, above n 20, 500; Luban, above n 19, 29–30.

<sup>112</sup> And even where they apply broader theoretical frameworks such as liberalism: see Gray, above n 15.

in resolving this issue through an external morality approach. Conversely, a pivot towards internal morality would provide an entirely different set of principles to ground this analysis, and thereby offer an alternative way to consider the issue and guide lawmakers in future.

### 1 ‘Case-by-Case’ Balanced Approaches

There is a heavy focus in anti-discrimination literature on human rights;<sup>113</sup> expectedly so, considering the two have long been intrinsically linked.<sup>114</sup> Many scholars confine the issue to the question of whether religious freedom or freedom from discrimination should triumph in the circumstances of a specific case or law, thus attempting to avoid advocating for the prevailing strength of one over the other in all circumstances. Most recently and prominently, Anthony Gray adopted a modernist liberal approach in considering sexual orientation discrimination in regards to the provision of accommodation in Australia, Europe and North America.<sup>115</sup> He notes that statutory interpretation rules in Australia require that where a provision is ambiguous, it is generally presumed not to undermine fundamental human rights under relevant treaties and legislation.<sup>116</sup> This then requires an intricate balancing of the right to religious freedom with the right to freedom from discrimination.<sup>117</sup> Indeed, Gray contends, this is why ‘the people assign to their democratically elected representatives [this] difficult task’.<sup>118</sup>

Leslie Samuels similarly construes the issue as a balancing of competing human rights, on a case-by-case basis, particularly with regard to human rights treaties.<sup>119</sup>

<sup>113</sup> With the notable exception of Cooper, who utilises a post-structural feminist examination of the features of the ‘body politic’ around anti-discrimination law: see Davina Cooper, ‘Bringing the State Up Conceptually: Forging a Body Politics through Anti-Gay Christian Refusal’ (2015) 16 *Feminist Theory* 87.

<sup>114</sup> See generally Dimitrina Petrova, ‘Implementing Anti-Discrimination Law and the Human Rights Movement’ (2006) 17 *Helsinki Monitor* 19; Walter Tarnopolsky, ‘Legislative Jurisdiction with Respect to Anti-Discrimination (Human Rights) Legislation in Canada’ (1980) 12 *Ottawa Law Review* 1.

<sup>115</sup> See Gray, above n 15, 105–7.

<sup>116</sup> Such as the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), and the Victorian and ACT human rights legislation: see *Charter of Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT). See also *ibid* 94.

<sup>117</sup> See especially Gray, above n 15, 107–8.

<sup>118</sup> *Ibid* 102. Gray also notes later in his article that human rights treaties confer freedom from discrimination as an absolute right, while the right to freely exercise religious beliefs is subject to other human rights, and therefore this may provide an alternative way to balance the two rights: at 107. However, the lack of binding force of these treaties in Australia’s dualist system is problematic: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–87 (Mason CJ and Deane J).

<sup>119</sup> Leslie Samuels, ‘Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights’ (2005) 8 *Ecclesiastical Law Journal* 74.

Carolyn Evans and Leilani Ujvari also contend that the balancing of religious freedom and freedom of equality remains the key determinant of religious exemptions in Australia.<sup>120</sup> Julia Crandell further argues for the application of a principled, case-by-case determination of how religious freedom and freedom from discrimination should be balanced in the provision of service to LGBTI+ individuals,<sup>121</sup> positing that it is easier for courts to determine harms occurring to particular individuals rather than weighing the two rights in an abstract sense.<sup>122</sup> Under this proportionality framework, a list of principles, such as harm suffered to the LGBTI+ person or religious adherent in question and whether the service is religious or secular, is to be weighed up in each case.<sup>123</sup> Christopher McCrudden has advocated for a similar approach.<sup>124</sup> This type of framework is often supported by proponents of religious exemptions, who argue that, more often than not, this strikes the appropriate balance between the two rights.<sup>125</sup>

However even within the balanced case-by-case approaches there is disagreement, with scholars such as Gray advocating for legislatures to determine where the balance ought to be struck,<sup>126</sup> while others, such as Crandell and McCrudden, would grant this power to the courts.<sup>127</sup> Regardless of which arm of government is preferred, this difficult balancing task has not yet resolved uncertainty and inconsistency in this area. Shelley Wessels similarly contends that:

The conflict between the two principles has frustrated courts, religious groups, and non-discrimination proponents. What should courts do when religious groups cry foul at a law that says their free exercise rights do not extend to their religious beliefs requiring discrimination? Or, conversely, what should courts do when other groups cry foul at a law exempting religious groups from non-discrimination requirements that they must meet?<sup>128</sup>

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<sup>120</sup> Though it should be noted that they posit other pragmatic arguments on the availability of non-religious private schools and the use of religious exemptions to create communities of common interests, and they also focused on educational religious exemptions rather than general religious exemptions: Evans and Ujvari, above n 65, 52–6.

<sup>121</sup> See Crandell, above n 18, 39–49.

<sup>122</sup> *Ibid* 39.

<sup>123</sup> *Ibid* 39–48.

<sup>124</sup> See, eg, Christopher McCrudden, ‘Dignity and Religion’ in Robin Griffith-Jones (ed), *Islam and English Law* (Cambridge University Press, 2013) 94, 103.

<sup>125</sup> See Carl F Stychin, ‘Closet Cases: “Conscientious Objectors” to Lesbian and Gay Legal Equality’ (2009) 18 *Griffith Law Review* 17, 24–5, 34.

<sup>126</sup> Gray, above n 15, 107–8.

<sup>127</sup> Crandell, above n 18.

<sup>128</sup> Evans and Ujvari, above n 65, 54, quoting Shelley K Wessels, ‘The Collision of Religious Exercise and Governmental Nondiscrimination Policies’ (1989) 41 *Stanford Law Review* 1201, 1203.

## 2 Religious Freedom Approaches

Other scholars have focused on this issue from a religious viewpoint to ensure that religious individuals and organisations can live out their faith in a meaningful way.<sup>129</sup> Nicholas Aroney argues that religious freedoms should be expansively considered as collective rights in addition to individual rights, which would strengthen their exemption from anti-discrimination prohibitions.<sup>130</sup> Similar arguments raised are that the application of anti-discrimination legislation to the internal affairs of religious groups significantly erodes their religious autonomy,<sup>131</sup> and that the absolutist nature of anti-discrimination law and the narrow operation of religious exemptions unduly undermines freedom of religion in Australia.<sup>132</sup> Reid Mortensen also argues that ‘the conformity [anti-discrimination legislation] can demand sits uneasily with the pluralism and individualism rights of religious liberty preserve and ... has the potential to marginalise some religious beliefs’.<sup>133</sup> Mortensen has perhaps been the staunchest advocate of religious freedom in this area, remarking that anti-discrimination laws present a ‘threat’ to the protection of religious freedom, and that any such laws requiring uniformity are ‘brutal’.<sup>134</sup> A similar point is made by Kirsty Magarey that interfering in the private religious sphere can reduce the effectiveness of anti-discrimination legislation in the public sphere, because the two spheres are inherently linked and inequalities in either affect the other.<sup>135</sup> Some

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<sup>129</sup> See generally Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012); Augusto Zimmermann, ‘The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws Are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution’ [2013] (3) *Bringham Young University Law Review* 457; Foster, above n 15.

<sup>130</sup> Nicholas Aroney, ‘Freedom of Religion as an Associational Right’ (2014) 33 *University of Queensland Law Journal* 153, 182–85.

<sup>131</sup> Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 338; William Johnson Everett, ‘Human Rights in the Church’ in John Witte and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff, 1996) 121, 128–9. See also Archbishop Anthony Fisher, ‘Should Bakers be Required to Bake Gay Wedding Cakes? Democracy and Religious Liberty in Australia’, *ABC Religion and Ethics* (online), 15 October 2015 <<http://www.abc.net.au/religion/articles/2015/10/15/4331899.htm>>.

<sup>132</sup> Baines, above n 72; Joel Harrison and Patrick Parkinson, ‘Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society’ (2014) 40 *Monash University Law Review* 413.

<sup>133</sup> Mortensen, above n 15, 219.

<sup>134</sup> *Ibid* 231–2; see also Reid Mortensen, ‘A Reconstruction of Religious Freedom and Equality — Gay, Lesbian and De Facto Rights and the Religious Schools in Queensland’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 320.

<sup>135</sup> Kirsty Magarey, ‘Discrimination and the Church’ (1991) 62 *Reform* 101.

also argue that s 116 of the *Australian Constitution* requires that religious liberty be preferred to anti-discrimination standards.<sup>136</sup>

### 3 *Freedom from Discrimination Approaches*

By contrast, various Australian human rights bodies have argued against absolutist religious exemptions in anti-discrimination legislation. The Discrimination Law Experts' Group, Human Rights Law Resource Centre, and Public Interest Law Clearing House have argued that the freedoms enjoyed by religious bodies participating in public sphere activities must be restricted where such activities would undermine freedom from discrimination.<sup>137</sup> Though speaking from an American context, Maureen E Markey contends that the right to exercise religious beliefs is permissible only to the extent that it does not contradict other fundamental human rights such as freedom from discrimination,<sup>138</sup> while James Oleske argues that the right of same-sex couples to equal protection should be prioritised over religious freedom.<sup>139</sup> Traditional liberalist viewpoints also tend to limit religious freedoms in order to ensure that other rights, such as freedom from discrimination, are protected.<sup>140</sup>

#### B *Fuller's Internal Morality*

It is therefore apparent that commentators employing the external morality approach to religious exemptions in the context of sexual orientation value religious freedom and freedom from discrimination to varying levels, and under this approach there remains no way to objectively measure which should prevail. An alternative approach — Lon L Fuller's internal morality theory of law, outlined in *The Morality of Law* — can be applied to this issue to seek a different route forward.<sup>141</sup>

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<sup>136</sup> Mortensen, above n 15, 231; Aroney, above n 18.

<sup>137</sup> Discrimination Law Experts' Group, Submission to the Senate Legal and Constitutional Affairs Committee, *Consolidation of Commonwealth Anti-Discrimination Laws*, 13 December 2011; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Eliminating Discrimination and Ensuring Substantive Equality: Joint Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995 (Vic)* (July 2009) Human Rights Law Centre <[https://www.parliament.vic.gov.au/archive/sarc/EOA\\_exempt\\_except/submissions/676%20-%20PILCH%20&%20HRLRC%20-%2010.07.09.pdf](https://www.parliament.vic.gov.au/archive/sarc/EOA_exempt_except/submissions/676%20-%20PILCH%20&%20HRLRC%20-%2010.07.09.pdf)>.

<sup>138</sup> See Maureen E Markey, 'The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World' (1998) 29 *Rutgers Law Journal* 487, 537–39.

<sup>139</sup> See James Oleske, 'The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages' (2015) 50 *Harvard Civil Rights — Civil Liberties Law Review* 99.

<sup>140</sup> Aroney, above n 130, makes reference of this at 183; see also Paul Marshall, 'Liberalism, Pluralism and Christianity: A Reconceptualization' (1989) 21 *Fides et Historia* 4; Stephen Macedo, 'Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism' (1998) 26 *Political Theory* 56.

<sup>141</sup> Fuller, above n 17.

Before being able to apply the internal morality of law to religious exemptions in Part IV, Fuller’s general treatise must firstly be set out. Fuller principally asserts that law has an inner morality, such that regardless of any legal system’s substantive purpose it is bound to comply with certain procedural requirements.<sup>142</sup> In the absence of such compliance, a legal system could be regarded as an illegitimate exercise of state coercion.<sup>143</sup> In this regard, Fuller’s natural law theory is often considered to grant rich theoretical content to the rule of law in regards to the form and framework of law.<sup>144</sup> In doing so, Fuller utilises the principle of reciprocity, requiring that if lawmakers create laws that respect internal morality, then citizens are bound to abide by them.<sup>145</sup> Kristen Rundle interprets this as meaning that a ‘legal subject’s obligation to obey law only arises in the first place in response to, or in anticipation of, a *corresponding effort* on the part of the lawgiver.’<sup>146</sup> In order to explain this concept, Fuller outlines the allegory of King Rex, a monarch who takes to the throne and attempts in good faith to reform the archaic legal system he oversees. The following is a summary from *The Morality of Law*.<sup>147</sup>

King Rex begins his law reform process by immediately repealing all existing laws and announces that he will act as judge in any disputes. However, following hundreds of decisions, no pattern could be detected in King Rex’s opinions and thus no general rules were applied consistently. Responding to criticisms and for the sake of ease, King Rex then created a new legal code that was kept secret from the public, and then a revised code that applied retrospectively. After his subjects responded that ‘they needed to know [the rules] *in advance* so they could act on them’,<sup>148</sup> King Rex published a revised code that applied to future conduct. However it became clear that this code was ‘truly a masterpiece of obscurity’,<sup>149</sup> and could not be understood by any citizens.

This code was revised and clarified, with the now clear expression bringing to light the various contradictions contained within its text. King Rex became angered by his subjects’ constant negativity in response to his attempts to create a sound legal system, and thus punished them by creating impossible requirements in the law.<sup>150</sup> After some time the King saw the error of his ways and made a further revision that was clear, consistent, did not demand impossibility, and was published freely and widely. However, many significant events had occurred during the constant revision of the King’s code, requiring it to be subjected to daily amendments. King Rex then

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<sup>142</sup> Ibid 33–46.

<sup>143</sup> Ibid 38–41.

<sup>144</sup> See, eg, Rundle, above n 20, 500; Luban, above n 19, 29–30.

<sup>145</sup> See generally Fuller, above n 17, 19–27, 39–41.

<sup>146</sup> Rundle, above n 20, 500 (emphasis in original).

<sup>147</sup> See Fuller, above n 17, 34–41.

<sup>148</sup> Ibid 35 (emphasis in original).

<sup>149</sup> Ibid 36.

<sup>150</sup> Such as requiring citizens summoned to the throne to report within 10 seconds: see *ibid*.

decided to take an active role in creating a long line of precedent, however it was discovered that this precedent was incongruent with the existing legal code. Soon after, King Rex died, with his reign characterised by a legal system that failed time and time again.

This allegory, Fuller explains, details at least eight key ways a legal system can fail and which thereby means that citizens would not have a moral obligation to obey such laws (the eight ‘failures’):<sup>151</sup>

- 1 Failure to have rules;
- 2 Failure to publicise rules;
- 3 Abuse of retroactive rules;
- 4 Failure to make rules understandable;
- 5 Enactment of contradictory rules;
- 6 Enactment of rules requiring the impossible;
- 7 Excessively frequent changes in rules; and
- 8 Failure of rules to match their application.

Famously, Fuller declared that, ‘[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly a legal system at all’.<sup>152</sup> The King Rex allegory therefore outlined failures that must be avoided to create a successful legal system.<sup>153</sup>

### *C The Eight Excellencies*

Fuller’s eight excellencies to strive towards in making law are the inverse of his eight ‘failures’. These eight excellencies comprise Fuller’s internal morality of law:<sup>154</sup>

- 1 Generality;
- 2 Promulgation;
- 3 Non-retroactivity;

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<sup>151</sup> Ibid 39.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid 89.

<sup>154</sup> Ibid 41.

- 4 Clarity;
- 5 Avoidance of contradiction;
- 6 Avoidance of laws requiring the impossible;
- 7 Constancy of law; and
- 8 Congruence between official action and declared rule.

Fuller explains that a law perfectly adhering to these eight excellencies would be a utopia that is difficult to achieve. However, he notes that striving towards their distinct standards is a way in which excellence in legality can be tested.<sup>155</sup> Fuller posits that endeavouring towards the eight excellencies is therefore a morality of aspiration rather than duty.<sup>156</sup> The morality of duty provides the ‘basic rules without which an ordered society is possible’, while the morality of aspiration details qualities of human potential.<sup>157</sup> This renders the excellencies as canons to strive towards, rather than obligatory conditions of law. In this regard, legislatures and courts need only ‘save us from the abyss’ for law to be valid, but their adherence to the excellences will, naturally, increase their ‘excellence’.<sup>158</sup> The eight excellencies must now be considered in turn.

### 1 *Generality*

Rundle argues that Fuller’s first excellency is implicitly ranked higher than the other excellencies.<sup>159</sup> This excellency requires that there must firstly be rules, and secondly that these rules must be of general, rather than particular, application.<sup>160</sup> Though little context is provided beyond this in Fuller’s original text, his reply several years later, which was included in a revised edition of *The Morality of Law*, sheds some further light on this excellency. In his reply, Fuller notes that rules must take the form of general declarations rather than specific directions.<sup>161</sup> These general rules must express the principle that ‘like cases should be given like treatment’.<sup>162</sup>

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<sup>155</sup> Ibid 41–2.

<sup>156</sup> With the exception of ‘promulgation’ which, Fuller argues, lawmakers are under a duty to adhere to: see *ibid* 43–4.

<sup>157</sup> Ibid 5–6.

<sup>158</sup> Ibid 44.

<sup>159</sup> See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Bloomsbury Publishing, 2012) 128–29, 138–39, 152.

<sup>160</sup> Fuller, above n 17, 46–9.

<sup>161</sup> Ibid 210–11.

<sup>162</sup> Ibid 211.

## 2 *Promulgation*

As the only excellency that Fuller argues is a duty rather than aspiration, promulgation requires that law must be made publicly known and accessible.<sup>163</sup> All citizens are entitled to know law's content, though this does not extend as far as educating every citizen on the full meaning of every law that may apply to them.<sup>164</sup> Rather, they must simply be given an opportunity to be able to observe and critique laws.

## 3 *Non-Retroactivity*

Fuller argues that 'a retroactive law is truly a monstrosity.'<sup>165</sup> He staunchly opposes and labels as 'blank prose' the governing of past conduct by future rules.<sup>166</sup> However, an absolute prohibition on retroactive laws is not necessarily appropriate under Fuller's theory.<sup>167</sup> At times, a curative retroactive measure to save laws that have deeply failed other excellencies 'may actually be essential to advance the cause of legality.'<sup>168</sup> This, however, is a rarity.<sup>169</sup>

## 4 *Clarity*

The need for clarity is 'one of the most essential ingredients of legality', and appears to largely rest on legislators, rather than judges, as Fuller emphasises the desire to minimise the task of interpretation in courts and tribunals.<sup>170</sup> In this regard, 'obscure and incoherent legislation can make legality unattainable by anyone'.<sup>171</sup> This legislative obligation does not necessitate the removal of general legal standards such as 'good faith' or 'due care'; Fuller notes that the incorporation of such standards may at times be the best way to achieve clarity in the law.<sup>172</sup> Regardless, clearly stated rules must be the end result.

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<sup>163</sup> Ibid 49–51.

<sup>164</sup> Ibid 49, 51.

<sup>165</sup> Ibid 53.

<sup>166</sup> Ibid.

<sup>167</sup> Rundle, above n 159, 91.

<sup>168</sup> Fuller, above n 17, 53.

<sup>169</sup> One example given is a law voiding all marriage certificates issued after its commencement that do not have a valid stamp, provided by the state. Were the state to run out of stamps to distribute and thereby not adequately promulgate the law to those who are wishing to get married, a retroactive law conferring validity on those marriages voided due to the absence of such stamps would best serve the ends of legality. See *ibid* 53–4.

<sup>170</sup> Ibid 634; Rundle, above n 159, 90–1.

<sup>171</sup> Fuller, above n 17, 63.

<sup>172</sup> Ibid 64.

### *5 Avoidance of Contradiction*

Fuller’s main example of a law that is contradictory is where in a single statute, one provision requires the automobile owner to install new license plates on 1 January, and a second provision makes it a crime to perform any labour on that date.<sup>173</sup> Punishing a person for doing what they were ordered, or had a legal right, to do is a contradiction under Fuller’s treatise and must therefore be avoided.<sup>174</sup>

### *6 Avoidance of Laws Requiring the Impossible*

Laws requiring the impossible do not include laws that are difficult to follow due to their failure to be clear or their failure to be promulgated.<sup>175</sup> Rather, they are laws that fall outside the other seven excellencies, and by their ‘brutal pointlessness may let the subject know that there is nothing that may not be demanded of him and that he should keep himself ready to jump in any direction.’<sup>176</sup> Fuller distinguishes this from the example of a teacher who asks more of their pupils than they may be capable of giving.<sup>177</sup> A failure to reach such heights does not render the pupil at odds with the law and its many serious punishments. However, laws that are harsh and unfair on certain persons may not be impossible but may still fail to reach perfection under this excellency.<sup>178</sup> As Fuller notes, ‘no hard and fast line can be drawn between extreme difficulty and impossibility.’<sup>179</sup>

### *7 Constancy of Law*

Noting similarities to the excellency of non-retroactivity, Fuller argues that laws should not be changed too frequently otherwise citizens may be unable to know which laws apply to them at any point in time.<sup>180</sup> However Fuller notes elsewhere, in explaining a conflict between the internal morality and external morality of law, that, ‘changes in circumstances, or changes in men’s consciences, may demand changes in the substantive aims of law ... [such that] we are often condemned to steer a wavering middle course between too frequent change and no change at all’.<sup>181</sup> As Fuller further states that this excellency is least suited to formalisation in a constitutional-type restriction,<sup>182</sup> this ideal middle course is apparent. Therefore the title of ‘constancy of law’ could instead perhaps be rephrased as ‘avoidance of unnecessary changes of law’.

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<sup>173</sup> Ibid 65–6.

<sup>174</sup> Ibid 66.

<sup>175</sup> Ibid 70.

<sup>176</sup> Ibid 71.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid 79.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid 79–81.

<sup>181</sup> Ibid 44–5.

<sup>182</sup> Ibid 79–80.

## 8 *Congruence between Official Action and Declared Rule*

This excellency is arguably the most distinct, being targeted towards judges rather than lawmakers,<sup>183</sup> which the other seven excellencies focus on. Fuller views this excellency as one of the most important.<sup>184</sup> At a minimum, this excellency requires the exercising of procedural due process, such as the right to counsel.<sup>185</sup> At its more idealistic core, however, lies the task of interpretation. Specifically, '[I]legality requires that judges and other officials apply statutory law, not according to their fancy or with crabbed literalness, but in accordance with principles of interpretation that are appropriate to their position in the whole legal order.'<sup>186</sup> This, Fuller explains, requires that those applying the law seek to interpret any ambiguities in adherence with the original intention of the statute.<sup>187</sup> Though Fuller's *The Morality of Law* predates statutory interpretation legislation, his consistent reference to the 'mischief' that statutes intend to prevent and on legislative intention strongly suggests that Fuller meant that judges should apply statutory interpretation rules to any legislative ambiguities.<sup>188</sup> Fuller's reference to *Heydon's Case* supports this construction.<sup>189</sup>

### *D Requirements of a Legal System, or a Good Legal System?*

Joseph Raz and other positivists have criticised Fuller for attempting to put forward the requirements of a legal system but instead confusing these with the requirements of a *good* legal system.<sup>190</sup> It is apparent from Fuller's own words, however, that his eight excellencies were always intended to be aspirations of *good* legal systems, not absolutist conditions required for the existence of *any* legal system. Fuller did, of course, note that a total failure under any of his eight failures, the reverse of his eight excellencies, would mean there is no law at all which citizens are obligated to comply with.<sup>191</sup> However, there is significant scope for a law to fall between a total failure to make a law and an excellency in lawmaking. A law that fails to adhere perfectly to

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<sup>183</sup> Luban, above n 19, 33.

<sup>184</sup> Fuller, above n 17, 91; Rundle, above n 159, 90–1.

<sup>185</sup> Fuller, above n 17, 81.

<sup>186</sup> *Ibid* 82.

<sup>187</sup> *Ibid* 83–7.

<sup>188</sup> See especially *ibid* 82–7.

<sup>189</sup> This case is usually considered the beginning of the purposive or mischief rule of statutory interpretation and an important early precursor to statutory interpretation legislation: *Heydon's Case* (1584) 3 Co Rep 7, 76 ER 637, quoted in *ibid* 82.

<sup>190</sup> See Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195. See also, Luban, above n 19, 32. Intriguingly, Luban also seems to interpret Fuller's theory as focusing on the conditions that would allow rules to succeed, rather than determining their existence: 'Fuller inquires into the moral and practical relationships between lawgivers and citizens that allow the enterprise of subjecting human conduct to rules succeed.' Luban also notes that the existence of rules is only challenged if they 'deviate *too much*' from the eight excellencies: see Luban, above n 19, 30–1 (emphasis added).

<sup>191</sup> Fuller, above n 17, 39.

all eight excellencies can still remain a valid law under Fuller’s approach so long as it avoids chronic failures. For example, a law on accounting standards may use a trade meaning that renders the law understandable to accountants but not to other citizens. This law has not totally failed to be understandable, but it has not achieved perfect excellence in clarity either. It is a law, but not an ‘excellent’ law; a law will become more ideal the more it adheres to these eight excellencies, maximising the potential of each excellency whilst minimising any undermining of the other excellencies.<sup>192</sup> While Fuller’s eight failures may be understood as conditions for any legal system, his eight excellencies cannot be understood as anything but aspirations for a *good* legal system.<sup>193</sup> This invites a more nuanced analysis than ticking eight items off a checklist.<sup>194</sup>

Fuller’s eight excellencies are the standard that should be strived towards for religious exemptions to sexual orientation under Australian anti-discrimination laws. Importantly it must be noted that Fuller’s treatise — as one of internal morality of law and not external morality — cannot provide a specifically worded provision to utilise in the future. This approach can, however, be used to provide broader thematic recommendations and guidance on a path forward for this issue.

#### IV FULLER’S INTERNAL MORALITY OF LAW: AN ‘EXCELLENT’ APPROACH TO RELIGIOUS EXEMPTIONS

Fuller’s internal morality of law theory has recently undergone a scholarly revival among legal theorists.<sup>195</sup> However, while the application of a natural law theory to interpret a real-life legal problem or hypothetical scenario is not a new concept,<sup>196</sup> an internal morality approach has not yet been applied to anti-discrimination laws. Thus, a Fullerian examination of religious exemptions on the prohibited ground of

<sup>192</sup> See generally *ibid* 41–2; Rundle, above n 159, 92.

<sup>193</sup> With the exception of promulgation, which as discussed above was deemed to be a morality of ‘duty’, rather than ‘aspiration’, by Fuller.

<sup>194</sup> Rundle, above n 159, 92.

<sup>195</sup> See, eg, Willem J Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (University of Chicago Press, 1999); Rundle, above n 20; Rundle, above n 159; Mehmet Ruhi Demiray, ‘Natural Law Theory, Legal Positivism, and the Normativity of Law’ (2015) 20 *The European Legacy* 807; Priel, above n 20; Luban, above n 19.

<sup>196</sup> See, eg, Peter Atudiwe Atupare, *Constitutional Justice in Africa: An Examination of Constitutional Positivism, Fundamental Law and Rights in Ghana and Nigeria* (PhD Thesis, Queen’s University (Canada), 2011); Don S Browning, ‘A Natural Law Theory of Marriage’ (2011) 26 *Zygon* 733; Larry A DiMatteo, ‘The History of Natural Law Theory: Transforming Embedded Influences Into a Fuller Understanding of Modern Contract Law’ (1999) 60 *University of Pittsburgh Law Review* 839; Timothy Hsiao, ‘Consenting Adults, Sex, and Natural Law Theory’ (2016) 44 *Philosophia* 509. Indeed such an application has been focused heavily upon in legal theory with the famous ‘vehicle in the park’ hypothetical: see Frederick Schauer, ‘A Critical Guide to Vehicles in the Park’ (2008) 83 *New York University Law Review* 1109.

sexual orientation will add a unique perspective to a growing, but external morality-focused, body of Australian literature. This can provide an alternative path forward to seek to resolve the uncertainty and inconsistency currently witnessed across Australia's nine relevant anti-discrimination laws.

In particular, this Part will provide suggested 'internally moral' answers to the three key questions raised in Part II: as to who should be protected under the sexual orientation prohibited ground; to whom general religious exemptions should apply; and how the requisite religious beliefs should be tested. An application of Fuller's eight excellencies will suggest that the prohibited ground of sexual orientation be expanded, that religious exemptions apply to religiously-affiliated bodies but not to individuals, and that the type of test to assess the requisite beliefs should be quasi-subjective.

Firstly, it should be noted that two excellencies are arguably achieved to their fullest in Australian anti-discrimination laws and therefore do not require in-depth analysis. It is apparent that all Australian laws are published widely and are publicly available for all citizens,<sup>197</sup> and such laws rarely, if ever, apply retroactively; indeed the purpose of anti-discrimination legislation is inherently forward-looking and preventative. One other excellency appears unnecessary to examine in detail: congruence between official action and declared rule. This requires that judges utilise relevant rules of statutory interpretation when applying legislation in cases. All decision makers in both seminal cases discussed in Part II applied clear rules of statutory interpretation and appeared to come to reasoned, albeit disparate, interpretations of the relevant legislation.<sup>198</sup> In the absence of any clear weakness in this excellency in other relevant case law, it appears imprudent to consider this issue in depth here. The ambiguity of the English language and statutory interpretation rules themselves would further render this an immense exercise in itself.<sup>199</sup> This, then, leaves the other five excellencies as requiring an in-depth application to religious exemptions.

#### *A Who Should be Protected Under the 'Sexual Orientation' Prohibited Ground?*

Under Fuller's excellency of generality, a rule increases in excellence as it becomes more general in scope. The general rule under anti-discrimination legislation is to

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<sup>197</sup> A Federal Register of Legislation was created by the *Acts and Instruments (Framework Reform) Act 2015* (Cth) pt 2. Similar provisions exist at state levels: See, eg, Department of Premier and Cabinet, *State Law Publisher*, Government of Western Australia <<https://www.slp.wa.gov.au/Index.html>>.

<sup>198</sup> See, eg, *Christian Youth Camps* (2014) 308 ALR 615, 671–75 (Maxwell P), 727–32 (Redlich JA); *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [30]. See also *Owen v Menzies* (2012) 293 ALR 571, 594–95; *Menzies v Waycott* [2001] VCAT 415 [225]–[236].

<sup>199</sup> See, eg, *Stock v Jones (Tipton) Ltd* [1978] 1 WLR 231, 236 (Simon L); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 382, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

prohibit discrimination against persons on certain prohibited grounds.<sup>200</sup> As such, it is apparent that the more general this prohibition is, the better the law will be under a Fullerian approach. This would appear to necessitate an expansive definition of sexual orientation, as a prohibited ground upon which discrimination is not permitted. The more expansively ‘sexual orientation’ is defined, the more general this prohibition will be and the greater it will protect people from discrimination. If this definition was confined to the narrow New South Wales prohibited ground of ‘homosexuality’, this would exclude from the protection of anti-discrimination laws persons identifying as any other sexual orientation, including heterosexuality. The moderate ground, utilised in all other states and territories except for South Australia, would extend this protection to heterosexuals and bisexuals but no other persons. It is therefore apparent that a consideration of other sexual orientations that may warrant protection — in particular pansexual, asexual and queer persons<sup>201</sup> — could assist lawmakers in drawing the appropriate line.

Despite the assertion in Part II that the Commonwealth legislative definition of sexual orientation could bear an expansive interpretation that may include pansexuality at the very least, the most prominent case interpreting the Commonwealth definition read its operation restrictively, albeit in a different context. In *Bunning v Centacare*, Vasta J held that polyamory was best described as a sexual behaviour that is a manifestation of sexual orientation, rather than a sexual orientation of itself.<sup>202</sup> As such, polyamory was not protected under the prohibited ground of ‘sexual orientation’ under federal anti-discrimination legislation. In obiter, Vasta J noted that he would also exclude ‘somasochists’, ‘coprophiliacs’ and ‘urophiliacs’ from the scope of ‘sexual orientation’.<sup>203</sup> Though polyamory and somasochism refer more to ‘erotic intimacy’ or ‘erotic experiences’ than sexual orientations,<sup>204</sup> it is evident

<sup>200</sup> Indeed the objects clause of many of these Acts explicitly states this. For example, one of the objects of the *Sex Discrimination Act 1984* (Cth) is ‘to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs’: at s 3(b).

<sup>201</sup> A pansexual person is a person who feels sexual attraction towards persons regardless of their sexual orientation, gender identity or intersex status, while an asexual person feels no sexual attraction to any persons. This is entirely different to celibacy, as celibacy is a deliberate choice to suppress sexual attraction or conduct, while asexual persons have not made a decision to feel no attraction to other people but rather simply feel this way: see Elizabeth F Emens, ‘Compulsory Sexuality’ (2014) 66 *Stanford Law Review* 303, 316–19.

<sup>202</sup> *Bunning v Centacare* (2015) 293 FLR 37, 47–8.

<sup>203</sup> Bennett, above n 47, 19, quoting *ibid* 47.

<sup>204</sup> See generally Christian Klesse, ‘Polyamory: Intimate Practice, Identity or Sexual Orientation?’ (2014) 17 *Sexualities* 81.

that the Commonwealth's definition is not unbound in its breadth.<sup>205</sup> This may mean that, while it has the potential to bear an expansive interpretation, courts continue to construe the provision narrowly. Indeed, Hardy, Rundle and Riggs have interpreted the Commonwealth definition of sexual orientation as not including pansexuality or asexuality.<sup>206</sup> This provision does, however, remain the broadest and most general of Australia's nine jurisdictions.

By contrast, the Australian Human Rights Commission ('AHRC') defines sexual orientation more expansively as: 'a person's emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.'<sup>207</sup> The generality of this type of definition is ideal under a Fullerian viewpoint: it encompasses persons who exclusively identify as pansexual or asexual,<sup>208</sup> who are not currently considered under any of the other labels used in the moderate construction of 'sexual orientation' under six state and territory anti-discrimination laws in Australia. Whilst the AHRC

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<sup>205</sup> As polyamory and sadomasochism are not characteristics that define *who* a person is attracted to, they are perhaps better excluded from 'sexual orientation' for the sake of clarity. Furthermore under the excellency of generality, it is apparent that if polyamorous persons or sadomasochists are covered under the AHRC definition above, then they are perhaps not in need of even further protection under a 'sexual orientation' prohibited ground. Weiss has provided convincing ethnographic evidence that polyamorous persons and sadomasochists ordinarily define themselves as having a sexual orientation beyond their sexual practice of polyamory or sadomasochism — such as identifying themselves as heterosexual or bisexual: see Margot Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Duke University Press, 2011) 11. Cf Bennett, above n 47, 24–39.

<sup>206</sup> Hardy, Rundle and Riggs, above n 2, 113.

<sup>207</sup> Australian Human Rights Commission, above n 2, 5; Australian Human Rights Commission, 'Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights' (Consultation Report, 2015) 5 <[https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015\\_Web\\_Version.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf)>.

<sup>208</sup> In a survey of 'LGBT' students at the University of Western Australia, 7 per cent of all respondents identified as asexual, while 8.5 per cent identified as 'other' with 'pansexual' among those listed under this category: see Duc Dau and Penelope Strauss, 'The Experience of Lesbian, Gay, Bisexual, and Trans Students at The University of Western Australia' (Research Report, Equity and Diversity, University of Western Australia, 2016) 12–3. See also April Scarlette Callis, 'Bisexual, Pansexual, Queer: Non-Binary Identities and the Sexual Borderlands' (2014) 17(1) *Sexualities* 63; Pádraig MacNeela and Aisling Murphy, 'Freedom, Invisibility, and Community: A Qualitative Study of Self-Identification with Asexuality' (2015) 44(3) *Archives of Sexual Behavior* 799; Richters et al, above n 44. Approximately 5 per cent of all respondents to a nation-wide survey in the United Kingdom in 2015 did not identify as being straight or 'LGB', and thereby may also fall within definitions of pansexuality, asexuality or queer: see Office for National Statistics, 'Sexual Identity, UK: 2015' (Statistical Bulletin Report, United Kingdom, 2016) <<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualidentityuk/2015>>.

definition of sexual orientation is more ideal than any of the comparable constructions in Australian anti-discrimination laws, it is worth noting that a significant proportion of LGBTI+ people also identify as ‘queer’ or ‘questioning’.<sup>209</sup> To exclude them from protection under ‘sexual orientation’ would undermine the generality of anti-discrimination laws. Relying on Fuller’s excellency of generality to identify who should be protected by the ground of sexual orientation would therefore provide a more robust protection of all individuals against discrimination.

Furthermore, the excellency of clarity promotes laws that are clear, coherent and accessible. It appears entirely unclear as to why a person who feels attraction towards all persons regardless of their sexual or gender identities, a person who does not feel sexual attraction, or a person who is fluid or unlabelled in their sexual attraction would not be considered to have a sexual orientation worthy of protection from discrimination. The diversity of human sexuality must inherently be recognised in a clear way.<sup>210</sup> Indeed, construing sexual orientation to exclude pansexual, asexual or queer persons would require such individuals to force themselves to have a sexual orientation with which they do not identify if they wish to be protected by a law that protects nearly all other persons. This would arguably be a law requiring the impossible and should therefore be avoided.

Finally, the constancy of law through time excellency, requiring that laws are not unnecessarily or constantly changed, should be considered. The sexual orientation prohibited ground was contained in the original version of current anti-discrimination legislation in South Australia (1984), the Australian Capital Territory (1991), the Northern Territory (1992), and Tasmania (1998).<sup>211</sup> Protection of sexual orientation or sexuality was added through a subsequent amending Act by New South Wales (1982),<sup>212</sup> Victoria (2000),<sup>213</sup> Queensland (2002),<sup>214</sup> Western Australia (2002),<sup>215</sup> and finally the Commonwealth (2013).<sup>216</sup> Aside from these amendments to add the prohibited ground itself and South Australia’s definitional amendment last year, the definition of this prohibited ground has never changed in any of these jurisdictions. As the circumstances surrounding the recent amendment to the Commonwealth

<sup>209</sup> 22.9 per cent of students reporting to the University of Western Australia survey of LGBT students self-identified as ‘queer’ or ‘questioning’: Dau and Strauss, above n 208, 12–3.

<sup>210</sup> On the breadth of human sexuality, see generally Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 2<sup>nd</sup> ed, 2008) 22.

<sup>211</sup> Tasmania has made one change, removing ‘transsexuality’ from this definition in 2013: *Anti-Discrimination Amendment Act 2013* (Tas) s 4(f).

<sup>212</sup> *Anti-Discrimination (Amendment) Act 1982* (NSW) sch 2. This was amended slightly linguistically in 1994: see *Anti-Discrimination (Amendment) Act 1994* (NSW) sch 3(17).

<sup>213</sup> *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic) s 5.

<sup>214</sup> *Discrimination Law Amendment Act 2002* (Qld) ss 12, 14.

<sup>215</sup> *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) ss 48, 52.

<sup>216</sup> *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) ss 12, 17.

laws do not appear to have changed,<sup>217</sup> a further amendment of the Commonwealth laws may be unnecessary and therefore undermine this excellency. This may also be the case in South Australia. However, changes in any of the other jurisdictions will not be problematic in this regard. Indeed, it may well be that the Commonwealth's definition does not need to be changed legislatively but instead must be interpreted more broadly by courts. Since Fuller notes that 'changes in circumstances, or changes in men's consciences, may demand changes in the substantive aims of law' which actually maximise this excellency,<sup>218</sup> significant contemporary changes in the way society views human sexuality clearly justify a more expansive protection of those identifying with a diverse sexual orientation.<sup>219</sup>

Therefore, a broader interpretation or expansion of the Commonwealth definition of sexual orientation to include pansexual, asexual and queer persons would seem appropriate under a Fullerian approach.<sup>220</sup> Of course, regardless of the breadth of defining sexual orientation, this protection cannot extend to persons who feel sexual attraction to minors,<sup>221</sup> deceased persons,<sup>222</sup> or animals,<sup>223</sup> as each of these acts are illegal throughout Australia.<sup>224</sup> To legislate otherwise in the absence of amending such criminal laws would significantly undermine Fuller's desideratum of avoiding contradiction.

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<sup>217</sup> See generally Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).

<sup>218</sup> Fuller, above n 17, 44–5.

<sup>219</sup> See, eg, Hardy, Rundle and Riggs, above n 2, 18–23; Paul Rishworth, 'Changing Times, Changing Minds, Changing Laws: Sexual Orientation and New Zealand Law, 1960 to 2005' (2007) 11 *International Journal of Human Rights* 85; Zhana Vrangalova and Ritch Savin-Williams, 'Mostly Heterosexual and Mostly Gay/Lesbian: Evidence for New Sexual Orientation Identities' (2012) 41 *Archives of Sexual Behaviour* 85.

<sup>220</sup> A broader interpretation may be all that is necessary, since anti-discrimination legislation also prohibits discrimination on the ground of any 'characteristics' that generally appertain to or are imputed to persons of a particular sexual orientation: *Sex Discrimination Act 1984* (Cth); *Discrimination Act 1991* (ACT) s 7(2); *Anti-Discrimination Act 1977* (NSW) s 49ZG(2); *Anti-Discrimination Act 1992* (NT) ss 20(2)(b), (c); *Anti-Discrimination Act 1991* (Qld) s 8; *Equal Opportunity Act 1984* (SA) s 29(2)(c); *Anti-Discrimination Act 1998* (Tas) s 14(2); *Equal Opportunity Act 1984* (WA) ss 35O(1)(b), (c); ss 5A(1)(b), (c). Queer persons in particular may possess such characteristics without identifying under a 'sexual orientation' label.

<sup>221</sup> See, eg, *Crimes Act 1900* (NSW) ss 66A, 66B, 66C, 66D; *Crimes Act 1958* (Vic) ss 45, 47, 47A; *Criminal Code Act Compilation Act 1913* (WA) ss 320, 321, 321A.

<sup>222</sup> See, eg, *Crimes Act 1900* (NSW) s 81C; *Crimes Act 1958* (Vic) s 34B; *Criminal Code Act Compilation Act 1913* (WA) ss 214, 215.

<sup>223</sup> See, eg, *Crimes Act 1900* (NSW) ss 79, 80; *Crimes Act 1958* (Vic) s 59; *Criminal Code Act Compilation Act 1913* (WA) s 181.

<sup>224</sup> Sadomasochists may be further excluded by this definition of sexual orientation depending upon the relevant criminal laws on assault and the defence of consent applying in each jurisdiction: see generally Theodore Bennett, 'Persecution or Play? Law and the Ethical Significance of Sadomasochism' (2015) 24 *Social & Legal Studies* 89.

As a final aside, the use of the term ‘sexual orientation’ seems ideal as a prohibited ground, rather than ‘sexuality’, as it is apparent from submissions to the AHRC that most people support the use of the term ‘sexual orientation’ due to its breadth and inclusiveness.<sup>225</sup> This would appear to fit well with Fuller’s excellency of generality.

*B To Whom Should General Religious Exemptions Apply?*

Four options present as feasible answers to the question of to whom general religious exemptions should apply: applying religious exemptions to narrowly-defined religious bodies (such as a church); to broadly-defined religiously-affiliated bodies (expanding the definition to include, for example, a bakery owned by a church); to all individuals; or removing religious exemptions entirely. Firstly, as Fuller notes, ‘a total failure to achieve anything like a general rule is rare.’<sup>226</sup> Under the relevant anti-discrimination laws, clearly the general *rule* is that discrimination is prohibited when it is based on a person’s sexual orientation. However, religious exemptions challenge this rule, as they allow for certain people to avoid liability for breaching the general rule, therefore weakening its generality. Fuller does not explicitly note that exemptions to prohibitions undermine the excellency of generality. Indeed, he posits that a rule applying particularly to one individual may well still be a law.<sup>227</sup> This, however, does not appear to strive towards ‘excellence’ in lawmaking. As Fuller notes that rules should be general declarations applied similarly across like cases, it could be argued that discrimination against a person on the ground of sexual orientation should be treated the same regardless of the perpetrator’s religious beliefs. Since the general rule is the prohibition of discrimination, cases of discrimination are alike if the acts of discrimination are themselves alike — not if the personal motivations for the discrimination are the same. An interpretation of this excellency could therefore be that there should not be one disposition for Person A and a different one for Person B if their actions and breach of a general rule are the same. If Fuller’s theory does indeed provide content to the rule of law,<sup>228</sup> requiring that all persons be bound equally to obey the law,<sup>229</sup> this would support such an interpretation. Indeed, Tasmanian Anti-Discrimination Commissioner Robin Banks responded to proposed amendments to expand religious exemptions in Tasmanian anti-discrimination laws by stating that:

To privilege religious speech also suggests that the rule of law — the principle that every person and organisation, including the government, is subject to the same law — is not seen to apply where a religious purpose can be argued. This is

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<sup>225</sup> Australian Human Rights Commission, above n 2, 22–3.

<sup>226</sup> Fuller, above n 17, 48.

<sup>227</sup> *Ibid* 47–8.

<sup>228</sup> As discussed in Part III: see Rundle, above n 20, 500; Luban, above n 19, 29–30.

<sup>229</sup> See also Fuller, above n 17, 210–12.

most likely to apply to people of religion and religious organisations. To displace the rule of law to privilege religion in a secular state is a serious step indeed.<sup>230</sup>

Of course, allowing such exemptions would not render anti-discrimination laws invalid under Fuller's approach because the underlying general prohibition against discrimination would remain — but it would weaken their excellence. Taking generality to its end point in striving for perfection may actually suggest that religious exemptions should be removed entirely from the general prohibition against discrimination. While excellence may still be achieved, albeit to a lesser degree, by limiting the exemptions to only narrowly defined religious bodies or even broadly defined religiously-affiliated bodies, a broad interpretation that would allow all individuals a general religious exemption would excessively undermine the generality of anti-discrimination laws.

The avoidance of contradiction excellency provides further guidance. Section 116 of the *Australian Constitution* specifies that, '[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion'.<sup>231</sup> While this restriction appears broad, this section has been read very narrowly by the High Court.<sup>232</sup> In all three cases in which it has considered s 116, the High Court has not yet found a violation of this clause and has restricted its operation only to laws that have the purpose of explicitly restricting the free exercise of religion.<sup>233</sup> Though this renders s 116 less relevant to religious exemptions under anti-discrimination law, it is pertinent that removing all protection for acts exercised on the basis of religious beliefs would seem to contradict this Australian constitutional provision. Even a narrow interpretation of s 116 would therefore imply that religious exemptions should not be removed entirely. A moderate interpretation could be that such exemptions should apply to religiously-affiliated bodies. Though s 116 applies only to Commonwealth anti-discrimination legislation, reliance on the excellency of clarity suggests that consistency across federal, state and territory legislation would be ideal, owing to the

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<sup>230</sup> Equal Opportunity Tasmania, *Anti-Discrimination Amendment Bill 2016 Released for Consultation on 29 August 2016: Response of the Anti-Discrimination Commissioner (Tas)* (September 2016) 24, <[http://equalopportunity.tas.gov.au/\\_\\_data/assets/pdf\\_file/0009/356382/16.09-ADC\\_response\\_to\\_the\\_AD\\_Amendment\\_Bill\\_2016.pdf](http://equalopportunity.tas.gov.au/__data/assets/pdf_file/0009/356382/16.09-ADC_response_to_the_AD_Amendment_Bill_2016.pdf)>.

<sup>231</sup> *Australian Constitution* s 116.

<sup>232</sup> See generally Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207; Neville Rochow, "'Speak Now or Forever Hold Your Peace": The Influence of Constitutional Argument on Same-Sex Marriage Legislation Debates in Australia' (2013) 3 *Brigham Young University Law Review* 521, 528.

<sup>233</sup> *Kruger v Commonwealth* (1997) 190 CLR 1; *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; *Krygger v Williams* (1912) 15 CLR 366.

potential for constitutional issues and the practical problems raised by inconsistent approaches.<sup>234</sup> A consistent approach would be far clearer.

The constancy of law excellency must also be considered. As explored below, few significant changes have been made to the scope of religious exemptions in Australian jurisdictions. Two relevant changes are worth noting. Firstly, Victoria repealed its separate exemption applying to the employment of any persons by a religious body in 2011.<sup>235</sup> Secondly, the Commonwealth excluded its general religious exemption from the provision of Commonwealth funded aged care in 2013.<sup>236</sup> These two changes are minor in scope; any further amendment would not appear to be a ‘constant’ change. Therefore, since all Australian jurisdictions have consistently applied the exemption to both religious bodies and individuals (Victoria and Tasmania) or only to religious bodies (all other jurisdictions), it is apparent that any change here would not be unnecessary and would not thereby weaken this excellency.

While the excellency of generality may well be maximised by requiring that such bodies be defined as narrowly as possible to not include religiously-affiliated bodies and to broaden the general prohibition against discrimination, as occurred in *Christian Youth Camps*, other excellencies suggest otherwise. The extreme spiritual and practical difficulties faced by many religiously-affiliated bodies in attempting to comply with some aspects of anti-discrimination law may require that the definition of religious body be broadened to encompass such bodies,<sup>237</sup> in order to avoid laws requiring the impossible. This suggests that, in contrast to *Christian Youth Camps*, a body engaging in largely commercial activities should be classified as a religious body if their activities are motivated by religious beliefs or if they have connections to a religious body and would find it spiritually impossible to act in defiance of their faith.<sup>238</sup> Indeed, the decision in *OW and OV* shows that this would be a far clearer test to apply through its lower threshold and more definitive evidentiary burden, compared to the strict test applied in *Christian Youth Camps* that required significant and complex evidence to establish. This would maximise the excellency of clarity.

Fuller notes that at times the excellencies may come into conflict with each other, and that the best way to resolve this is to pursue a balanced middle course that

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<sup>234</sup> As discussed in Parts I and II, respectively. The constitutional issue is complicated further by the federal government having exclusive power to legislate with respect to marriage, and their ability to legislate for anti-discrimination falling under a different power entirely (the external affairs power): see *Australian Constitution* ss 51(xx), (xxix); *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

<sup>235</sup> *Equal Opportunity Amendment Act 2011* (Vic) s 18.

<sup>236</sup> *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) s 49B.

<sup>237</sup> This is explored in greater detail below, in Section C.

<sup>238</sup> Cf *Christian Youth Camps* (2014) 308 ALR 615, 668.

involves partial fulfilment of each conflicting excellency.<sup>239</sup> Generality would be maximised by removing religious exemptions, but could still be ‘excellent’ if applied to narrowly defined religious bodies or broadly defined religiously-affiliated bodies. The avoidance of laws requiring the impossible would support either definition of religious body, while clarity and avoidance of laws requiring the impossible would be maximised by the broadly defined religiously-affiliated bodies. Therefore, allowing general religious exemptions for broadly defined religiously-affiliated bodies, but not for individuals, may be the best path forward to maximise these four excellencies. Of course, this balancing of excellencies is similar to the unresolved balancing of contradicting human rights seen in external morality approaches to this issue. Since the internal characteristics of anti-discrimination laws remain largely unexamined, however, this approach can still add significant value as an alternative path forward.

### *C How Should the Requisite Religious Beliefs be Tested?*

While Fuller’s excellencies cannot provide an answer for the legislative phrasing of the requisite beliefs that activate religious exemptions, they can be used to make broader recommendations for this issue. In particular, Fuller’s analysis can assist in determining whether religious beliefs should be tested subjectively or objectively. A subjective test would clearly broaden the operation of religious exemptions, while an objective test narrows their scope. Whether such beliefs should then be ‘reasonable’, ‘necessary’ or some other standard would become a question for lawmakers.

Two preliminary points should be made. Firstly, any changes to the two-limb general religious exemption test should not contradict provisions in existing human rights legislation under the avoidance of contradiction excellency.<sup>240</sup> Secondly, it should be noted that the constancy of law through time excellency will likely not be undermined through any new changes. Religious exemptions were included in the first versions of all relevant anti-discrimination legislation currently in force. Despite inconsistency in the application of general religious exemptions, no substantive changes have ever been made to their legislative construction in New South Wales,<sup>241</sup> South Australia,<sup>242</sup>

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<sup>239</sup> Fuller, above n 17, 45.

<sup>240</sup> See, eg, *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>241</sup> The only change made was to insert ‘act’ in addition to ‘practice’ in 1994: *Anti-Discrimination (Amendment) Act 1994* (NSW) sch 4 cl 24.

<sup>242</sup> Only one change was made, in 2009, to extend the exemption to the administration of a body established for religious purposes in accordance with the precepts of that religion and to shift the educational religious exemption to a different section and redefine it: see *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA) ss 19, 26.

Western Australia, the Australian Capital Territory,<sup>243</sup> Queensland,<sup>244</sup> Tasmania, or the Commonwealth. Two exceptions therefore remain: in 2004 the Northern Territory expanded and simplified its general religious exemption provision,<sup>245</sup> while Victoria passed new anti-discrimination legislation in 2010, which added a ‘reasonableness’ test to the second limb of its general religious exemption.<sup>246</sup> Victoria’s individual religious exemption test was also altered from requiring that beliefs be ‘genuinely’ held, to requiring that the discrimination be ‘reasonably necessary’ for the person to comply with their beliefs.<sup>247</sup> If the reasons for shifting to a strict objective test are still applicable, a further change in Victoria may be unnecessary and avoidable. However, amendments in any other jurisdiction, considering their lack of substantive changes, would not undermine this excellency. Indeed, the dearth of changes made in this area may, as Fuller notes, maximise this excellency by better reflecting contemporary society.<sup>248</sup>

Turning to the main aspect of this question, the avoidance of laws requiring the impossible can assist in determining whether the religious beliefs test should be subjective or objective. Though Fuller spends much of his explanation of this excellency detailing practical and physical impossibilities, he also outlines the potential for spiritual impossibilities. Fuller’s final observation of this excellency contends that, ‘our notions of what is in fact impossible may be determined by presuppositions about the nature of man and the universe’.<sup>249</sup> Fuller relies on Thomas Jefferson’s view that laws compelling certain religious beliefs may well require the impossible.<sup>250</sup> Fuller then questions whether ‘there is not in [Jefferson’s] conception a profounder respect both for truth and for human powers than there is in our own.’<sup>251</sup> Hence, laws compelling one to ignore their own religious beliefs may well fail to achieve ‘excellence’ in avoiding the impossible. Indeed, the bakery owner in a prominent UK gay wedding cake case publicly stated that, ‘[t]his has never been about the customer. It has been about a message promoting a cause that

<sup>243</sup> Purely syntactical changes were made in 2000 and 2003: *Justice and Community Safety Legislation Amendment Act 2000 [No 2]* (ACT); *Statute Law Amendment Act 2003* (ACT) sch 3, pt 3.7.

<sup>244</sup> One change was made to exclude the exemption from work-related and education areas: *Discrimination Law Amendment Act 2002* (Qld) s 20.

<sup>245</sup> Changing to the current requirement that ‘the act is done as part of any religious observance or practice’: *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT) s 24.

<sup>246</sup> *Equal Opportunity Act 2010* (Vic) s 82(2); *Equal Opportunity Act 1995* (Vic) s 75(2).

<sup>247</sup> *Equal Opportunity Act 2010* (Vic) s 84; *Equal Opportunity Act 1995* (Vic) s 77.

<sup>248</sup> See generally Fuller, above n 17, 44–5, and the discussion in Part III on this excellency.

<sup>249</sup> *Ibid* 79.

<sup>250</sup> *Ibid*; see also at 70, where Fuller seems to note that moral incompatibilities may also weaken the ‘excellency’ of a law, albeit under the avoidance of contradiction excellency.

<sup>251</sup> *Ibid* 79.

contradicts the Bible.<sup>252</sup> This lends support to the application of a subjective test to the requirement of religiously held beliefs.

Another aspect of this excellency reinforces this view. As much of Fuller's explanation of this excellency relates to strict liability, which is not imposed under anti-discrimination laws, few examples are provided as to how a person's beliefs or mental intricacies may impact upon the requiring of the impossible. One clear example is given, though: that of a person suffering from a mental illness who steals a purse from someone else. Fuller notes that this person's mental illness may make it impossible for them to understand or obey the laws of private property.<sup>253</sup> However, rather than rendering the law invalid, this would simply provide a defence to not send the person to jail; this person is not entitled to keep the purse and the purse must still be returned to its owner.<sup>254</sup> While of course holding religious beliefs cannot be equated to suffering from a mental illness, this example may shed light on how Fuller would approach religious exemptions. It seems apparent that should a person believe they are unable to perform a task, whether due to their beliefs or through illness, then they are entitled to an exemption to the law requiring this 'impossible' task. However the law remains good law. Were subjective intention to be the required test under religious exemptions, this would fit the analogy well. One may argue, though, that mental illness is more akin to a physical injury that renders a person unable to perform a task, whereas a belief simply renders that person unwilling to perform the task, but still physically capable.

Could the reverse situation apply? Though discrimination can undoubtedly be harmful and dehumanising,<sup>255</sup> it would rarely require LGBTI+ persons to perform an impossible act. Requiring an LGBTI+ couple to choose another store to bake their wedding cake would not require them to do the impossible. The case law examined in this area shows that the burden of impossibility weighs far more heavily on religious adherents than LGBTI+ persons.<sup>256</sup>

The excellency of clarity is also relevant. The use of standards such as 'reasonable' beliefs under an objective test would not inherently undermine Fuller's desideratum of clarity, as he notes that objective community standards can at times provide a clear path forward.<sup>257</sup> This should not be confused, however, with delegating a legislative task to the judiciary. Fuller strongly argues that it is a serious oversight if a legislator

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<sup>252</sup> See McDonald, above n 6.

<sup>253</sup> Fuller, above n 17, 73.

<sup>254</sup> Ibid.

<sup>255</sup> Cristy Clark, 'With that Ring, I Thee Judge: Why the Law Should Not Allow Exceptions on Marriage Equality', *The Conversation* (online), 6 October 2016 <<https://theconversation.com/with-that-ring-i-thee-judge-why-the-law-should-not-allow-exceptions-on-marriage-equality-66482>>.

<sup>256</sup> Cf Ben Winsor, 'Comment: Yes, You Do Have to Bake my Damn Gay Wedding Cake', *SBS* (online), 4 October 2016 <<http://www.sbs.com.au/topics/sexuality/agenda/article/2016/10/04/comment-yes-you-do-have-bake-my-damn-gay-wedding-cake>>.

<sup>257</sup> Fuller, above n 17, 64.

cannot convert their objective test into clearly stated rules.<sup>258</sup> Indeed, ‘it would be a mistake to conclude from this that all human conflicts can be neatly contained by rules derived, case by case, from the standard of fairness.’<sup>259</sup> To adopt a policy of social experimentation, by hoping that judicial precedent develops clear standards in applying a broad test to difficult legal problems, appears optimistic and undesirable under a Fullerian approach. This suggests that a test falling somewhere between being strictly objective and strictly subjective may even be ideal.

Judicial discussions in anti-discrimination case law would appear to support a subjective test to maximise clarity in decision-making. In *OW and OV*, the CEO of the Board of the Wesley Mission Council noted that each local church and parish under the Uniting Church ‘carries out its mission ... according to the guidance of God as it perceives it ... Accordingly, within our own Synod, and the Sydney Presbytery in particular, it is well known that there exists a great deal of diversity on many issues.’<sup>260</sup> The CEO contended that local parishes would be bound by doctrinal determinations made by the Uniting Church, but ‘because the Uniting Church has decided not to make a doctrinal determination on the issue of homosexuality ... whether to appoint a homosexual leader is an issue that local congregations can determine on the basis of their own conscience’.<sup>261</sup> Indeed the New South Wales Court of Appeal noted in *Sunol v Collier* that while assumptions over the rightness or wrongness of certain sexualities ‘may have been settled for many, if not most, in our community some years ago, [this] cannot deny the existence of social and political debate about these issues.’<sup>262</sup>

Other practical examples display how an objective test would undermine the excellency of clarity, due to the difficulty in establishing uniformly held religious beliefs. In 2012, a motion on human sexuality passed with majority support in both lower houses of the Synod of the Anglican Diocese of Perth. This motion, inter alia, recognised diversity in sexual identities and supported committed same-sex couples being able to register their relationships as ‘civil unions’.<sup>263</sup> However, this motion was rejected twice at higher levels of the Anglican religious hierarchy: first by the Anglican Archbishop of Perth,<sup>264</sup> and then unanimously by all three houses of the Provincial Council.<sup>265</sup> As a

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<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [18].

<sup>261</sup> Ibid.

<sup>262</sup> *Sunol v Collier [No 2]* [2012] NSWCA 44 [65] (Allsop P).

<sup>263</sup> Roger Herft, *Circular: Members of Synod (Synod Resolution 58/12: Human Sexuality)* (1 November 2012) Anglican Diocese of Perth <<http://www.perth.anglican.org/wp-content/uploads/2015/11/2012-Synod-motion-58.12-Presidents-decision.pdf>>.

<sup>264</sup> Ibid.

<sup>265</sup> ‘WA Provincial Council Votes against Human Sexuality Resolution’, *Anglican Church League* (online), 15 November 2013 <<http://acl.asn.au/wa-provincial-council-votes-against-human-sexuality-resolution/>>.

result, it did not pass. If an anti-discrimination case was brought where the defendant argues an exemption based on an Anglican belief that same-sex couples cannot legally recognise their relationships as ‘civil unions’, how would this be decided? Would a requisite consensus to pass an objective test be established by the two lower houses of Synod agreeing with this motion? Or would the dissent of the Archbishop and the Provincial Council render this issue too divisive to establish this as a belief conforming to the Anglican faith? Based on the various objective tests and requirements applied in anti-discrimination case law to date, there could not possibly be a clear answer to this question. It is apparent, therefore, that the objective test provides significant issues for striving towards clarity. This is especially the case since, as noted in *Christian Youth Camps*, ‘[t]he question as to when a religion requires that a person behave in a certain way is a vast and contentious one. Religions vary widely in the degree to which they prescribe certain behaviours’.<sup>266</sup> Indeed, the lack of a uniform position within Christian churches on same-sex attraction has been noted on various occasions.<sup>267</sup>

However, Gray’s suggestion that, ‘[t]here must be some basis in the religious text, or religious doctrine from an objective source, linking the claimant’s belief with religion’ also seems appropriate in seeking clarity.<sup>268</sup> It would be incoherent to not require any objective evidence of a religious doctrine to activate a religious exemption. A court must be guided towards a verifiable religion and doctrines that may fall within its ambit. It seems, therefore, that Fuller’s excellency of avoiding laws requiring the impossible would significantly favour a more subjective test while the excellency of clarity would favour a quasi-subjective test grounded on some objectivity. As the excellency of generality would be undermined to a greater degree by an exclusively subjective test, considering this would broaden the exemption to the general prohibition against discrimination, a quasi-subjective test may be the best path forward. This could require that subjectively established beliefs be grounded on an objectively verifiable religion that can be interpreted to bear such beliefs, regardless of the merits of this religious interpretation. As noted by Redlich JA in *Christian Youth Camps*, a court is ‘neither equipped nor required to evaluate [any person’s theological] moral calculus.’<sup>269</sup> In pursuing such a quasi-subjective test, reliance could be placed on the findings of the Human Rights and Equal Opportunity Commission in a 1998 inquiry into a complaint of discrimination:

Religious institutions can claim quite properly a margin of appreciation or discretion in making distinctions under [general religious exemptions]. Religious believers have the right to determine what are or are not the doctrines ... of their religion. The state and state institutions have no entitlement or authority in human rights law or domestic law to define those. But in applying laws that

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<sup>266</sup> *Christian Youth Camps* (2014) 308 ALR 615, 732 (Redlich JA).

<sup>267</sup> Harrison and Parkinson, above n 132, 418; Chai R Feldblum, ‘Moral Conflict and Liberty: Gay Rights and Religion’ (2006) 72 *Brooklyn Law Review* 61; Douglas Laycock, ‘Religious Liberty and the Culture Wars’ (2014) 3 *University of Illinois Law Review* 839.

<sup>268</sup> Gray, above n 15, 95.

<sup>269</sup> *Christian Youth Camps* (2014) 308 ALR 615, 733.

recognise the doctrines, tenets, beliefs or teachings of a religion the state and state institutions are entitled to rely upon what religious believers say are their doctrines ... Indeed they have no option but to do so.<sup>270</sup>

## V CONCLUSION: THE PATH FORWARD

Discourse around the external morality of law has led to important discussions about the ambitions of law and the outcomes it seeks to achieve. These accounts often draw from human rights, and in doing so seek to ensure the greatest protection of individual rights such as equality, expression, association and liberty. However, these rights-based external morality accounts have struggled to resolve conflicts between religious freedom and freedom from discrimination — two rights that inherently come into conflict with each other. This is particularly the case when considering the issue of religious exemptions to Australian anti-discrimination laws on the ground of sexual orientation. The entrenched sides to this debate have been well rehearsed in recent years and have not yet been able to find a way to resolve the substantial inconsistencies and uncertainty seen in the interpretation and application of Australian religious exemption provisions.

As such, a pivot towards the internal morality of law would provide an alternative path forward for scholars, advocates and lawmakers. This approach would recommend expanding the ‘sexual orientation’ prohibited ground, extending religious exemptions to religiously-affiliated bodies but excluding them from individuals, and shifting towards a quasi-subjective test in order to determine the requisite beliefs to activate such exemptions.<sup>271</sup> Adopting these three recommendations would help to resolve the inconsistent legislative approaches to this issue across Australia, in addition to providing a clearer judicial barometer that could minimise the unpredictable decision making seen thus far in the case law. An internal morality approach could also be used in interpreting religious exemptions to gender identity, intersex status and other prohibited grounds.

What would the three recommendations mean for future ‘gay wedding cake’ cases? It is apparent that any same-sex couple suffering discrimination would undoubtedly be covered by a broader conception of ‘sexual orientation’, while the requisite religious beliefs would likely be established so long as the religious adherent/s in question could point to a connected religious source for their views. Such cases would likely, then, be decided by the status of the religious adherent/s’ organisation. If the bakery was owned by a religious institution such as a church, they would likely be able to legally refuse to bake a cake for a same-sex wedding. However, individuals

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<sup>270</sup> Sidoti, above n 67, 23.

<sup>271</sup> This would, in the end, result in broader anti-discrimination laws and broader exemptions, as was suggested under New York’s anti-discrimination law in David Wexelblat, ‘Trojan Horse or Much Ado About Nothing? Analyzing the Religious Exemptions in New York’s Marriage Equality Act’ (2012) 20 *American University Journal of Gender, Social Policy & the Law* 961, 987–88.

and privately-owned bakeries with no institutional affiliations with religious bodies would be unable to rely on these exemptions and would therefore be prohibited from discriminating against same-sex couples due to their sexual orientation.

As recently stated by Robert Wintemute, a prominent human rights scholar, ‘religious exemptions to anti-discrimination legislation will be the next key battleground in the clash between religious freedom and freedom from discrimination in Australia.’<sup>272</sup> A recognition that, despite its merits, external morality may not be the only path forward could open this battleground to alternative and promising debates. An internal morality perspective, which advocates for a more ‘excellent’ form and process of lawmaking, could provide a fuller approach to religious exemptions that would allow lawmakers to indeed have their cake and eat it too.

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<sup>272</sup> Robert Wintemute, ‘Same-Sex Marriage: Should a Court, Legislature or Plebiscite Introduce it, and Should Religious Individuals be Granted Exemptions?’ (Speech delivered at the Law School Research Seminar Series, University of Western Australia, 3 November 2016).



# THE SOCIO-POLITICAL AND LEGAL HISTORY OF THE TAX DEDUCTION FOR DONATIONS TO CHARITIES IN AUSTRALIA AND HOW THE ‘PUBLIC BENEVOLENT INSTITUTION’ DEVELOPED

## ABSTRACT

Every year the Australian revenue grants tax concessions of around \$1.3 billion in respect of tax deductibility of donations to specific charities and not-for-profits (NFPs). This article explains the historical development of the tax deduction for charitable donations. It explores the exemption of charities and other NFPs from land and income tax in order to explain how this tax deduction arose. The discussion will establish that the tax deductibility of donations arose in an ad hoc fashion due to war and depression, that the concession was shaped by the personal issues and ideologies of influential politicians, that the ‘person in the street’ opinion about charities was important and that Britain and the United States of America also played a part. It will also demonstrate how the revenue was taken into account in the development of a tax deductible NFP that is unique to Australian taxation law, the ‘Public Benevolent Institution’.

## I INTRODUCTION

**T**ax concessions for charities and specific not-for-profits (‘NFPs’) in Australia are more extensive, complicated and generous than in many other developed nations.<sup>1</sup> Tax concessions to NFPs represent a significant amount of public sector revenue in Australia. The Australian Treasury estimates that the tax deductibility of donations to specific eligible NFPs (including charities) costs the Commonwealth revenue over \$1.3 billion per year.<sup>2</sup> The main type of charity that is

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<sup>1</sup> See generally Ann O’Connell, ‘The Tax Position of Charities in Australia — Why Does it Have to be So Complicated?’ (2008) 37 *Australian Tax Review* 17. Since this article was written, the Federal government has issued a discussion paper considering potential reforms to the tax deduction for donations: See The Treasury (Cth) ‘Tax Deductible Gift Recipient Reform Opportunities’ (Discussion Paper, 15 June 2017).

<sup>2</sup> The Treasury (Cth) ‘Tax Expenditures Statement 2015’ (Report 29, January 2016) 26–7. No amount is estimated for revenue foregone in respect of the income tax exemption. ‘Tax expenditure’ is a term used to refer to tax exemptions, deductions or offsets, concessional tax rates and deferrals of tax liability: at 4–7.

eligible for tax deductibility of donations is termed in the income tax legislation a ‘Public Benevolent Institution’ (‘PBI’).

In order to understand the breadth and depth of these concessions, and, in particular, the tax deduction for donations, it is essential to examine their historical development. The imposition of government taxation is a social process and without an understanding of how and why taxation develops, it is impossible to comprehend the present system or the dynamics which precipitate change. An understanding of how and why taxation develops and changes further promotes the evolution of opinions about likely and potentially fruitful future policy directions.

This article concentrates on the historical development of the tax deduction for charitable donations and explores the exemption of charities and other NFPs from land and income tax in order to explain how this tax deduction arose. The article builds on the work of Chia and O’Connell<sup>3</sup> and will demonstrate that the tax deductibility of donations arose in an ad hoc fashion due to war and depression, that the concession was shaped by the personal issues and ideologies of influential politicians, that the ‘person in the street’ opinion about charities was important and that Britain and the United States of America also played a part. It will demonstrate how the revenue was taken into account in the development of a type of charity that is unique to Australian taxation law, the PBI.

## II THE EARLY HISTORY OF INCOME TAX IN THE AUSTRALIAN COLONIES WITH SPECIFIC REFERENCE TO CHARITIES

### *A The Earliest References to Tax Exemptions from Tax for Charities*

Initially the colonies relied on taxes on imports in order to provide for the administration of the colonial governments. In 1875, 90.4 per cent of New South Wales’ revenue came from customs and excise duties and 0.4 per cent from probate and stamp duty.<sup>4</sup> There was no income tax and additional revenue was obtained in an ad hoc nature from the sale of land.<sup>5</sup>

In 1880, Tasmania was the first Australasian colony to pass a Bill that imposed tax, in a limited way, on income.<sup>6</sup> Section 17 of the *Real and Personal Estates Duties Act 1880* (Tas) stated that in order to impose land tax, the value of the relevant land would

<sup>3</sup> Joyce Chia and Ann O’Connell, ‘Charitable Treatment? — A Short History of the Taxation of Charities in Australia’ in John Tiley (ed), *Studies in the History of Tax Law* (Hart Publishing, 2011) vol 5, 91, 91.

<sup>4</sup> Steve Gibson, ‘A Short History of Taxation in Australia’ (1999) 41 *Australian Marxist Review* 31, 32.

<sup>5</sup> Ibid.

<sup>6</sup> *Real and Personal Estates Duties Act 1880* (Tas) sch B imposed tax on company dividends; Peter A Harris, ‘Metamorphosis of the Australasian Income Tax: 1866 to 1922’ (Research Study No 37, Australian Tax Research Foundation, 2002) 55–65.

be the equivalent of the annual rent reasonably expected to be payable. Corporate dividends would be the only other taxable income.<sup>7</sup> Section 14 of the Act exempted from land tax ‘any Hospital, Benevolent Asylum, or other building used solely for charitable purposes’. The Act used the term ‘charitable purposes’ and exempted any building used only for charitable purposes from a modified land tax, but it offered no definition of what this meant and certainly no deduction for gifts to charities. According to Myles McGregor-Lowndes, ‘[t]he exemption of charitable bodies follows the English legislative pattern of charitable organizations being exempt from income tax and relying upon the common law definition of charity stemming from the *Statute of Elizabeth 1601*.’<sup>8</sup>

McGregor-Lowndes is referring to the fact that in 1799 the British government imposed its first income tax.<sup>9</sup> The legislation was introduced by William Pitt the Younger in his budget of December 1798 to pay for weapons and equipment in preparation for the Napoleonic wars. Within this statute was an exemption from income tax of any ‘Corporation, Fraternity or Society of Persons established for charitable Purposes only’.<sup>10</sup> This ‘exemption appears to have its origins in the 1671 and 1688 land tax exemptions for hospitals and charitable institutions, which was then continued in the income tax context.’<sup>11</sup> For example, s 25 of the *Taxation Act 1692*<sup>12</sup> exempted specified organisations including: universities, colleges and schools; charities for the relief of the poor; and hospitals and alms houses.<sup>13</sup> These three areas of public good — educational institutions, charities in the ‘narrow’ sense being those for the relief of the poor, and hospitals — have remained at the core of tax concessions for NFP organisations both in the United Kingdom and subsequently, Australia.

There is no Tasmanian Hansard to support or refute McGregor-Lowndes’ argument. Although the other Australian states operated Hansard services since colonial times,

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<sup>7</sup> *Real and Personal Estates Duties Act 1880* (Tas).

<sup>8</sup> Myles McGregor-Lowndes, ‘Defining Charity’ (Paper presented at the National Centre on Philanthropy and the Law Defining Charity 14th Annual Conference, New York, 24–25 October 2002) 2.

<sup>9</sup> *Income Tax Act 1799*, 39 Geo 3, cl 13.

<sup>10</sup> *Ibid* s 5.

<sup>11</sup> Fiona Martin, ‘The Legal Concept of Charity and its Expansion after the Aid/Watch Decision’ (2011) 3s *Cosmopolitan Civil Societies Journal* 20, 23. In respect of some hospitals it can be traced back even further as St Bartholomew’s Hospital, London was exempt from tax as early as the reign of Edward I (1272–1307): *Ibid*. See also John F Avery Jones, ‘The Special Commissioners from Trafalgar to Waterloo’ in John Tiley (ed), *Studies in the History of Tax Law* (Hart Publishing, 2007) vol 2, 3, 14–16; Michael Gousmett, ‘The Public Benefit Test’ (2006) *New Zealand Law Journal* 57, 57.

<sup>12</sup> 4 Wm & M, c 1.

<sup>13</sup> O’Connell, ‘The Tax Position of Charities in Australia’, above n 1, 93.

Tasmania's Hansard did not officially commence until mid-1979.<sup>14</sup> However, it seems likely that the Australian colonies would follow their Imperial founder in such matters.

Four years after Tasmania, the South Australian Government succeeded in passing the first broad-based income tax of the Australasian colonies, the *Taxation Act 1884* (SA).<sup>15</sup> This took the South Australian Government seven years and five attempts.<sup>16</sup> Section 9 imposed income tax on all income with the exception of the income of companies, public bodies and societies that did not carry on any business for the benefit of shareholders or members and the income of all friendly societies.<sup>17</sup> So the legislation exempted NFPs such as friendly societies and companies not carrying on business for the benefit of shareholders from income tax but not specifically charities. Section 7(III) of the *Taxation Act 1884* (SA), on the other hand, exempted from land tax land used solely for any religious or charitable purposes, or by an institute under the *Institute Act 1874* (SA). So charities were exempt from land tax, where the land was used solely for their charitable purposes, but not income tax. It is difficult to know why this distinction was drawn, but it may be that the government of the time needed as much revenue as possible and saw income tax as one of the sources of this revenue. Forty years earlier the South Australian government had been gaining revenue from fees for land grants.<sup>18</sup> But by 1884 most of the saleable land had been sold.<sup>19</sup> South Australia also raised revenue from customs duty,<sup>20</sup> but by 1884 South Australia's population had significantly increased<sup>21</sup> and there had been severe droughts,<sup>22</sup> so there was need for greater government revenue to support its services.

After many failed attempts, Tasmania finally passed a Bill that imposed tax on a broad income base in 1894. This Act, the *Income Tax Act 1894* (Tas), imposed tax on all income 'arising, accruing, received in or derived from Tasmania'.<sup>23</sup> Section 15(II)

<sup>14</sup> The Legislative Council Hansard began on 6 June 1979 and the House of Assembly Hansard on 12 June 1979: Tasmanian Parliamentary Library, *Hansard: Background — Tasmania* (12 July 2015) <<http://www.parliament.tas.gov.au/tpl/Backg/Hansard.htm>>.

<sup>15</sup> Harris, above n 6, ch 4; *Taxation Act 1884* (SA).

<sup>16</sup> Harris, above n 6, 66.

<sup>17</sup> *Taxation Act 1884* (SA) ss 9(II)–(III).

<sup>18</sup> *An Act to Authorise the Levying of Fees on Land Grants 1841* (SA).

<sup>19</sup> C M H Clark, *A History of Australia* (Melbourne University Press, 1981) vol 1, 180–219.

<sup>20</sup> *An Act to amend the Laws for the Regulation of the Customs and Trade in South Australia 1842* (SA). There were acts imposing customs duty in South Australia until 1897.

<sup>21</sup> State Library of Victoria, *Early Australian Census Records — South Australia* (13 April 2017) <<http://guides.slv.vic.gov.au/earlycensus/sa>>.

<sup>22</sup> Government of South Australia, *A History of Agriculture in South Australia: The Measure of the Land*, Primary Industries and Regions SA <[http://www.pir.sa.gov.au/aghistry/left\\_nav/land\\_settlement\\_in\\_sa/the\\_measure\\_of\\_land](http://www.pir.sa.gov.au/aghistry/left_nav/land_settlement_in_sa/the_measure_of_land)>.

<sup>23</sup> *Income Tax Act 1894* (Tas) s 14.

exempted income from companies and other entities that did not carry on business for the benefit of shareholders or members,<sup>24</sup> a provision similar to s 9 of the *Taxation Act 1884* (SA). Charities were not referred to, although they had been in earlier Bills.<sup>25</sup> Again it is hard to know why this omission occurred although it was possibly in order to maximise income tax revenue.

New South Wales first attempted, but failed, to introduce an income tax into the colony in 1886.<sup>26</sup> It had previously tried, unsuccessfully, to introduce a land tax;<sup>27</sup> and even income tax was considered only as an aspect of taxing land. As Premier Patrick Jennings stated:

This tax is ancillary to the land-tax ... and it will not be fair or just to tax the real property of the country, and allow incomes derived from commerce and trade, from professions, from the civil service, and from other sources, to go untouched.<sup>28</sup>

### B *New South Wales, Income Tax and Exemptions for Charities*

Several years earlier, however, New South Wales had enacted the *Municipalities Act 1867* (NSW) which established specific municipalities or local governments in the state and enabled them to levy property taxes. This Act exempted hospitals; benevolent institutions; and buildings used exclusively for public charitable purposes; churches, chapels, and other buildings used exclusively for public worship; and all public schools, colleges and universities.<sup>29</sup> This is possibly the earliest reference to ‘Benevolent Institutions’ — a term which was not used in the English legislation, although it was used in the early days of the colony.<sup>30</sup> Furthermore, the New South Wales government was clearly concerned about problems relating to poverty and lack of education as is demonstrated by the introduction of schools to assist poverty stricken boys.<sup>31</sup>

New South Wales did not enact an income tax until 1895. At this stage, the State was in the grip of a deep depression and revenue was needed from sources other

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<sup>24</sup> Ibid s 15(II).

<sup>25</sup> Harris, above n 6, 59, 131–2.

<sup>26</sup> Ibid 94.

<sup>27</sup> Ibid 98.

<sup>28</sup> Ibid.

<sup>29</sup> *Municipalities Act 1867* (NSW) s 163.

<sup>30</sup> In 1813, Edward Smith Hall, an influential figure in the colony, founded the ‘NSW Society for Promoting Christian Knowledge and Benevolence’. In 1818 the organisation was renamed The Benevolent Society of NSW and became a non-religious organisation. Its purpose was to ‘relieve the poor, the distressed, the aged, and the infirm’: The Benevolent Society, *Timeline* (2015) <<http://www.benevolent.org.au/200--year--celebration/last--200>>.

<sup>31</sup> New South Wales, *Minutes of the Proceedings*, Legislative Council, 2 July 1867, 2.

than the sale of government land.<sup>32</sup> This legislation resulted after many bitter parliamentary debates, several elections and many draft Bills that were never enacted.<sup>33</sup> The final Act was called the *Land and Income Tax Assessment Act of 1895* (NSW). Section 11(v) exempted from land tax lands occupied or used exclusively for, or in connection with, public NFP hospitals whether or not supported by grants from consolidated revenue, benevolent institutions, public charitable purposes, churches, chapels for public worship, universities, affiliated colleges and the Sydney Grammar School. This Act offered an exemption from land tax for land used for charitable purposes and also for ‘benevolent institutions’. Section 17(v) exempted from income tax ‘[t]he incomes and revenues of all ecclesiastical, charitable, and educational institutions of a public character, whether supported, wholly or partly, by grants from the Consolidated Revenue Fund or not’. There is no reference to benevolent institutions for this exemption, although there is for the land tax. There is no discussion in the parliamentary debates to shed light on this difference, nor is there a definition of benevolent institution in the legislation. As the legislation refers to three types of organisations — ‘benevolent institutions’, ones with ‘public charitable purposes’, and ‘churches’ — there are clearly distinguishable.

*C Victoria, Queensland and Western Australia: Then a Commonwealth is Formed*

In 1895, Victoria introduced income tax on all income, whether derived by persons or companies.<sup>34</sup> Section 7(1) provided for a long list of exempt income including the income of religions, mining companies and companies and other entities that did not carry on business for the benefit of shareholders or members. This latter exemption being similar to that in the contemporaneous legislative provisions in South Australia and Tasmania.<sup>35</sup>

During the 19<sup>th</sup> century, Queensland and Western Australia relied heavily on indirect taxation, as did all the states. This was mainly in the form of customs and excise duties.<sup>36</sup> Queensland had enacted a tax on dividends in 1890.<sup>37</sup> In 1902 it enacted an income tax act, of which s 12 (vi) exempted the income of ‘religious, charitable and educational institutions of a public character’.<sup>38</sup>

Western Australia did not progress to responsible government until 1890<sup>39</sup> and did not enact a full income tax act until 1907 with the enactment of the *Land and Income*

<sup>32</sup> Bureau of Census and Statistics (Cth), *Official Year Book of the Commonwealth of Australia No 15* (Bureau of Census and Statistics, 1922) xxxvi.

<sup>33</sup> Harris, above n 6, ch 5.

<sup>34</sup> *Income Tax Act 1895* (Vic).

<sup>35</sup> *Taxation Act 1884* (SA); *Income Tax Act 1894* (Tas).

<sup>36</sup> Harris, above n 6, 160.

<sup>37</sup> *Dividend Duty Act 1890* (Qld).

<sup>38</sup> *Income Tax Act 1902* (Qld).

<sup>39</sup> *Constitution Act 1889* (WA).

*Tax Assessment Act 1907* (WA).<sup>40</sup> Western Australia was the last of the colonies to do this. The legislation imposed income tax on all income of persons and companies but exempted, inter alia, the income of all ‘ecclesiastical, charitable, and educational institutions of a public character, whether supported wholly or partly, or not at all, by grants from the Consolidated Revenue Fund.’<sup>41</sup>

The *Australian Constitution* changed the taxation landscape as s 51(ii) granted the Commonwealth Parliament power to ‘make laws for the peace, order and good government of the Commonwealth with respect to [...] taxation; but so as not to discriminate between States or parts of States’.<sup>42</sup> The states retained the right to tax land and income but this was concurrent with the Commonwealth.<sup>43</sup> The *Australian Constitution* gave the power to impose customs and excise solely to the Commonwealth.<sup>44</sup>

By this stage, the taxation exemptions for charities seemed to be fairly well entrenched in the state legislation, although the boundaries of the concessions granted varied. For example, the *Land and Income Taxation Act 1910* (Tas) exempted from land tax ‘[I]and on which is built any hospital, benevolent asylum, or other building used solely for charitable or religious purposes’.<sup>45</sup> This provision continued the principle of exempting from land tax land that is used for charitable purposes. However, s 27(1)(ii) exempted the incomes of companies, societies, public bodies, or public trusts that did not carry on business or trade for the purpose of distributing profit to members or shareholders. So although Tasmania felt that it could exempt from land tax buildings used for charitable purposes, it needed to keep the income tax exemption narrow, thus protecting its revenue base.

#### D 1890–World War I: Taxation Powers under the Australian Constitution

The colonies held an Australasian Federal Conference in 1890.<sup>46</sup> One of the major topics of discussion at this conference was taxation and who would be able to levy which types of taxation. Eleven years later, Australia became a Commonwealth and the Commonwealth government was given power under s 51(ii) of the *Australian Constitution* to impose income tax (although this was a concurrent power with the

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<sup>40</sup> The Western Australian government had earlier imposed a tax on company profits under the *Companies Duty Act 1899* (WA).

<sup>41</sup> *Land and Income Tax Assessment Act 1907* (WA) s 19(6).

<sup>42</sup> *Australian Constitution* s 51(ii).

<sup>43</sup> Ibid; Cynthia Coleman and Margaret McKerchar, ‘The Chicken or the Egg? A Historical Review of the Influence of Taxation Administration on the Development of Taxation Law in Australia’ in John Tiley (ed), *Studies in the History of Tax Law* (Hart Publishing, 2004) vol 1, 285, 287–8.

<sup>44</sup> *Australian Constitution* s 90.

<sup>45</sup> *Land and Income Taxation Act 1910* (Tas) s 15(v).

<sup>46</sup> *Official Record of the Proceedings and Debates of the Australasian Federation Conference, 1890, held in the Parliament House, Melbourne* (Government Printer, 1890).

states).<sup>47</sup> Section 90, however, gave the Commonwealth the exclusive power to levy customs and excises and it was thought that this would provide adequate revenue for the Commonwealth so that the states could continue to levy income tax.<sup>48</sup> Although there was now a Commonwealth, as the states were still in a position to impose income and land tax, several continued to do so during the period leading up to and after World War I (WWI).

#### *E 1920–1923: The Royal Commission on Taxation*

From 1920 to 1923 there was a Royal Commission on Taxation.<sup>49</sup> One aspect of the series of reports that resulted from this Royal Commission was the recommendation that the Commonwealth impose income tax and that the states have sole ability to impose land tax.<sup>50</sup> However, the Commonwealth did not take over sole responsibility for imposing income tax until 1942 and did not cease imposing land tax until 1952–3.<sup>51</sup>

Nonetheless, in 1915 the Commonwealth enacted its first income tax legislation.<sup>52</sup> This legislation contained an exemption for the income of religious, scientific, charitable or public educational institutions and also a deduction for gifts to certain charitable organisations.

### III THE DEDUCTION FOR GIFTS TO CHARITIES

#### *A 1907: Victoria Enacts a Deduction Provision*

Victoria was the first government to introduce the innovation of allowing tax deductions for gifts to certain charities. A Victorian Royal Commission on Charitable

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<sup>47</sup> *Australian Constitution* s 51(ii); Coleman and McKerchar, above n 43, 287–8.

<sup>48</sup> *Australian Constitution*; Denis James, ‘Federal and State Taxation: A Comparison of the Australian, German and Canadian Systems’ (Current Issues Brief No 5, Parliamentary Library, Parliament of Australia, 1997–98) 5–6.

<sup>49</sup> Commonwealth, Royal Commission on Taxation (Cth), *The Royal Commission on Taxation Second Report* (1922).

<sup>50</sup> *Ibid* 77, [234].

<sup>51</sup> James, above n 48, 9. In 1942 the Commonwealth reached agreement with the states that they should cede to it their income taxing powers on a ‘temporary’ basis. Several states were still imposing income tax at this time. The Commonwealth needed to raise income taxes to finance World War II, but if it set its income tax at a uniform high level, this would impose a serious burden on those inhabitants in states with high income tax. Imposing low Commonwealth tax would not yield sufficient revenue. In 1946, the Commonwealth informed the states that it would retain the sole income taxing position, but would make appropriate tax reimbursement grants to the states on condition that they did not attempt to reimpose their own taxes. In 1957, the High Court ruled that the imposition of this condition on the provision of general revenue assistance to the states was a valid use of s 96 of the *Australian Constitution*: at 7.

<sup>52</sup> *Income Tax Act 1915* (Cth).

Institutions in 1891 had recommended that charities were funded by monies raised from an entertainment tax.<sup>53</sup> This suggestion was not successful, but, by 1907, the idea was mooted that taxpayers be entitled to a tax deduction for certain charitable donations.<sup>54</sup>

The first British income tax was imposed in 1799<sup>55</sup> and there was an exemption in this legislation for the income of charities. Initially, there was no direct tax relief for private donations in Britain. Wealthy donors, however, could get around this by the use of a deed of covenant. Under this deed they would promise to make regular payments to a trust or individual, over a period of time, and the income tax liability could be transferred to the holder of the deed, in this case a charity. As charities were exempt from income tax this was one way for individuals to avoid paying income tax on regular donations.<sup>56</sup> This was not, however, the approach taken in Australia.

The *Income Tax Act 1907* (Vic) was enacted in order to amend the rate of income tax and add some provisions to the *Income Tax Act 1895* (Vic). Section 3 of the 1907 Act provided that:

In estimating the income for any year of any taxpayer liable to deductions for tax there shall be deducted from the gross amount of such taxpayer's income any gift of any sum over Twenty pounds paid by him during such year to or for any free public library or any free public museum or any public institution for the promotion of science and art (including Working Men's Colleges and Schools of Mines) or any public university or any public hospital or public benevolent asylum or public dispensary or any woman's refuge or ladies' benevolent society or miners' benevolent fund whether any such library or other institution is or is not in existence at the time of such gift. Provided that such public library or museum or other public institution is situate within Victoria.

This provision contained a rather eclectic mix of organisations that the government of the time considered worthy of assistance, ranging from free public museums, public universities and public hospitals to 'public benevolent asylums' and refuges for women. The reference to 'public benevolent asylum' and 'ladies' benevolent society' is a reference to the organisations actual names and does not appear to be the legislature differentiating between charitable and benevolent. Furthermore, there is no reference to 'charitable' or 'charitable purposes', which is unusual considering that other state tax legislation of this time had used these terms. The 1895 Act had also exempted from income tax the income of a mixture of entities including religions,

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<sup>53</sup> 'The Charities Commission Supplementary Report — Tax on Sports Advocated', *The Argus* (Melbourne), 20 August 1895, 7.

<sup>54</sup> Chia and O'Connell, 'Charitable Treatment?', above n 3, 101.

<sup>55</sup> *Income Tax Act 1799*, 39 Geo 3, cl 13.

<sup>56</sup> Kimberley Scharf and Sarah Smith, 'Charitable Donations and Tax Relief in the UK' (Paper presented at Charitable Giving and Tax Policy: A Historical and Comparative Perspective, Centre for Economic Policy Research Conference, Paris School of Economics, 11–12 May 2012) 120, 121.

NFPs, the University of Melbourne and the Working Men's College in Melbourne.<sup>57</sup> As we can see from the following discussion in Parliament, there was debate in 1907 about the use of a more general term in respect of the donation deduction.

George Prendergast raised the omission of a general reference to charities in the 1907 Bill when he stated in parliamentary debate that it would be better to include 'or such other organization existing for the purpose of giving charity as may be determined by the Governor in Council.'<sup>58</sup> He was concerned that societies that did good work such as the St Vincent de Paul Society were not included and commented that:

It would be better to have the discretion in the hands of the Governor in Council. Even if it were provided that all societies affiliated with the Charity Organization Society were included that would considerably enlarge the scope of the clause. If certain organizations were mentioned it might mislead, and some people would say that it was done purposely.<sup>59</sup>

William Beazley supported this argument when he said that 'the only fear he had (sic) was that the clause ... would have the effect of directing the attention of benefactors to particular institutions ... It should be provided that the clause should apply to any charitable institution without distinction.'<sup>60</sup> The arguments of Prendergast and Beazley were however unsuccessful.

The rationale for the deduction was the encouragement of taxpayers to donate money to charity. The Premier, Sir Thomas Bent, explained that he had included this proviso because:

he had found that in one or two cases, gentlemen had stated that they would not give to charities the large amounts they otherwise would give because the Government were charging income tax upon them. Therefore, he thought it only fair that any one giving over £20 should not be charged income tax upon the amount.<sup>61</sup>

J M Davies argued in the upper house, the Legislative Council, that the deduction would motivate donors. He also thought that providing for charities through donations would mean that they were able to increase their public good and this would make up any lost revenue.<sup>62</sup> He does not provide any basis, even anecdotal, for these arguments.

<sup>57</sup> *Income Tax Act 1895* (Vic) s 7(1).

<sup>58</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 19 September 1907, 1273.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1907, 1214.

<sup>62</sup> Victoria, *Parliamentary Debates*, Legislative Council, 2 October 1907, 1356–7.

Twenty pounds is the approximate equivalent of \$2872 in terms of what it can purchase in 2016,<sup>63</sup> so it was a relatively large amount. It is also important to remember that the provision only applied if the donation of over £20 was to a particular organisation. It was not a cumulative deduction.

The identical deduction was continued in the 1915 income tax legislation<sup>64</sup> and also the last comprehensive income tax legislation for Victoria, the *Income Tax (Assessment) Act 1936* (Vic). However the minimum donation had been reduced by this time to £1, presumably to ensure that it was available to a greater range of taxpayers, and the list of eligible donees was amended to include public hospitals, public benevolent institutions, public funds established and maintained for the purpose of providing money for public hospitals or public benevolent institutions in Victoria, or for the establishment of such hospitals or institutions, or for the relief of persons in Victoria who were in necessitous circumstances. It also included: public funds established and maintained for providing money for the construction of an intermediate hospital in Victoria; public authorities engaged in research into the causes, prevention or cure of disease in human beings, animals or plants; public universities; funds to build public memorials relating to WWI and institutions or funds for the benefit of returned soldiers.<sup>65</sup> At no time were general charitable institutions included in the donation provision, even though by 1936 their income was exempt from income tax.<sup>66</sup> Religious entities were not included either although their income was also exempt from income tax<sup>67</sup> and had been in the 1915 legislation.<sup>68</sup>

The parliamentary debates surrounding the 1936 Bill took place in November and December 1936, yet there is no reference in these debates to tax deductions for donations. Some reasons for continuing the deduction may be gleaned from a debate in 1935 regarding the raising of funds for the Royal Melbourne Hospital. During this debate James Murphy stated:

private benevolence is not what it was years ago. In years past there were numbers of outstanding benefactors, whose contributions to the public hospitals were noteworthy. The Edward Wilson estate has contributed in all about £140 000 to the Royal Melbourne Hospital; but we do not now hear of benefactions such as were fairly common in the old days, and something else must be done.<sup>69</sup>

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<sup>63</sup> Reserve Bank of Australia, *Pre-Decimal Inflation Calculator* (2016) <<http://www.rba.gov.au/calculator/annualPreDecimal.html>>.

<sup>64</sup> *Income Tax Act 1915* (Vic) s 29.

<sup>65</sup> *Income Tax (Assessment) Act 1936* (Vic) s 70(1)(a).

<sup>66</sup> *Ibid* s 14(e).

<sup>67</sup> *Ibid*. This provision also exempted the income of scientific, charitable or public educational institutions.

<sup>68</sup> *Income Tax Act 1915* (Vic) s 17(c).

<sup>69</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 20 November 1935, Vol 198, 4568.

These points may also explain why public hospitals were specifically included in the list of eligible donees.

*B 1915: The First Commonwealth Income Tax and a Deduction for Donations*

The *Australian Constitution* had allocated the majority of expenditure responsibilities to the states with the expectation that the federal government would carry out functions that the states were not able to conduct efficiently themselves, such as defence and foreign affairs.<sup>70</sup>

Under the *Australian Constitution*, the states retained major control of land and income taxes, although these were concurrent with the Commonwealth,<sup>71</sup> and the Commonwealth was solely responsible for customs and excise.<sup>72</sup>

Until 1915, the revenues derived from customs and excise duties had been enough to meet the Australian government's revenue needs. Thus it was not until 1915 that the Commonwealth enacted the *Income Tax Assessment Act 1915* (Cth) in order to raise funds for the war effort, and to deal with the economic crisis arising from Australia's part in WWI.<sup>73</sup>

The Act exempted from income tax the income of religious, scientific, charitable or public educational institutions.<sup>74</sup> It also granted a deduction for gifts, each exceeding £20, to 'public charitable institutions'.<sup>75</sup> Unlike the Victorian provision, the concession was expressed (at least at first glance) to be for a very broad group of donees, 'public charitable institutions', although the 'greater than' £20 minimum remained. It seems that this is only the second Australian Act that granted a tax concession for charitable donations.<sup>76</sup> In fact, Harris, in his comprehensive analysis of the historical development of Australian taxes, states that '[s]ection 18(h) allowed a deduction for gifts to certain institutions or public war fund and had no obvious counterpart in the prior Acts considered by this study.'<sup>77</sup>

Again it was a Victorian who strenuously argued for a tax deduction for gifts to charities. As Chia and O'Connell point out, this was a Victorian pastoralist, James

<sup>70</sup> Sam Reinhardt and Lee Steel, 'A Brief History of Australia's Tax System' (Paper presented at the 22nd APEC Finance Ministers' Technical Working Group Meeting, Khanh Hoa, Vietnam, 15 June 2006) 6.

<sup>71</sup> *Australian Constitution* s 51(ii); James, above n 48.

<sup>72</sup> *Australian Constitution* s 90.

<sup>73</sup> Reinhardt and Steel, above n 70, 7; Harris, above n 6, 175–6.

<sup>74</sup> *Income Tax Assessment Act 1915* (Cth) s 11(d).

<sup>75</sup> *Ibid* s 18(h).

<sup>76</sup> Chia and O'Connell, 'Charitable Treatment?', above n 3, 108–9; Harris, above n 6, 187.

<sup>77</sup> Harris, above n 6, 187.

Chester Manifold.<sup>78</sup> James Manifold's father, William Thomson Manifold, had been a noted philanthropist. He had donated to the Church of England cathedral and chapter house at Ballarat and Ballarat Grammar School; endowed scholarships and super-annuation funds; and gave £280 000 to Trinity College, University of Melbourne.<sup>79</sup>

His son, James Chester Manifold also gave generously to many causes.<sup>80</sup> During the House of Representatives debate on the Income Tax Assessment Bill 1915 (Cth) on 1 September 1915 he noted that although there was a tax deduction for contributions over £5 for war funds there was no similar tax deduction for gifts to charitable institutions.<sup>81</sup> Manifold argued that a tax deduction might induce the public to donate to these organisations.<sup>82</sup> William 'Billy' Hughes, who was Attorney-General at this time, expressed concern about the breadth of such a concession, however, he also noted that he had discussed the issue with the Commissioner of Taxation and that he would consider it.<sup>83</sup> The original Bill did not include the deduction, but when it was returned to the House of Representatives from the Senate for further debate on 9 September,<sup>84</sup> it had been amended to include deductions for 'gifts exceeding twenty pounds each to public charitable institutions'.<sup>85</sup> The discussions of both houses indicate that protection of the revenue was important, and that a possible solution to this was to ensure a relatively high threshold for the deduction. The discussions also highlight the view that a deduction would motivate greater donations.

It was Manifold who suggested the phrase 'public charitable institution' in the debate of 1 September 1915. He stated at that time that this phrase was already defined in some state legislation.<sup>86</sup> Manifold was correct; examples from this period included the *Charitable Institutions Act 1888* (Tas) which defined 'Charitable Institution' as:

Any hospital established for the treatment of the sick: Any home or refuge for destitute or unfortunate persons: Any institution for the gratuitous education or gratuitous maintenance and education of children: Any society or association of persons established or associated for the purpose of raising and disbursing

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<sup>78</sup> Chia and O'Connell, 'Charitable Treatment?', above n 3, 108.

<sup>79</sup> Paul H De Serville, 'Manifold Brothers' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography*, (Melbourne University Press, 1986), vol 10, 391, 391.

<sup>80</sup> *Ibid.*

<sup>81</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 1 September 1915, 6608.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Although the Bill was debated in the Senate on 2 September 1915, there was no discussion of the gift to charities provision: Commonwealth, *Parliamentary Debates*, Senate, 2 September 1915, 6620–36.

<sup>85</sup> Income Tax Assessment Bill 1915 (Cth), cl 18.

<sup>86</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 1 September 1915, 6608.

moneys for the relief or maintenance of indigent persons: And any other institution which the Attorney-General may certify as a fit and proper institution to be registered under this Act.<sup>87</sup>

The *Charitable Institutions Management Act 1885* (Qld) provided that the Governor may declare as a ‘public charitable institution’:

any public institution which is maintained wholly or in part at the public expense for the reception, maintenance and care of indigent persons, or other persons requiring medical or other aid or comfort, not being a Hospital for the Insane or a Hospital established under the Statutes relating to Hospitals, and not being an Orphanage within the meaning of the *Orphanages Act 1879*.<sup>88</sup>

These provisions demonstrate that the phrase ‘public charitable institution’ was directed at those institutions that treated the sick or educated, relieved, or otherwise assisted the poor.

When the Bill was before the Senate for the second time on 9 September 1915, the only discussion was about whether the threshold minimum of £20 was too high.<sup>89</sup> It is interesting to note that the continuance of the £20 minimum not only protected the revenue but also restricted the concession to relatively wealthy taxpayers, unlike today where the threshold is \$2.<sup>90</sup> In all this discussion, there was no articulation of real policy analysis or evaluation although it does seem clear that donations to the traditional class of charities, relief of poverty, and assistance to the sick was the intended beneficiary of the concession.

The *Income Tax Assessment Act 1918* (Cth) continued the deduction but reduced the threshold to £5.<sup>91</sup> However, its passage through Parliament was also a difficult one. Chia and O’Connell note that, although it did not attract any comment in the committee deliberations, there were ‘multiple objections, which echoed earlier debates’ when it got to the House of Representatives.<sup>92</sup> Four issues were raised: first, that the £20 threshold was too high and therefore discriminated against poorer donors; second, that removing the threshold would be too large a cost to the revenue; third, that WWI had diverted moneys to patriotic funds and charities had suffered; finally, that the provision did not motivate donation and should be abolished altogether.<sup>93</sup> The House ultimately recommended that the provision be deleted.<sup>94</sup>

<sup>87</sup> *Charitable Institutions Act 1888* (Tas) s 2 (definition of ‘Charitable Institution’).

<sup>88</sup> *Charitable Institutions Management Act 1885* (Qld) s 2.

<sup>89</sup> Commonwealth, *Parliamentary Debates*, Senate, 9 September 1915, 6744–5.

<sup>90</sup> *Income Tax Assessment Act 1997* (Cth) s 30–15.

<sup>91</sup> *Income Tax Assessment Act 1918* (Cth) s 14(f)(iii).

<sup>92</sup> Chia and O’Connell, ‘Charitable Treatment?’, above n 3, 110.

<sup>93</sup> *Ibid* 110–1.

<sup>94</sup> *Ibid*.

At around this time, several Victorian newspapers reported concerns about the lack of public funding of various charities including hospitals.<sup>95</sup> One in particular noted that there was a general shortage of private benevolence from wealthy citizens.<sup>96</sup> The Secretary of the Charity Organisation Society was vocal in his condemnation of the deletion of the deduction, comparing Australia unfavourably to the United States (which had introduced a deduction):

Sir, — The House of Representatives has deleted from the Income Tax Assessment Bill the clause providing for deductions from gross income of gifts of £20 or over to charities. Contrast with this the attitude of the United States Legislature towards the same question ... It was realised that the proposal was a patriotic and a just one, and that, as one authority put it, ‘the Government can well afford such an investment of whatever it would lose in taxes thereby, and can easily recoup its losses by increased taxes on excess war profits, or increased rates of income tax on the income it selects as taxable income.’<sup>97</sup>

The United States of America had introduced an income tax in 1913. In 1917 it introduced an income tax deduction for gifts to charities at the same time increasing the income tax rates in order to finance its war effort.<sup>98</sup> The same argument, of motivating wealthy people to donate to charity, was given by politicians as the rationale.<sup>99</sup>

The Senate ultimately did not agree that the provision should be deleted and the Bill was sent back to the House of Representatives.<sup>100</sup> Once returned to the House there was further heated debate; however, this time the proponents of the deduction were successful, and the threshold was also reduced.<sup>101</sup> The main reason given for the continuation of the concession was that it motivated people to donate to charities.<sup>102</sup> There was, however, no empirical evidence for this, as demonstrated by the comments in 1922 of the Royal Commission on Taxation.

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<sup>95</sup> ‘Tax for Charities’ *The North Western Advocate and the Emu Bay Times* (Melbourne), 1 March 1918, 3; ‘Municipal Tax for Charities’, *Kilmore Advertiser* (Victoria), 20 April 1918, 2; ‘Grants to Charities. Government Action Criticised’, *The Age* (Melbourne, Victoria), 23 January 1918, 8.

<sup>96</sup> ‘Grants to Charities. Government Action Criticised’, above n 95.

<sup>97</sup> S Greig Smith, ‘Charities and Income Tax, Letter to the Editor of the Argus’, *The Argus* (Melbourne, Victoria), 28 May 1918, 5.

<sup>98</sup> Charles T Clotfelter, ‘Charitable Giving and Tax Policy in the US’ (Paper presented at Centre for Economic Policy Research Public Policy Conference on Altruism and Charitable Giving, Paris School of Economics, 11–12 May 2012) 40.

<sup>99</sup> *Ibid.*

<sup>100</sup> Chia and O’Connell, ‘Charitable Treatment?’, above n 3, 110–1.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

*C Royal Commission on Taxation Recommends the Abolition  
of Deductions for Donations*

In 1921, the Commonwealth government established a Royal Commission on Taxation to report on a number of issues relating to taxation, including the equitable distribution of the burden of taxation and the harmonisation of Commonwealth and state taxes.<sup>103</sup> The third report of the Royal Commission strongly recommended the abolition of the deduction for donations to charities. There were two reasons for this. First, the fact that, depending on the income tax rate of the donor, the taxpaying community was in effect paying part of the gift and second, that the Royal Commissioners did not have any evidence that the concession had stimulated private benevolence.<sup>104</sup>

Parliament ignored the recommendation of the Royal Commission. In 1922 Commonwealth land tax was modified<sup>105</sup> and Commonwealth income tax was consolidated and amended by the *Income Tax Assessment Act 1922* (Cth). The Act continued the deduction of £5 for each gift to ‘public charitable institutions’ in Australia.<sup>106</sup> Again, there was heated debate about the provision in the lower house, with some members of Parliament stating that the concession was really only relevant in wartime, but these objections were not successful.<sup>107</sup> This was a time when unemployment for unskilled men was significant,<sup>108</sup> although Australia was not experiencing financial depression. It may be that the majority in Parliament felt that by motivating donors with a tax deduction, donations would increase and charities generate greater benefits to the poor and disadvantaged.

The income tax legislation was again amended in 1927 and the deduction for gifts to public charitable institutions continued but with a lowering of the threshold to £1.<sup>109</sup> The deduction was also amended to include public universities and their colleges and also public memorials relating to WWI.<sup>110</sup>

<sup>103</sup> Commonwealth, Royal Commission on Taxation, *Royal Commission on Taxation Third Report* (1922).

<sup>104</sup> *Ibid* 162–3.

<sup>105</sup> *Land Tax Act 1922* (Cth).

<sup>106</sup> *Income Tax Assessment Act 1922* (Cth) s 23(1)(h)(ii); *Income Tax Assessment Act 1922* (Cth) s 14(1)(d) also continued the exemption of income of ‘religious, scientific, charitable or public educational institution[s]’ that was originally provided for in the *Income Tax Assessment Act 1915* (Cth) s 11(d).

<sup>107</sup> Chia and O’Connell, ‘Charitable Treatment?’, above n 3, 112.

<sup>108</sup> Colin Forster, ‘Unemployment and Minimum Wages in Australia, 1900–1930’ (1985) 45 *The Journal of Economic History* 383, 387–8.

<sup>109</sup> *Income Tax Assessment Act 1927* (Cth) s 14(c).

<sup>110</sup> *Ibid*.

But, as discussed below, the term ‘public charitable institution’ was intended to be defined narrowly,<sup>111</sup> so that the concession was clearly aimed at assisting those in poverty, necessitous circumstances or the sick. Various twists and turns in the historical development of the law of charity, including the views of the High Court and the Privy Council would ensure that the core concept of charity, (relief of poverty or of those in necessitous circumstances) would be enshrined in Australian legislation in respect of the tax deduction.

#### D 1920–1926: Australian Judicial Perspectives on Charitable Purpose

At the same time as Parliament debated whether or not to continue the deduction for charitable donations, the High Court had its first opportunity to consider the provision in the case of *Swinburne v Federal Commissioner of Taxation*.<sup>112</sup> This case concerned the issue of whether or not a gift of £1000 by Mr Swinburne to the Swinburne Technical College was deductible under s 18(1)(h)(iii) of the *Income Tax Assessment Act 1915–1918* as a gift in excess of £5 to a ‘public charitable institution’. The High Court held that this provision, both as a matter of community knowledge and also referring to the state legislation in effect at the time of its enactment, referred to charities in the ordinary sense. In other words, the provision was aimed at those organisations for the relief of people in necessitous or helpless circumstances.<sup>113</sup> The Court looked back at the legislation in effect at the time of the first enactment, discussed earlier in this article, as well as the list of entities that were specifically listed as being eligible for the deduction in the *Income Tax Assessment Act 1915–1918*, and held that Parliament clearly intended that the provision was limited to the ordinary or common view of charity.<sup>114</sup> It did not include charities in the broader technical legal sense established by the House of Lords in *Commissioners for Special Purposes of the Income Tax v Pemsel*, which extended the meaning of charity to the relief of poverty; advancement of religion; advancement of education; and other purposes beneficial to the community.<sup>115</sup> Similar reasoning was followed by the High Court in *Kelly v Municipal Council of Sydney*,<sup>116</sup> although that case dealt with exemption from local government rates and the provision was narrowly drafted to allow the exemption only for places of worship, hospitals, benevolent asylums or other buildings used ‘solely for charitable purposes’.<sup>117</sup>

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<sup>111</sup> Ibid. Section 14(c) defined ‘public charitable institution’ as ‘[A] public hospital, a public benevolent institution and includes a public fund established and maintained for the purpose of providing money for such institutions or for the relief of persons in necessitous circumstances’.

<sup>112</sup> (1920) 27 CLR 377 (‘*Swinburne*’).

<sup>113</sup> Ibid 384.

<sup>114</sup> Ibid 384–6.

<sup>115</sup> [1891] AC 531, 583 (Lord McNaghten) (‘*Pemsel’s Case*’).

<sup>116</sup> (1920) 28 CLR 203.

<sup>117</sup> Ibid, 207–8.

The question of the definition of ‘charitable’ and ‘charitable purpose’ in the context of a different type of tax, estate duty, again came before the High Court in 1923 in the case of *Chesterman v Federal Commissioner of Taxation*.<sup>118</sup> The *Estate Duty Assessment Act 1914* (Cth) contained an exemption from estate duty for organisations with a ‘charitable purpose’.<sup>119</sup> This is the earliest federal legislation to refer to charitable purpose, as it was enacted a year earlier than the federal income tax legislation, which also contained an exemption from income tax for ‘charitable institutions’.<sup>120</sup> The Court held that the term ‘charitable’ was limited to ‘the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief’.<sup>121</sup> A similar conclusion to that reached in *Swinburne*.<sup>122</sup> At this stage, Australian law was strong in the view that ‘charity’ attracted its popular meaning. In other words, relief of poverty, and not the extended meaning that the House of Lords had given it in *Pemsel’s Case*.

#### IV THE MODERN LEGAL DEFINITION OF CHARITABLE PURPOSE AND THE RISE OF THE PUBLIC BENEVOLENT INSTITUTION

##### *A Charitable Purpose*

The development of the law of charity in Australia did not, however, end with the High Court in *Chesterman*. In 1926, *Chesterman* was appealed to the Privy Council,<sup>123</sup> which held that ‘charitable’ had a wider technical legal definition than its ordinary meaning.<sup>124</sup> The Privy Council specifically adopted the four categories of charity suggested by Lord Macnaghten in *Pemsel’s Case*.<sup>125</sup> These are the relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community, not falling under any of the preceding heads.<sup>126</sup> The result of the appeal was that the estate duty exemption became available to a broad group of publicly beneficial organisations that fell within this wider legal meaning of charity.<sup>127</sup>

<sup>118</sup> (1923) 32 CLR 362 (*Chesterman*).

<sup>119</sup> *Estate Duty Assessment Act 1914* (Cth) s 8(5).

<sup>120</sup> *Income Tax Assessment Act 1915* (Cth) s 11.

<sup>121</sup> *Chesterman* (1923) 32 CLR 362, 384, (Isaacs J), citing *Pemsel’s Case* [1891] AC 531, 572 (Lord Herschell).

<sup>122</sup> (1920) 27 CLR 377.

<sup>123</sup> *Chesterman v Federal Commissioner of Taxation* [1926] AC 128.

<sup>124</sup> *Ibid*, 130–2.

<sup>125</sup> [1891] AC 531.

<sup>126</sup> *Ibid* 583. In 2004 the federal government enacted the *Extension of Charitable Purpose Act 2004* (Cth) which provides for certain specified purposes to be charitable. These are not-for-profit child care and rental accommodation under the national rental affordability scheme, *Extension of Charitable Purpose Act 2004* (Cth) ss 4–4A, as repealed by *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) s 43.

<sup>127</sup> [1926] AC 128.

The classification of charitable purpose into the four areas set out by Lord Macnaghten in *Pemsel's Case*<sup>128</sup> has been consistently used as a guideline in Australian judicial considerations.<sup>129</sup> Since 1 January 2014, Australia has had a federal statutory definition of charitable purposes;<sup>130</sup> however, the common law purposes continue to apply.<sup>131</sup> Furthermore, this statutory definition only applies at the federal level; while the common law, unless modified by statute, applies to all state and territory legislation.<sup>132</sup> In addition, in order for a NFP to be eligible for income tax exemption as a charity under ss 50-1 and 50-5 of the *Income Tax Assessment Act 1997* (Cth), it must be registered with the Australian Charities and Not-for-profits Commission<sup>133</sup> and also be endorsed by the Australian Taxation Office.<sup>134</sup>

The current legal definition of charity in Australia can be summarised as follows. First, it must have a charitable purpose, and this purpose must (i) satisfy the common law test as set out in *Pemsel's Case*<sup>135</sup> and subsequent case law; or, (ii) for federal purposes, fall within the statutory definition of charitable purpose. Under the common law there are other requirements for an organisation to attain charitable status. It must be not-for-profit.<sup>136</sup> In other words, no payment can be made to a charity's members other than for wages or allowances to employees, reimbursement of expenses, or payment for services.<sup>137</sup> This requirement also means that on a winding up any excess funds must be transferred to an entity with similar purposes.<sup>138</sup>

As well as requiring a charitable purpose, NFP entities that aim to qualify as charities must also be of public benefit.<sup>139</sup> In one sense, this means that the purpose(s) must

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<sup>128</sup> [1891] AC 531, 583.

<sup>129</sup> See *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204; *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455; *Commissioner of Taxation v Triton Foundation* (2005) 147 FCR 362, 368 (Kenny J).

<sup>130</sup> *Charities Act 2013* (Cth) s 12.

<sup>131</sup> *Ibid*; *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) sch 2, pt 4, item 7.

<sup>132</sup> John Vaughan-Williams, 'The Future of Charity Regulation in Australia: The Complexities of Change' (2016) 37 *Adelaide Law Review* 219, 223–4.

<sup>133</sup> *Income Tax Assessment Act 1997* (Cth) s 50-47.

<sup>134</sup> *Ibid* ss 50–100–10.

<sup>135</sup> [1891] AC 531.

<sup>136</sup> *Re Smith's Wills Trusts; Barclays Bank Ltd v Mercantile Bank Ltd* [1962] 1 WLR 763; O'Connell, 'The Tax Position of Charities in Australia', above n 1, 24.

<sup>137</sup> O'Connell, 'The Tax Position of Charities in Australia', above n 1, 24; Gino Evan Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [3.24]–[3.25].

<sup>138</sup> Australian Taxation Office, 'Income Tax and Fringe Benefits Tax: Charities', (Research Report TR 2011/4, 12 October 2011), [235].

<sup>139</sup> *Pemsel's Case* [1891] AC 531; *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159.

benefit society generally;<sup>140</sup> in another sense, this means that benefits it provides must be for the public or a section of the public, as opposed to only benefitting family members or a group defined through a contractual relationship.<sup>141</sup> In respect of public benefit in the first sense, there must be some actual public benefit resulting from the entity's objectives. This benefit can, however, extend beyond material benefit to other forms including social, mental and spiritual.<sup>142</sup> In *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation*,<sup>143</sup> the High Court held that the production of law reports was a matter that was beneficial to the community in a charitable sense.<sup>144</sup>

With respect to charitable public benefit in the second sense, as early as the late 18<sup>th</sup> century the English courts considered that for a gift to be charitable it must be of general public benefit.<sup>145</sup> Lord Simonds in *Williams' Trustees v Inland Revenue Commissioners*<sup>146</sup> said that 'a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals'.<sup>147</sup> In *Re Compton*,<sup>148</sup> Lord Greene decided that a trust for the education of descendants of a named person was really a family trust and not charitable because it was not for the benefit of the community.<sup>149</sup>

The case law has, however, accepted that a NFP does not have to benefit the entire public and that a 'sufficient section of the public' will suffice.<sup>150</sup> The rationale is that not all charities are for the benefit of the entire community. Charitable purposes are often motivated by the need to assist a section of the community with special needs or disadvantages.<sup>151</sup> Finally, a NFP is not a charity if its aims are contrary to

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<sup>140</sup> Dal Pont, above n 137, [3.3].

<sup>141</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

<sup>142</sup> Dal Pont, above n 137, [3.37].

<sup>143</sup> (1971) 125 CLR 659.

<sup>144</sup> *Ibid* 669.

<sup>145</sup> *Jones v Williams* (1767) 2 Amb 651, 652; 27 ER 422, 423.

<sup>146</sup> [1947] AC 447.

<sup>147</sup> *Ibid* 457.

<sup>148</sup> *Re Compton; Powell v Compton* [1945] Ch 123.

<sup>149</sup> *Ibid* 136.

<sup>150</sup> *Dingle v Turner* [1972] AC 601, 623–4 (Lord Cross); *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

<sup>151</sup> *Hall v The Urban Sanitary Authority of the Borough of Derby* (1885) 16 QBD 163, 171; Dal Pont, above n 137, [3.5]–[3.6]; Debra Morris 'The Long and Winding Road to Reforming the Public Benefit Test for Charity: A Worthwhile Trip or "Is Your Journey Really Necessary?"' in Kerry O'Halloran and Myles McGregor-Lowndes (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar Publishing, 2010) 103, 107–8.

public policy,<sup>152</sup> unlawful or for a lawful purpose that is to be carried out by unlawful means.<sup>153</sup>

In 2013, the federal government enacted the *Charities Act 2013* (Cth) ('*Charities Act*'), which took effect from 1 January 2014 and applies to all federal legislation. Under the *Charities Act*, an entity is 'charitable' if it is a 'charity' within this defined term.<sup>154</sup> This means it must satisfy four requirements: first, it is a NFP entity; second, all of the entity's purposes are *charitable* and for the *public benefit* (or are ancillary or incidental to *and* in furtherance or in aid of such purposes); third, none of the entity's purposes are disqualifying purposes (such as illegal, or against public policy); finally, the entity is not an individual, political party or government entity.<sup>155</sup>

In general terms the *Charities Act* follows the approach of the common law in that it preserves the NFP requirement,<sup>156</sup> preserves the charitable purpose and public benefit requirements,<sup>157</sup> and determines an entity's purpose from its governing rules, activities and other relevant matters.<sup>158</sup> Charitable purposes are defined in s 12, and expanded upon in ss 14, 15, 16 and 17 of the *Charities Act*. These purposes include the *Pemsel's Case*<sup>159</sup> categories.

#### B 1926–Present: *The Emergence of the Public Benevolent Institution*

In 1926, Isaacs J expressed criticism of the Privy Council's interpretation of the word 'charitable':

It is obvious to me that in the interests of all concerned the meaning of Parliament should be legislatively declared beyond doubt ... Parliament by a few words declares whether by 'charitable' it means to use that word in its ordinary modern sense, or in the technical Elizabethan sense that some quaint Chancery decisions in connection with trusts have affixed to it as its primary legal meaning, extending

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<sup>152</sup> *Perpetual Trustee Co (Ltd) v Robins* (1967) 85 WN (Pt 1) (NSW) 403, 411; see also *Thrupp v Collett (No.1)* (1858) 26 Beav 125, 53 ER 844; *Re MacDuff*; *MacDuff v MacDuff* (1896) 2 Ch 451, 459–60; *Re Pieper (deceased)*; *Trustees Executors & Agency Co Ltd v A-G (Vic)* [1951] VLR 42.

<sup>153</sup> *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382, 395.

<sup>154</sup> *Charities Act* s 5 (definition of 'charity').

<sup>155</sup> *Ibid* ss 5 (definition of 'charity'), 6, 11, 12 (definition of 'charitable purpose'); see also Australian Charities and Not-for-profits Commission, *Who Can Apply To Be Registered?*, Australian Charities and Not-for-profits Commission Website <<http://www.acnc.gov.au/>>.

<sup>156</sup> *Charities Act* s 5 (definition of 'charity').

<sup>157</sup> *Ibid* ss 5 (definition of 'charity'), 12 (definition of 'charitable purpose').

<sup>158</sup> *Ibid* s 5 (definition of 'charity').

<sup>159</sup> [1891] AC 531.

to objects which include, as I have said, purposes quite outside what any ordinary person would understand by charitable.<sup>160</sup>

In 1927, the federal income tax legislation was amended to alter the range of eligible donees to include ‘public charitable institutions’ in Australia, public universities in Australia or to affiliated colleges, and public funds to establish and maintain funds for public memorials relating to WWI.<sup>161</sup> The Act defined ‘public charitable institution’ to mean a public hospital, a public benevolent institution and a public fund established and maintained for the purpose of providing money for such institutions or for the relief of persons in necessitous circumstances.<sup>162</sup> The legislature also deleted the word ‘charitable’ from the *Estate Duty Act Assessment Act 1914* (Cth) and included ‘Public Benevolent Institution’.<sup>163</sup> The response of the federal legislature to *Chesterman*<sup>164</sup> was therefore to introduce the PBI, a more limited category of exempt entity that was more akin to the ordinary meaning of charitable rather than its broader legal meaning.<sup>165</sup>

The term PBI is unique to Australian law. In 1927, at the time of its introduction into the income tax legislation, the Treasurer, Dr Earle Page, asserted into the House of Representatives that the term “charitable institution” is being defined in order to remove any possible difficulty which might arise in litigation through what is apparently regarded by the court as a somewhat obscure provision’.<sup>166</sup> It seems that he was implicitly referring to *Chesterman*.<sup>167</sup>

The tax deduction provision generated some debate in the House of Representatives in 1927 about where to draw the line in allowing deductions for donations. Arthur Rodgers argued that there should be an upper limit to donations.<sup>168</sup> Matthew Charlton made the argument that donations should only be allowed to organisations that the ordinary community would recognise as being for the relief of poverty when he said ‘[i]t never enters the mind of any man or woman in the community, desirous of making a donation to any educational or similar institution, that he or she will escape tax by such an action’.<sup>169</sup> He also pointed out that there needed to be a limit to the definition of eligible donee ‘[i]f we gave the exemption to donations

<sup>160</sup> *Young Men’s Christian Association of Melbourne v Federal Commissioner of Taxation* (1926) 37 CLR 351, 359.

<sup>161</sup> *Income Tax Assessment Act 1927* (Cth) s 14(c).

<sup>162</sup> *Ibid.*

<sup>163</sup> *Estate Duty Assessment Act 1928* (Cth) s 5(b).

<sup>164</sup> [1926] AC 128.

<sup>165</sup> Dal Pont, above n 137, [2.28]; see also Michael Chesterman, ‘Foundations of Charity Law in the New Welfare State’ (1999) 62 *Modern Law Review* 333, 340–1.

<sup>166</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1927, 1395.

<sup>167</sup> [1926] AC 128.

<sup>168</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 1927, 2164.

<sup>169</sup> *Ibid* 2169.

to schools the principle would go on extending and extending'.<sup>170</sup> The result was that the concession for public universities and their colleges remained but was not extended to other educational institutions, and the term PBI also remained (it was not specifically debated). Clearly the parliamentarians were concerned with protecting the revenue, either through limiting the total amount a donor could deduct or the types of entities that were eligible for deductions. They also acknowledged that most people considered relief of poverty or assistance to those in necessitous circumstances as the core requirement of a charity.

### *C Judicial Consideration of the Meaning of Public Benevolent Institution*

Now that the legislature had included a new term, PBI, but without a statutory definition of this term, it became critical for the sake of clarity and certainty in the law that this phrase was considered by the Australian judiciary. It did not take long. In 1931, in the leading case *Perpetual Trustee Co Ltd v Commissioner of Taxation*<sup>171</sup> the High Court concluded that a NFP is 'benevolent' if it is organised, promoted or conducted for the relief of poverty or distress (sickness, disability, destitution, suffering, misfortune or helplessness).<sup>172</sup> It also stated that a PBI must have benevolent relief as its main purpose, and that the relief a PBI provides must be provided to people in need.<sup>173</sup> In other words, the entity's benevolence must be directed to people in need and not the broader general community, although subsequent case law has determined that this relief does not have to be 'direct'.<sup>174</sup>

In the later case of *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*,<sup>175</sup> Priestly JA said:

To me, the word 'benevolent' in the composite phrase 'public benevolent institution' carries with it the idea of benevolence exercised towards persons in need of benevolence, however manifested. Benevolence in this sense seems to me to be quite a different concept from benevolence exercised at large and for the benefit of the community as a whole even if such benevolence results in relief of or reduction in poverty and distress. Thus it seems to me that 'public benevolent institution' includes an institution which in a public way conducts itself benevolently towards those who are recognisably in need of benevolence but excludes an institution, which although concerned, in an abstract sense, with the relief of

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<sup>170</sup> Ibid.

<sup>171</sup> (1931) 45 CLR 224.

<sup>172</sup> Ibid 232–4, 236.

<sup>173</sup> Ibid 241–2.

<sup>174</sup> *Commissioner of Taxation v Hunger Project Australia* (2014) 221 FCR 302; Fiona Martin and Ian Murray, 'The "Direct" Requirement for a Public Benevolent Institution: Does the Hunger Project Case Confirm it Never Applied?' (2013) 15 *Journal of Australian Taxation* 161; Ian Murray and Fiona Martin, 'The Blossoming of Public Benevolent Institutions: From "Direct" Providers to Global Networks' (2015) *Alternative Law Journal* 36.

<sup>175</sup> (1985) 1 NSWLR 567.

poverty and distress, manifests that concern by promotion of social welfare in the community generally.<sup>176</sup>

The courts have held that PBI is a composite phrase and takes its ordinary meaning<sup>177</sup> but, when doing this, have also considered the meaning of each of the words. As Priestley JA points out, benevolence is an integral aspect of a PBI and a PBI's work must be towards persons in need of benevolence.

A PBI must also meet the legal requirements of being an 'institution'. There is no technical legal definition of the term 'institution' and it also takes its ordinary meaning. A mere trust or a fund is not an institution.<sup>178</sup> Therefore where an entity merely manages trust property that is applied for a charitable purpose, it is not an institution. It must also be 'public' and the main requirement is the extensiveness of the class of individuals that the entity benefits.<sup>179</sup>

Nearly 20 years ago, Michael Chesterman pointed out that, through the introduction of the PBI, the Australian legislature enshrined the idea that charitable status should not be the sole way of gaining tax privileges for philanthropic organisations.<sup>180</sup> He argued that the PBI category is more closely aligned to the popular meaning of 'charitable' and also the minority view of the House of Lords in *Pemsel's Case* where two out of the six Law Lords dissented from the majority view and stated that charitable should essentially be confined to relief of poverty and those in necessitous circumstances.<sup>181</sup> For example, Lord Halsbury LC in his dissenting judgment said that 'the real ordinary use of the word "charitable" as distinguished from any technicalities whatsoever, always does involve the relief of poverty.'<sup>182</sup>

Lord Bramwell, the other dissenting judge in *Pemsel's Case*, also commented on the fiscal issues behind granting an exemption from income tax to charities and this particular relevance to the poor when he said:

What was the intention, and why the exemption is made in the Act, is of course very much guesswork. But something like a reasonable ground may be suggested in this ... to tax the charity is to tax the poor, or take from the poor who would otherwise get the amount of the tax ... It is to be remembered ... that to exempt any subject of taxation from a tax is to add to the burthen on taxpayers generally, and a very large exemption must be made ... for the benefit of so-called charities, many of which are simply mischievous.<sup>183</sup>

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<sup>176</sup> Ibid 575.

<sup>177</sup> *Public Trustee (NSW) v Federal Commissioner of Taxation* (1934) 51 CLR 75, 103.

<sup>178</sup> *Stratton v Simpson* (1970) 125 CLR 138, 158.

<sup>179</sup> *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388, 397–8.

<sup>180</sup> Chesterman, above n 165, 342.

<sup>181</sup> [1891] AC 531, 552 (Lord Halsbury LC), 564–6 (Lord Bramwell).

<sup>182</sup> Ibid 552.

<sup>183</sup> Ibid 565–6.

Lord Bramwell is pointing out that if a concession is granted to one group of taxpayers then it has to be made up by another. This theme has also been demonstrated through some of the political debates around exempting provisions that occurred in Australia at a similar time.

The PBI therefore follows from the common or popular meaning of charity by focussing on the needs of the poor and disadvantaged<sup>184</sup> whilst also being a means of reducing fiscal concessions. In fact, the Privy Council in *The Council of the Municipality of Ashfield v Joyce*<sup>185</sup> confirmed the first point when it said ‘it is also hard to resist the conclusion that “public charity” in its popular sense would be almost, if not wholly, contained in the adjoining expression “public benevolent institution”.’<sup>186</sup>

## V FUTURE DIRECTIONS AND REFORMS

Not all charities are eligible for ‘Deductible Gift Recipient’ (‘DGR’) status. In fact, only about 38 per cent of charities are currently DGRs.<sup>187</sup> PBIs are the largest group of charities that are eligible for DGR status.<sup>188</sup> We have seen that the PBI was developed by the legislature to ensure that the tax concession of deductibility of donations was not available to all charities. There are several explanations for this, although the paramount one seems to be the protection of the revenue. The donation tax concession is estimated by Treasury to cost the Federal revenue over \$1.2 billion per year.<sup>189</sup> An additional reason that flows from some of the parliamentary debates and judicial statements is that PBIs are closely aligned to the traditional view that charities are for the relief of poverty and therefore should have special privileges.

The modern approach of government is, however, arguably different. As O’Connell points out, it seems unlikely that the federal government intends to limit the amount of the tax deductible donation to PBIs and other eligible NFPs: ‘Over the last 10 years, the federal government has been making it easier for taxpayers to undertake philanthropy, in particular by encouraging the growth of private funds (now called private ancillary funds) that can make distributions to endorsed entities.’<sup>190</sup>

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<sup>184</sup> Chesterman, above n 165, 342.

<sup>185</sup> [1978] AC 122.

<sup>186</sup> *Ibid* 137.

<sup>187</sup> Natasha Cortis et al, ‘Australian Charities Report 2015’ (Report, Centre for Social Impact and Social Policy Research Centre, University of New South Wales, Australia) 49–50.

<sup>188</sup> *Ibid*.

<sup>189</sup> The Treasury, ‘Tax Expenditures Statement 2015’, above n 2, 26–7. No amount is estimated for revenue foregone in respect of the income tax exemption.

<sup>190</sup> Ann O’Connell, ‘Charitable Giving and Tax Reform: the Challenges in Regulating the Not-For-Profit Sector’, *The Conversation* (online), 7 May 2012 <<https://theconversation.com/charitable-giving-and-tax-reform-the-challenges-in-regulating-the-not-for-profit-sector-6500>>.

At times there have been calls for the restriction of the income tax exemption for charities.<sup>191</sup> Some argue that this concession should be granted more sparingly, and in some jurisdictions, the income from business activities of charities that is not connected with their main charitable purposes is taxed.<sup>192</sup> However, others argue that the concession is a subsidy to finance the production of public and quasi-public goods that would otherwise have been produced by the government.<sup>193</sup> An alternative, but still strong argument is that the income tax exemption makes up for the fact that charities have substantial difficulties in raising capital.<sup>194</sup> Although the previous Labor federal government did recommend a modified form of unrelated business income tax in 2011,<sup>195</sup> the current government subsequently rejected this proposal.<sup>196</sup>

## VI CONCLUSION

The historical development of the income tax deduction for gifts to certain types of charitable organisations arose out of the exemption from income and land tax of charitable institutions, which had begun in England and was adopted in the Australian colonies. However, as can be seen from the outline of the parliamentary debates in Part II of this article, no real discussion of the policy behind these exemptions was made by the early colonial legislature.

An examination of the early historical legislation demonstrates that exempting organisations from income tax and enabling a deduction for donations were often influenced by economic factors. When colonies could no longer sell Crown land

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<sup>191</sup> The Treasury, 'Better Targeting of Not-for-Profit Tax Concessions', (Consultation Paper, The Treasury, 27 May 2011).

<sup>192</sup> For example in the United States there is a federal government tax on the unrelated business income of charities, the unrelated business income tax ('UBIT'), IRC §§ 511–3.

<sup>193</sup> Australia's Future Tax System Review Panel, 'Australia's Future Tax System: Report to the Treasurer, Final Report' (pt 2 vol 1, The Treasury, 2010) 206; Estelle James and Susan Rose-Ackerman, *The Nonprofit Enterprise in Market Economics* (Routledge, 2011) 20, 29–31, 84–9; Nina J Crimm, 'An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation' (1998) 50 *Florida Law Review* 419, 436–9.

<sup>194</sup> Henry Hansmann, 'The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation' (1981) 91 (1) *Yale Law Journal* 54, 71–5; Cf Michael Fricke, 'The Case Against Income Tax Exemption for Nonprofits' (2016) 89 *St John's Law Review* 1129.

<sup>195</sup> Commonwealth, '2011–2012 Australian Government Budget — Budget Paper No. 2' (Budget Measures, Paper No. 2, Department of Finance and Deregulation (Cth), 10 May 2011) 36; Bill Shorten, 'Making it Easier for Charities to Help Those Who Need It' (Media Release no.77/2011, 10 May 2011).

<sup>196</sup> Anna Lewis and Bill d'Apice, 'The Unrelated Business Income Tax is (Finally!) Dead' on Makinson d'Apice Lawyers, *Charities and Not-For-Profits Law in Australia* (29 May 2014) <<http://www.charitiesnfplaw.com.au/2014/05/29/the-unrelated-business-income-tax-is-finally-dead/>>.

or were under economic pressure due to depression or impending war they turned to alternative forms of revenue, even though these were politically unpalatable. However, as part of this tax reform they considered that charities or forms of NFPs should generally be exempted from land tax and income tax even though this might mean that revenue was lost. The influence of Britain on the colonies was strong and it is likely that the general exemption in the earliest English income tax legislation of the income of charities was felt to be something that colonial governments should follow.

The exemption from taxes for charities was not, however, always adopted as comprehensively by the colonies, as is seen by the South Australian legislation of 1884,<sup>197</sup> which exempted from income tax only specific types of NFPs and not all charities.

With regard to the deduction for gifts, the private philanthropic beliefs of influential politicians — that allowing a deduction would motivate donations — comes across strongly as a factor in favour of the deduction, even though the Royal Commission on Taxation did not agree with this. It also seems from the parliamentary debates that the public good undertaken by charities was valued and that it should be encouraged. The discussion in this article, particularly around the development of the PBI, demonstrates that revenue considerations were extremely important. Many politicians talked about the need to ensure that the revenue was protected, and that revenue foregone needed to be balanced against the good that giving to charities might cause.

Although the exemption from income tax has been applied to charitable organisations, which after *Chesterman* is a broad group, this article demonstrates that protection of the revenue clearly came out on top when it came to allowing a tax deduction. The PBI is a narrower version of the concept of charity than the technical legal version; even today, not all charities are eligible for tax deductibility of donations, whilst all PBIs are.

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<sup>197</sup> *Taxation Act 1884 (SA)*.



**AN EFFECTIVE PRIORITY FOR THE  
COMMISSIONER OF TAXATION IN LIQUIDATION:  
*BELL GROUP NV (IN LIQ) v WESTERN AUSTRALIA*  
(2016) 331 ALR 408**

I INTRODUCTION

In *Bell Group NV (in liq) v Western Australia*,<sup>1</sup> the High Court<sup>2</sup> unanimously held that the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (*'Bell Act'*) was invalid in its entirety under s 109 of the *Constitution*. The Court found that the *Bell Act* was inconsistent with Commonwealth tax legislation<sup>3</sup> that ascribes certain characteristics to Commonwealth tax debts,<sup>4</sup> and that created obligations owing to the Commissioner as a creditor of the Bell Group entities.<sup>5</sup>

The issues ultimately decided by the High Court in *Bell* were relatively confined. That said, in determining that a s 109 inconsistency existed, the Court provided a useful and instructive analysis of the meaning, operation and effect of the relevant provisions of the *Tax Acts*.

This case note focuses on the High Court's interpretation of one of these provisions, namely s 215 of the *ITAA 1936* (now s 260–45 of sch 1 to the *TAA*). It concludes that the High Court's findings as to the obligations owing to the Commissioner by a liquidator under s 215 support a view that an effective or 'quasi' priority exists in favour of the Commissioner in collecting tax debts vis-à-vis other unsecured creditors in liquidations.

In this case note, a reference to former ss 177, 208–9 and 215 of the *ITAA 1936* should be read equally as a reference to their current *TAA* equivalents.<sup>6</sup>

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\* BCom (Acc), LLB (Hons, 1<sup>st</sup> class).

<sup>1</sup> (2016) 331 ALR 408 (*'Bell'*).

<sup>2</sup> French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ, Gageler J in a separate (concurring) judgment.

<sup>3</sup> *Income Tax Assessment Act 1936* (Cth) (*'ITAA 1936'*) and *Taxation Administration Act 1953* (Cth) (*'TAA'*) (collectively *'Tax Acts'*).

<sup>4</sup> *Bell* (2016) 331 ALR 408, 424 [60].

<sup>5</sup> *Ibid* 426 [66].

<sup>6</sup> Sections 177 and 208–9 of the *ITAA 1936* are now enacted in substantially similar terms in *TAA* sch 1 ss 350–10(1) item 2 and 255-5 respectively. *ITAA 1936* s 177 applies to assessments issued on or before 1 July 2015 and *TAA* sch 1 s 350–10(1) item 2

## II FACTS IN *BELL*

The 2013 settlement of the ‘mega-litigation’<sup>7</sup> involving the Bell Group<sup>8</sup> resulted in some \$1.7 billion being made available to the liquidators of the Group for distribution to its creditors.<sup>9</sup> Despite hopes that the creditors would ‘cooperate to bring about a swift and equitable distribution’,<sup>10</sup> further litigation as to the distribution of the proceeds ensued. It was in this context that the Western Australian Parliament — Western Australia being a creditor of Bell Group entities and having provided substantial funding for the liquidator’s recovery proceedings — enacted the *Bell Act*.

The *Bell Act* established a state-based regime for dissolving and administering the property of the Bell Group and a number of its subsidiaries.<sup>11</sup> The intended practical effect of the *Bell Act* was to establish a statutory authority<sup>12</sup> in which all property of the relevant Bell Group companies would vest.<sup>13</sup> Western Australia (through the Authority and the Governor) could then determine at its ‘absolute discretion’ who was paid an amount from the property vested in the Authority.<sup>14</sup> The Authority had absolute discretion to determine the existence of liabilities of the Bell Group companies and their quantum.<sup>15</sup> Any property not distributed would vest in Western Australia.<sup>16</sup>

Unsurprisingly, the plaintiffs in the High Court proceedings were substantial creditors of Bell Group companies. The plaintiffs alleged that the *Bell Act* was invalid under

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applies to assessments issued after 1 July 2015. *ITAA 1936* ss 208–9 apply to amounts due and payable on or before 1 July 2000 and *TAA* sch 1 s 255–5 applies to tax debts due and payable after 1 July 2000. Section 215 of the *ITAA 1936* is now enacted in substantially similar terms in *TAA* sch 1 s 260–45. *ITAA 1936* s 215 applies in respect of assessments issued by the Commissioner for periods before the 2007 income year. *TAA* sch 1 s 260–45 applies to assessments issued in respect of the 2007 income year onwards.

<sup>7</sup> Dan Butler, ‘Equitable Remedies for Participation in a Breach of Directors’ Fiduciary Duties: The Mega-Litigation in *Bell v Westpac*’ (2013) 31 *Company and Securities Law Journal* 307, 307.

<sup>8</sup> *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1. See also *Bell Act* sch 2 for a list of proceedings relating to the recovery of funds by the liquidators of the Bell Group.

<sup>9</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 3167 (Michael Nahan, Treasurer).

<sup>10</sup> *Ibid.*

<sup>11</sup> See *Bell Act* sch 1 for a list of the 35 relevant subsidiaries of The Bell Group Ltd.

<sup>12</sup> Called the WA Bell Companies Administrator Authority (‘Authority’): *Bell Act* s 7.

<sup>13</sup> *Bell Act* s 22.

<sup>14</sup> *Ibid* ss 37–44.

<sup>15</sup> *Ibid* s 37.

<sup>16</sup> *Ibid* ss 46(2), 48.

s 109 of the *Constitution* due to its inconsistency with the *Tax Acts, Corporations Act 2001* (Cth) ('CA') and s 39(2) of the *Judiciary Act 1903* (Cth).

The Attorneys-General of each of the other states intervened (generally in support of the defendant), as did the Commissioner of Taxation and the Attorney-General of the Commonwealth (generally in support of the plaintiffs). In this regard, the Commonwealth was a creditor in respect of unpaid tax liabilities amounting to approximately \$466 million.

### III DECISION

The majority of the High Court found that the *Bell Act*<sup>17</sup> had the effect of 'altering, impairing or detracting' from ss 177, 208–9, 215 and 254 of the *ITAA 1936* and therefore that the *Bell Act* was invalid under s 109 of the *Constitution*.<sup>18</sup> The broad content and operation of these provisions is set out below in considering the High Court's reasoning.

Justice Gageler reached the same result but on a 'narrower basis'.<sup>19</sup> His Honour found that an inconsistency existed between the *Bell Act* and ss 215 and 254 of the *ITAA 1936* and that this inconsistency was itself sufficient to conclude that the *Bell Act* was invalid.<sup>20</sup>

The nature of the *Bell Act* as a 'package of interrelated provisions ... intended to operate fully and completely ... to provide a comprehensive regime for dealing with all the relevant property'<sup>21</sup> of the Bell Group meant that the offending provisions could not be severed or read down. Without the offending provisions, the scheme could not possibly have operated as intended<sup>22</sup> and the *Bell Act* was invalid in its entirety.<sup>23</sup>

As the Court found inconsistency with the *Tax Acts*, it was unnecessary to consider the other challenges to validity.<sup>24</sup>

The High Court's reasoning is summarised below.

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<sup>17</sup> In particular ss 9, 16, 22, 25, 35, 37–9, 42–4 and 73–4: *Bell* (2016) 331 ALR 408, 424 [60].

<sup>18</sup> *Bell* (2016) 331 ALR 408, 424 [60], 426 [66].

<sup>19</sup> *Ibid* 430 [79].

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid* 426 [69].

<sup>22</sup> *Ibid* (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 431 [81] (Gageler J).

<sup>23</sup> *Ibid* 427 [73].

<sup>24</sup> *Ibid* 427 [75] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 430 [78] (Gageler J).

### A *The Majority*

In finding that there was an inconsistency between the *Bell Act* and the *Tax Acts*, the majority of the High Court contemplated two broad aspects of the operation of the *Tax Acts*.

#### 1 *Characteristics of Commonwealth Tax Debts*

The majority found that ss 177 and 208–9 of the *ITAA 1936* ascribe certain characteristics to Commonwealth tax debts in relation to their existence, quantification, enforceability and recovery.<sup>25</sup> Under s 177, the production of a notice of assessment to a taxpayer is conclusive evidence that the assessment of a tax liability was made for the correct amount. Sections 208–9 complement s 177 by providing that such a debt is due to the Commonwealth and payable to the Commissioner, with the Commissioner able to recover the debt by suing in a court of competent jurisdiction.

According to the majority in *Bell*, the operation of ss 177 and 208–9 resulted in the accrual of rights in the Commonwealth to payment as a creditor of Bell Group companies.<sup>26</sup> The *Bell Act* purported to override these rights by, in effect, giving Western Australia a discretion to determine the existence of a liability of a Bell Group company to the Commissioner, the quantum of any such liability, whether to make a payment in respect of any liability and the amount to be paid.<sup>27</sup> It conferred on the Governor a power to extinguish tax debts by making no determination in respect of them.<sup>28</sup> Further, the *Bell Act* prohibited the Commissioner from bringing or continuing any action, claim or proceeding against any Bell Group company in relation to the tax liabilities.<sup>29</sup>

It followed that the *Bell Act* purported to ‘strip’ Commonwealth tax debts of the characteristics ascribed to them by ss 177 and 208–9 of the *ITAA 1936*.<sup>30</sup> In overriding the Commonwealth’s accrued rights as a creditor, the Commonwealth and the Commissioner were ‘reduced to the position of ... mere supplicant[s] for the exercise of a favourable discretion’.<sup>31</sup> This engaged s 109 of the *Constitution*.

#### 2 *Liquidator’s Obligations to the Commissioner*

The majority found that ss 215 and 254 of the *ITAA 1936* gave rise to obligations of the liquidators of Bell Group companies in favour of the Commissioner.<sup>32</sup>

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<sup>25</sup> Ibid 424 [60].

<sup>26</sup> Ibid 423 [55].

<sup>27</sup> Ibid 423 [57].

<sup>28</sup> Ibid 424.

<sup>29</sup> Ibid 424 [58].

<sup>30</sup> Ibid 424 [60].

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 424–5 [62].

Section 215 broadly requires a liquidator not to part with any assets of a company until notified by the Commissioner of the amount sufficient to provide for pre-liquidation tax debts payable by the company. The liquidator must then set aside certain assets out of those available to pay ordinary debts to meet the taxation liability. The liquidator is liable to pay the tax to the extent of the amount set aside.

Section 254 applies to post-liquidation tax debts. It broadly requires a liquidator to retain, out of money coming to him or her as a liquidator, amounts sufficient to pay tax that is or will become due in respect of income, profits or gains derived by him or her as a liquidator. Again, the liquidator is liable to pay the tax to the extent of the amount required to be retained.

As the *Bell Act* purported to transfer and vest the property of Bell Group companies in the Authority, the majority found that the liquidator was prevented from complying with his obligations under ss 215 and 254.<sup>33</sup> The obligations owed to the Commissioner were substituted for ‘a mere expectancy or possibility of the payment of an uncertain amount’.<sup>34</sup>

The alteration, impairment or detraction from the operation of ss 215 and 254 of the *ITAA* by the *Bell Act* was significant so as to engage s 109 of the *Constitution*.<sup>35</sup>

#### B *Justice Gageler*

Whilst the majority tended to focus on the impossibility for liquidators to fulfil their ss 215 and 254 retention obligations, Gageler J also attached importance to the purpose and practical operation of ss 215 and 254 in protecting the Commonwealth’s revenue. In so doing, his Honour considered the proper characterisation, operation and effect of ss 215 and 254 of the *ITAA 1936*.

A core tenet of WA’s argument was that s 215 is no more than a ‘machinery provision’ imposing a setting aside obligation to ensure the availability of funds that *might* ultimately be required to be paid the Commonwealth.<sup>36</sup> The actual amount of the distribution, contended WA, is by s 215 to be determined in accordance with whatever law governs winding up.<sup>37</sup> In this case, the relevant law was the *Bell Act*.

Justice Gageler disagreed, holding that s 215 is more than a mere machinery provision to protect the Commonwealth’s revenue. Critical to this finding was the manner in which the liquidator’s setting aside obligation is calculated under s 215. The value of the assets required to be set aside (and therefore the extent of the liquidator’s payment obligation), quite independently of the operation of any other law, equates

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<sup>33</sup> Ibid 425 [65].

<sup>34</sup> Ibid 426 [66].

<sup>35</sup> Ibid.

<sup>36</sup> Ibid 433 [85].

<sup>37</sup> Ibid.

to the amount that would ordinarily be required to be paid to the Commissioner as an unsecured creditor under s 555 of the *CA*. It also equates to the amount that would have been required to be paid under the former corporations law of the states and territories. In Gageler J's view, this coincidence was part of the design of s 215 in imposing a payment obligation as a separate and distinct law of the Commonwealth.<sup>38</sup> The *Bell Act*, in removing from the liquidator's control the property that formed the subject matter of the liquidator's retention obligation, 'denude[d] s 215 of its relevant practical operation and in so doing flout[ed] its protective purpose'.<sup>39</sup> This gave rise to a s 109 inconsistency.<sup>40</sup>

Western Australia's arguments in respect of s 254 of the *ITAA 1936* mirrored its arguments about s 215, and suffered the same fate.

#### IV DISCUSSION

Since the enactment of the *Crown Debts (Priority) Act 1981* (Cth), the Commonwealth has not enjoyed general priority for income tax debts in insolvency. The Commissioner is entitled only to the same proportionate dividend as other ordinary unsecured creditors.<sup>41</sup>

Notwithstanding the lack of express priority, the Commissioner can still obtain certain advantages not afforded to other unsecured creditors.<sup>42</sup> These advantages arise by virtue of the Commissioner's enhanced ability to collect debts through administrative procedures not available to private creditors — a form of 'de facto tax priority'.<sup>43</sup> The retention and setting aside obligation imposed on liquidators in respect of tax liabilities under s 215 of the *ITAA 1936* may be seen as conferring such a de facto priority.<sup>44</sup>

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<sup>38</sup> Ibid 433–4 [89].

<sup>39</sup> Ibid 434 [93].

<sup>40</sup> Justice Gageler also added that s 29 of the *Bell Act*, which prevented the liquidator from performing any functions as a liquidator, would have prevented the liquidator's compliance with his s 215 obligations, giving rise to a s 109 inconsistency in any event: *Bell* (2016) 331 ALR 408, 434 [92]–[93].

<sup>41</sup> *CA* s 555.

<sup>42</sup> Sylvia Villios, 'The Commissioner's Power to Issue Creditor's Statutory Demands: Implications for Corporate Rescue Post Insolvency' (2014) 43 *Australian Tax Review* 187, 194.

<sup>43</sup> Ibid.

<sup>44</sup> Other examples include the imposition of personal liability on directors for unpaid tax liabilities under *TAA* sch 1 s 18-125 and the Commissioner issuing notices to third party creditors of the debtor company under *TAA* sch 1 s 260-5 (although this latter power is only operative *before* a liquidator is appointed: *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346).

It is important to bear in mind that the broader collection powers conferred on the Commissioner (including by the predecessors to s 215) were enacted during a time in which the Crown maintained priority over unsecured creditors.<sup>45</sup> While the Crown maintained priority, the granting and exercise of powers to collect tax in a particular manner were ‘not of great practical concern’ in insolvency.<sup>46</sup> However, in line with the policy shift requiring the Commissioner to operate on an equal footing with other stakeholders, the question arises as to whether the Commissioner’s broader administrative powers in the context of insolvency elevate the Commonwealth above the position of ordinary creditors.<sup>47</sup> The decision of the High Court in *Bell* goes some way to answering this question, particularly in the context of s 215 of the *ITAA 1936*. In the author’s view, *Bell* strengthens the Commissioner’s position and supports the proposition that the Commissioner has an effective priority in insolvency.

It might be suggested that the operation of s 215 extends only so far as providing greater certainty and administrative efficiency to the Commissioner,<sup>48</sup> rather than conferring on the Commissioner any substantive right to payment. In other words, it may be argued that under s 215, the Commissioner is not granted any right or entitlement to the funds set aside — the provision operates merely to ensure that there are assets set aside to fund the payment of a potential liability, the quantum of which will be determined by reference to laws other than the *Tax Acts*. Indeed, this was the crux of the argument put forward by WA.

Prior to *Bell*, the view that s 215 is no more than a ‘machinery provision’ operating to ensure that there are funds available at the conclusion of a winding up sufficient to cover a distribution that *might* be required to the Commonwealth<sup>49</sup> did appear to have some basis in the case law.<sup>50</sup>

In *Farley*, Latham CJ of the High Court held that s 215 did not provide the Commissioner with a right to receive the sum set aside, nor did it create any charge over the sum.<sup>51</sup> His Honour stated:

These words, in my opinion, only show that the liquidator is required to provide a sum which will be available for the payment of such tax as may be found to

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<sup>45</sup> Catherine Brown, Colin Anderson and David Morrison, ‘The Certainty of Tax In Insolvency: Where Does the ATO Fit?’ (2011) 19 *Insolvency Law Journal* 108, 109.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> See, eg, Thomson Reuters, *McPherson’s Law of Company Liquidation* (at 19 April 2015) [13.1410].

<sup>49</sup> *Bell* (2016) 331 ALR 408, 433 [85].

<sup>50</sup> See *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 (‘*Farley*’); *Re Richard Foreman & Sons Pty Ltd*; *Uther v Commissioner of Taxation (Cth)* (1947) 74 CLR 508 (‘*Uther*’); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 (‘*Cigamatic*’).

<sup>51</sup> *Farley* (1940) 63 CLR 278, 289.

be due. The actual amount to be paid and all questions of priority are then left to be determined by the law which is applicable.<sup>52</sup>

Further, in considering the imposition of personal liability on the liquidator for the payment of tax under s 215, Starke J stated that ‘the ... legislation is not dealing with substantive rights whether of priority *or otherwise* but is for the purpose of restraining the distribution of the funds of a company in liquidation in aid and in protection of the revenue’.<sup>53</sup> Similarly, Evatt J found that s 215 was ‘merely administrative’ and ‘designed to secure the setting aside of money pending final administration, all questions of priority and preference being determined by the law to be found elsewhere than in the section’.<sup>54</sup> *Farley*, insofar as it dealt with s 215, was followed by the High Court in *Uther* and *Cigamic*.

*Bell* appears to mark somewhat of a departure from the above characterisation of s 215. In light of *Bell*, it seems that an interpretation that s 215 is merely administrative and does not confer substantive rights to payment on the Commissioner ‘glosses the legal operation of the section and understates its purpose’.<sup>55</sup>

*Bell* makes clear that it would be inconsistent for a law of a state to diminish the Commissioner’s position under s 215 to one in which the Commissioner has only a ‘mere expectancy or possibility of the payment of an uncertain amount’.<sup>56</sup> In light of this, s 215 must now be viewed as itself creating a substantive right to payment in the Commissioner — a statutory right that is protected in equity. In other words, rather than ensuring the mere setting aside of assets, s 215 provides a mechanism for the enforcement of the Commissioner’s right to receive payment in respect of tax debts in insolvency.

Whilst the standing of ordinary unsecured creditors in liquidations may arguably be diminished by state legislation, s 215 protects the Commonwealth’s position. The Commissioner in *Bell* had a substantive right to receive the amount he would ordinarily expect to receive in a *pari passu* liquidator distribution under the *CA*. The ‘stronger’ interpretation of s 215 in *Bell* arguably creates an effective priority for the Commissioner in liquidations.

## V CONCLUSION

Prima facie, *Bell* might be seen as a non-controversial application of s 109 of the *Constitution* to politically controversial state legislation. However, *Bell* goes beyond

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid 297 (emphasis added).

<sup>54</sup> Ibid 327.

<sup>55</sup> *Bell* (2016) 331 ALR 408, 433 [86].

<sup>56</sup> Ibid 426 [66].

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this. It provides new High Court authority on the proper characterisation and scope of s 215 of the *ITAA 1936* (and its *TAA* equivalent).

*Bell* constitutes a development in the existing law by confirming that s 215 confers substantive rights on the Commissioner to payment in liquidations. The Commissioner's protected position under s 215 is *not* a right afforded to other ordinary unsecured creditors in liquidations. To this end, *Bell* reinforces and expands the effective or quasi priority of the Commissioner in insolvency.



**PACIOCCO v AUSTRALIA & NEW ZEALAND  
BANKING GROUP LTD  
(2016) 90 ALJR 835**

I INTRODUCTION

The highly anticipated conclusion to a five-year battle over the status of the doctrine of penalties in Australia came in the case of *Paciocco v Australia & New Zealand Banking Group Ltd*.<sup>1</sup> This case note reviews the procedural history of *Paciocco*, which provides the foundation for the earlier controversy surrounding the penalties doctrine and the consequent importance of the case, before undertaking an analysis of the High Court's decision and its wider ramifications. *Paciocco* takes a welcome step towards remedying the Court's prior significant expansion of the doctrine.

II BACKGROUND

*A Andrews v Australia and New Zealand Banking Group Ltd*

*Paciocco* was characterised as the 'sequel'<sup>2</sup> to the case of *Andrews v Australia and New Zealand Banking Group Ltd*,<sup>3</sup> in which the High Court reconsidered the application of the penalties doctrine in Australia. The *Andrews* litigation commenced before Gordon J in the Federal Court in 2011, and constituted representative proceedings against Australia and New Zealand Banking Group Ltd ('ANZ') to obtain declarations that 'exception fees' charged on accounts amounted to penalties and were therefore unenforceable.<sup>4</sup> Justice Gordon held that, of the various exception fees, only the late payment fees could be considered penalties.<sup>5</sup> The decision was appealed to the Full Court of the Federal Court, however, the High Court removed the issues arising in the appeal relating to the penalties doctrine.<sup>6</sup>

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\* Student Editor, 2016, *Adelaide Law Review*, University of Adelaide.

<sup>1</sup> (2016) 90 ALJR 835 ('*Paciocco*').

<sup>2</sup> *Ibid* 852 [72] (Gageler J).

<sup>3</sup> (2012) 247 CLR 205 ('*Andrews*').

<sup>4</sup> *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53, 59 [1].

<sup>5</sup> *Ibid* 60 [5].

<sup>6</sup> *Andrews* (2012) 247 CLR 205, 219 [17]–[18] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

A unanimous High Court reconfigured the doctrine of penalties and its application in Australia. The Court defined a penalty as a ‘collateral’ stipulation imposing ‘upon the failure of the primary stipulation ... an additional detriment ... in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation’.<sup>7</sup> Significantly, the Court, explicitly overruling *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd*,<sup>8</sup> rejected the notion that the application of the penalties doctrine was limited to instances where there had been a breach of contract, as well as the notion that the doctrine was found at common law and not in equity.<sup>9</sup>

The decision of the High Court in *Andrews*, which effectively broadened the scope of the penalties doctrine beyond that expounded in the seminal case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*<sup>10</sup> and endorsed by the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd*,<sup>11</sup> was widely criticised. As French CJ and Gageler J noted in *Paciocco*,<sup>12</sup> the UK Supreme Court recently deemed *Andrews* ‘a radical departure from the previous understanding of the law’.<sup>13</sup> In a practical context, the decision in *Andrews* was taken as demanding the reconsideration of contracts in a variety of industries, which could now be caught by the expanded scope of the doctrine.<sup>14</sup> Commentators criticised the High Court’s ‘complex and convoluted’ penalty definition, which fostered uncertainty in contractual drafting,<sup>15</sup> and the lack of consideration given to contemporary and contrary authority.<sup>16</sup>

However, the High Court did not decide whether the exception fees in question constituted penalties in *Andrews*, and remitted the case to Gordon J in the Federal Court. This formed the basis of the *Paciocco* litigation.

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<sup>7</sup> Ibid 216 [10].

<sup>8</sup> (2008) 257 ALR 292.

<sup>9</sup> *Andrews* (2012) 248 CLR 205, 227 [46], 228 [50], 233 [63], 236 [78] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

<sup>10</sup> [1915] AC 79 (*‘Dunlop’*).

<sup>11</sup> (2005) 224 CLR 656 (*‘Ringrow’*).

<sup>12</sup> (2016) 90 ALJR 835, 841 [7] (French CJ), 857 [121] (Gageler J).

<sup>13</sup> *Cavendish Square Holding BV v Talal El Makdessi* [2016] 2 All ER 519, 541 [41] (Lord Neuberger and Lord Sumption) (*‘Cavendish’*).

<sup>14</sup> See, eg, Steven Klimt and Narelle Smythe, *When Is a Penalty Clause Not a Penalty Clause?* (18 September 2012) Clayton Utz <<https://www.claytonutz.com/knowledge/2012/september/when-is-a-penalty-clause-not-a-penalty-clause>>.

<sup>15</sup> See, eg, J W Carter et al, ‘Contractual Penalties: Resurrecting the Equitable Jurisdiction’ (2013) 30 *Journal of Contract Law* 99, 103, 112.

<sup>16</sup> See generally *ibid*.

## B Facts

The first appellant, Mr Paciocco, and the second appellant, Speedy Development Group Pty Ltd, held credit card and deposit accounts with the respondent, ANZ.<sup>17</sup> These accounts were charged numerous ‘exception fees’, in accordance with ANZ’s standard terms and conditions for the accounts, and included ‘late payment fees’.<sup>18</sup> These were fees charged for failing to meet the minimum monthly payment by the due date. The late payment fee applied equally to accounts irrespective of the outstanding payment amount. Mr Paciocco argued that these late payment fees constituted penalties and were therefore unenforceable, and in the alternative, that they were in contravention of various statutory provisions.<sup>19</sup>

Mr Paciocco brought the action against ANZ as a representative proceeding.<sup>20</sup> Other class actions brought on similar grounds against other major banks in Australia were stayed pending the outcome of the *Paciocco* litigation.<sup>21</sup>

## C Procedural History

### 1 Primary Judgment

At first instance, Gordon J set out a six-step test<sup>22</sup> that effectively combined the formulations in *Dunlop, AMEV-UDC Finance Ltd v Austin*<sup>23</sup> and *Andrews* and, applying this test, concluded that of the exception fees, only the late payment fees constituted penalties.<sup>24</sup> Her Honour held that the late payment fees were to be paid

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<sup>17</sup> As the second appellant is a company controlled by the first appellant, subsequent references to Mr Paciocco will be taken to include the second appellant: *Paciocco* (2016) ALJR 835, 839 [2] (French CJ).

<sup>18</sup> *Paciocco* (2016) 90 ALJR 835, 853 [82] (Gageler J).

<sup>19</sup> *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BG, 12CB and 12CC; *National Consumer Credit Protection Act 2009* (Cth) sch 1, s 76; *Fair Trading Act 1999* (Vic) ss 8, 8A and 32W.

<sup>20</sup> *Federal Court of Australia Act 1976* (Cth) pt IVA.

<sup>21</sup> The stayed class actions were against the remainder of the ‘Big Four’ (Commonwealth Bank of Australia, Westpac Banking Corporation and National Australia Bank) as well as Citibank, St. George Bank, BankSA and Bankwest: Maurice Blackburn Lawyers, *Bank Fees Class Action* <<https://www.mauriceblackburn.com.au/past-class-actions/bank-fees-class-action/>>; Rachael Brown, ‘ANZ Class Action: Bank Wins Appeal Against Credit Card Fees Decision’, *ABC News* (online), 8 April 2015 <<http://www.abc.net.au/news/2015-04-08/anz-bank-wins-appeal-against-credit-card-fees-decision/6376834>>.

<sup>22</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249, 258 [15] (Gordon J).

<sup>23</sup> (1986) 162 CLR 170 (*‘AMEV-UDC’*).

<sup>24</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249, 326–7 [373]–[374].

upon breach of the contract (a requirement at law only and not in equity)<sup>25</sup> and, alternatively, that they were collateral to a primary stipulation in ANZ's favour in accordance with the High Court's penalty definition in *Andrews*.<sup>26</sup>

The conclusion of Gordon J turned on the evidence of two expert witnesses: Mr Regan for Mr Paciocco and Mr Inglis for ANZ. Mr Regan and Mr Inglis both gave evidence on the costs incurred by ANZ as a result of late payments. However, Mr Paciocco instructed Mr Regan to calculate the actual loss sustained by ANZ from the late payments and the cost of returning ANZ to its original position ('operational costs'), whereas ANZ instructed Mr Inglis to calculate the maximum amount of costs conceivably incurred by ANZ from the late payments (which included, in addition to operational costs, the cost of increases in loss provisions and the cost of regulatory capital). As a result, the figure asserted by Mr Inglis was significantly higher than that of Mr Regan. Justice Gordon preferred Mr Regan's evidence and rejected that of Mr Inglis, which her Honour considered calculated costs too broadly 'in a theoretical accounting sense' instead of the actual loss or damage that was relevant for the purposes of the test.<sup>27</sup> Her Honour accordingly concluded that the late payment fees were 'extravagant and unconscionable'.<sup>28</sup>

## *2 Appeal to the Full Court of the Federal Court*

ANZ appealed the finding at first instance that the late payment fees constituted penalties,<sup>29</sup> while Mr Paciocco appealed the finding that the other exception fees were not penalties.<sup>30</sup> The Full Court of the Federal Court (Allsop CJ delivering the lead judgment with Besanko and Middleton JJ agreeing) allowed ANZ's appeal and dismissed Mr Paciocco's appeal.<sup>31</sup>

In contrast to the primary judge, Allsop CJ held that the approach of Mr Inglis was correct.<sup>32</sup> Applying 'the correct analytical perspective', the late payment fees could not be considered extravagant or unconscionable.<sup>33</sup> ANZ argued that Gordon J had erred by undertaking an *ex post* assessment of the actual damage suffered from breach, in circumstances where an *ex ante* assessment of the greatest conceivable loss as well as the 'economic interests to be protected'<sup>34</sup> was required to determine whether a stipulation is extravagant or unconscionable, and therefore a penalty.

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<sup>25</sup> Ibid 258 [15].

<sup>26</sup> Ibid 326 [373].

<sup>27</sup> Ibid 284 [140].

<sup>28</sup> Ibid 302 [240].

<sup>29</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 231 [81] (Allsop CJ).

<sup>30</sup> Ibid 252 [194].

<sup>31</sup> Ibid 288 [367] (Allsop CJ), 289 [371] (Besanko J), 295 [398] (Middleton J).

<sup>32</sup> Ibid 251 [184].

<sup>33</sup> Ibid 251 [187].

<sup>34</sup> Ibid 247 [169].

Chief Justice Allsop accepted this submission.<sup>35</sup> His Honour held that the other costs taken into account by Mr Inglis — provisioning and regulatory capital costs — were legitimate interests of ANZ that merited protection.<sup>36</sup>

### III DECISION

Mr Paciocco raised two grounds of appeal to the High Court. The first ground of appeal concerned the issue of whether the late payment fees amounted to penalties. The second ground of appeal related to the claims that the late payment fees breached the aforementioned statutory provisions. The following analysis of the Court's decision will deal with the first ground of appeal, which has proved the most contentious aspect of this decision and the preceding litigation over the last five years. The Court (4:1) dismissed the appeal and agreed with the Full Court of the Federal Court, finding that the late payment fees were not penalties.

#### *A The Test*

Justice Kiefel, French CJ agreeing,<sup>37</sup> held that the relevant question to determine what would amount to a penalty was 'whether a provision for the payment of a sum of money on default is out of all proportion to the interests of the party which it is the purpose of the provision to protect.'<sup>38</sup> Her Honour considered that such a test was consistent with the cases of *Clydebank Engineering & Shipbuilding Co Ltd v Castaneda*,<sup>39</sup> *Dunlop*, *Ringrow* and *Andrews*.<sup>40</sup>

Applying *Cavendish*, Keane J held that where 'the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract', the stipulation would amount to a penalty as opposed to a 'provision protective of a legitimate interest'.<sup>41</sup> This formulation is very similar to that advocated by Kiefel J. In *Ringrow*, the High Court interpreted 'extravagant and unconscionable' as meaning 'out of all proportion'.<sup>42</sup> The critical difference is the requirement that the stipulation be triggered by a breach of contract — the element on which *Cavendish* and *Andrews*, and accordingly UK and Australian law, diverge.

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<sup>35</sup> Ibid 237 [117], 242 [147].

<sup>36</sup> Ibid 246 [164], 247 [167].

<sup>37</sup> *Paciocco* (2016) 90 ALJR 835, 840 [2].

<sup>38</sup> Ibid 846 [29]. See also *ibid* 850 [57] and 851 [69].

<sup>39</sup> [1905] AC 6 (an antecedent of *Dunlop*).

<sup>40</sup> *Paciocco* (2016) 90 ALJR 835, 851 [69] (Kiefel J).

<sup>41</sup> Ibid 882 [270], quoting *Cavendish* [2016] 2 All ER 519, 608 [255] (Lord Hodge).

<sup>42</sup> *Ringrow* (2005) 224 CLR 656, 669 [32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

Justice Nettle, the sole dissident, distinguished between what he considered to be a ‘typical penalty case’ — as referred to by the High Court in *Ringrow*<sup>43</sup> and to which the *Dunlop* tests would be applicable — and the ‘more complex’ penalty case referred to in *Cavendish*, which would require considerations ‘beyond a comparison of the agreed sum and the amount of recoverable damages’, including the legitimate interests of the party allegedly imposing the penalty.<sup>44</sup> In the case of the former, the test would be whether the stipulation was ‘exorbitant or extravagant (or, in other words, “out of all proportion”) in comparison with the greatest loss that could conceivably be proved to have followed from the breach’.<sup>45</sup> In the case of the latter, the test would be that expressed in *Cavendish* and applied by Keane J above.<sup>46</sup>

Although these judges differed in their articulation of the applicable test, their Honours were in agreement regarding the key aspect of a penalty: it must be exorbitant or out of all proportion. That the inquiry necessitated the identification of the party’s legitimate interests was also common to the formulations of the judges. However, contrary to Kiefel and Keane JJ, Nettle J held that the inquiry only becomes necessary in complex cases.<sup>47</sup> These conflicting views appear to have arisen from different interpretations of *Ringrow*. According to Nettle J, in ‘typical penalty cases’, only the amount ‘recoverable as unliquidated damages’ is relevant.<sup>48</sup> However, Keane J contended that the description in *Ringrow* of ‘a genuine pre-estimate of the damage’, as opposed to damages, included legitimate interests.<sup>49</sup> His Honour’s argument that this interpretation is necessary given that these stipulations seek to avoid ‘the uncertainty and expense of litigation’ is an important practical consideration.<sup>50</sup>

Justice Gageler, on the other hand, framed the inquiry as whether the relevant stipulation ‘is properly characterised as having no purpose other than to punish’.<sup>51</sup> His Honour saw this as consistent with the second proposition in *Dunlop* that the ‘essence’ of a penalty is that it is ‘stipulated as *in terrorem*’,<sup>52</sup> which he considered ‘captures the essence of the conception to which the whole of the analysis is directed’.<sup>53</sup> Justice Gageler preferred such an approach over a formulation requiring considerations of ‘legitimate interests’, as applied in *Cavendish* and by Keane J, as it allowed

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<sup>43</sup> Ibid 665 [21].

<sup>44</sup> *Paciocco* (2016) 90 ALJR 835, 890–1 [319]–[322].

<sup>45</sup> Ibid 894 [338] (citations omitted).

<sup>46</sup> Ibid 891 [321]–[322].

<sup>47</sup> Ibid 890–1 [319]–[322].

<sup>48</sup> Ibid 891 [320], quoting *Ringrow* (2005) 224 CLR 656, 665 [21] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

<sup>49</sup> *Paciocco* (2016) 90 ALJR 835, 884 [282]–[283], quoting *Ringrow* (2005) 224 CLR 656, 662 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (emphasis added).

<sup>50</sup> *Paciocco* (2016) 90 ALJR 835, 884 [284] (Keane J).

<sup>51</sup> Ibid 865 [165]–[167].

<sup>52</sup> Ibid 864 [158], quoting *Dunlop* [1915] AC 79, 86 (Lord Dunedin).

<sup>53</sup> *Paciocco* (2016) 90 ALJR 835, 865 [165] (Gageler J).

for a ‘more tailored’ consideration of the commercial circumstances surrounding the formation of the contract.<sup>54</sup> His Honour did acknowledge, however, that even such ‘differently framed inquiries’ could ultimately produce the same outcome<sup>55</sup> — as they did in the present case. A stipulation that is exorbitant or out of all proportion is likely to be considered as having no other purpose than a punitive one. Further, as will be illustrated in the following section, a consideration of interests, as Gageler J himself undertook, also permits the Court to undertake a broad examination of commercial circumstances.

### B *Applying the Test*

Justices Kiefel, Gageler and Keane all identified ANZ’s ‘multi-faceted’ commercial interest as ensuring its customers made repayments on time.<sup>56</sup> Justice Keane identified a further interest that derived from this commercial interest: the ability of ANZ to secure greater profit by lending.<sup>57</sup> A consideration of only the operational costs (Mr Regan’s evidence) did not adequately reflect the ‘totality’<sup>58</sup> or ‘full range’<sup>59</sup> of ANZ’s interests. The provisioning and regulatory capital costs also affected ANZ’s interests by impacting upon recorded profit and outgoings respectively,<sup>60</sup> and were real ‘injuries to [ANZ’s] financial position’ for which ANZ was required to account.<sup>61</sup> Therefore, it could not be said that the late payment fees were out of all proportion to ANZ’s interests<sup>62</sup> or stipulated *in terrorem*.<sup>63</sup> Even if, as Gordon J had found, the provisioning and regulatory capital costs as calculated by Mr Inglis were not recoverable in a claim for damages, the test was not restricted to that consideration.<sup>64</sup>

In dissent, Nettle J agreed with the approach undertaken by Gordon J. His Honour found that ANZ’s only interest was in obtaining the costs it had actually incurred and were claimable in damages,<sup>65</sup> and therefore the tests in *Dunlop* applied.<sup>66</sup> Justice Nettle analysed each category of costs and concluded that because the provisioning and regulatory capital costs were only an estimate of future loss and had not actually been incurred by ANZ, they could not sound in damages, and were therefore

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<sup>54</sup> Ibid 865 [166].

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 850 [58] (Kiefel J), 865 [167], 866 [170]–[172] (Gageler J), 882 [271] (Keane J).

<sup>57</sup> Ibid 883 [278].

<sup>58</sup> Ibid 866 [170] (Gageler J).

<sup>59</sup> Ibid 884 [279] (Keane J).

<sup>60</sup> Ibid 866 [172] (Gageler J).

<sup>61</sup> Ibid 851 [68] (Kiefel J).

<sup>62</sup> Ibid 851 [69] (Kiefel J), 884 [279] (Keane J).

<sup>63</sup> Ibid 867 [176] (Gageler J).

<sup>64</sup> Ibid 851 [65]–[66] (Kiefel J), 866 [171]–[172] (Gageler J), 884 [282]–[283] (Keane J).

<sup>65</sup> Ibid 892 [326] (Nettle J).

<sup>66</sup> Ibid 893 [334].

irrelevant to determining whether the late payment fees were penalties.<sup>67</sup> Only the operational costs could be considered, and as these were relatively small, the late payment fees were extravagant or out of all proportion to the greatest conceivable loss that could be claimed in damages.<sup>68</sup>

#### IV RAMIFICATIONS

As exemplified by *Paciocco*, a decision on the penalties doctrine has the potential to impact not only upon contracts between commercial parties but also upon the general community. Furthermore, businesses in a wide variety of industries charge late payment fees — telecommunications and utilities are the most prominent among the public.<sup>69</sup> The ramifications of the decision in *Paciocco* are therefore wide-reaching.

In *Andrews*, the High Court broadened the scope of the penalties doctrine by rejecting the requirement that the offending party breach the contract. By endorsing a test that considers the ‘legitimate interests’ of the party alleged to have imposed a penalty beyond what it is actually capable of recovering in damages, the High Court has made it easier to argue that a stipulation is not out of all proportion to the interests it seeks to protect. The Court took a broad approach to identifying ANZ’s interests in *Paciocco*, which, as Gordon J recognised, were merely ‘part of the costs of running a bank in Australia’.<sup>70</sup>

The High Court has thereby effectively narrowed the scope of the doctrine significantly — a welcome and appropriate change to the law following the decision in *Andrews*. The penalties doctrine has been deemed an ‘anomaly’ in the law of contract,<sup>71</sup> and in *Cavendish* the UK Supreme Court took the further step of considering whether it should be abolished altogether.<sup>72</sup> This is further made evident through a comparison of the High Court’s position on the relationship between the doctrine of

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<sup>67</sup> Ibid 896 [352], 898 [364].

<sup>68</sup> Ibid 899 [371].

<sup>69</sup> ACA Lawyers was accepting registrations for class actions against Telstra, Optus and Vodafone pending the decision of the High Court in *Paciocco* and was also considering pursuing actions against AGL, EnergyAustralia and Origin, but ceased after the decision in *Paciocco* was handed down: ACA Lawyers, *Telco Class Action* <<http://www.acalawyers.com.au/telcos/>>; John Rolfe, ‘Energy Companies Headed to Court: ACA Lawyers Plan Class Action Against AGL, EnergyAustralia and Origin Over Late Fees’, *news.com.au* (online), 20 August 2014 <<http://www.news.com.au/>>.

<sup>70</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249, 287 [155].

<sup>71</sup> Anthony Gray, ‘Contractual Penalties in Australian Law after *Andrews*: An Opportunity Missed’ (2013) 18 *Deakin Law Review* 1, 1.

<sup>72</sup> While acknowledging that there was a ‘case to be made’, the Court ultimately decided against doing so: *Cavendish* [2016] 2 All ER 519, 539–40 [36]–[39] (Lord Neuberger and Lord Sumption), 582–4 [162]–[167] (Lord Mance), 608–10 [256]–[266] (Lord Hodge).

penalties and freedom of contract in *Andrews* against *Paciocco*. Justice Gordon aptly characterised the penalties doctrine as a ‘narrow exception’ to freedom of contract.<sup>73</sup> However, in *Andrews*, the High Court was not convinced that ‘notions of an untrammelled “freedom of contract” provide a universal legal value’.<sup>74</sup> In *Paciocco*, Keane J appears to resile from, or at least qualify, this position by highlighting the ‘abiding importance’ of the fundamental principle of freedom of contract, and in turn commercial certainty, as limiting judicial intervention in bargains between capable parties.<sup>75</sup> This accords with prior statements of the Court.<sup>76</sup>

Of course, freedom of contract must be balanced against protecting vulnerable or inexperienced parties, and the penalties doctrine plays a role in this.<sup>77</sup> In *Cavendish*, Lord Mance deemed ‘the extent to which the parties were negotiating at arm’s length on the basis of legal advice’ a ‘relevant factor’ in determining the exorbitance of the stipulation.<sup>78</sup> However, in *Paciocco*, only Nettle J in dissent had regard to the nature of the relationship between ANZ and Mr Paciocco, and the inherent incapacity of Mr Paciocco as a consumer to negotiate a standard form contract with a commercial party such as ANZ in arriving at his conclusion.<sup>79</sup> The relevance of such a consideration to the penalty test, and whether the test would apply differently, for example, to a commercial construction contract, warranted closer examination by the majority.

## V CONCLUSION

The aforementioned wide-reaching ramifications of the High Court’s decision indicate that the significance of *Paciocco* cannot be underestimated. The Court’s clarification of the requisite test, the narrowing of the penalties doctrine and the revival of freedom of contract subsequent to *Andrews* is laudable. However, in bringing an end to the bank fees saga, *Paciocco* leaves unanswered a number of questions concerning the doctrine of penalties that arose from the High Court’s decision in *Andrews*. Commentators will continue to grapple with the nature of the relationship of the penalties doctrine at law and in equity,<sup>80</sup> how penalties can be partially

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<sup>73</sup> *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53, 60 [4].

<sup>74</sup> *Andrews* (2012) 247 CLR 205, 216 [5] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

<sup>75</sup> *Paciocco* (2016) 90 ALJR 835, 872–3 [220]–[221], 878 [250]–[251]. See also 849 [54] (Kiefel J), 863 [156] (Gageler J), quoting *Ringrow* (2005) 224 CLR 656, 669 [31]–[32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

<sup>76</sup> *Ringrow* (2005) 224 CLR 656, 669 [31]–[32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *AMEV-UDC* (1986) 162 CLR 170, 190, 193–4 (Mason and Wilson JJ).

<sup>77</sup> *AMEV-UDC* (1986) 162 CLR 170, 194 (Mason and Wilson JJ).

<sup>78</sup> *Cavendish* [2016] 2 All ER 519, 579 [152].

<sup>79</sup> *Paciocco* (2016) 90 ALJR 835, 899 [371].

<sup>80</sup> Justice Gordon’s aforementioned six-step test, approach and alternative conclusions in *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 appear to suggest that they are separate.

enforced,<sup>81</sup> the concept of ‘collateral stipulations’,<sup>82</sup> which did not feature in the formulations of the judges in *Paciocco*, and the application of the test to contracts between experienced commercial parties. The resolution of these issues now falls to future cases.

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<sup>81</sup> According to the Court’s penalty definition in *Andrews*, ‘the collateral stipulation and the penalty are enforced *only to the extent*’ of compensation made to the party benefiting from the penalty for ‘prejudice suffered by failure of the primary stipulation’: *Andrews* (2012) 247 CLR 205, 216–17 [10] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) (emphasis added). See, eg, discussion in Carter et al, above n 15, 114–17. The concept of partial enforcement was also criticised in *Cavendish* [2016] 2 All ER 519, 553–4 [85]–[87] (Lord Neuberger and Lord Sumption).

<sup>82</sup> See, eg, Carter et al, above n 15, 117–21.

## 2016 SENATE ELECTORAL REFORMS IN THE HIGH COURT AND BEYOND

### I INTRODUCTION

In 2016, the government implemented significant reforms to the Senate electoral processes when it passed amendments to the *Commonwealth Electoral Act 1918* (Cth) ('CEA'). Shortly after the passage of the amending legislation, Senator Bob Day challenged the amendments' constitutional validity in the High Court of Australia. In *Day v Australian Electoral Officer (SA)*,<sup>1</sup> the High Court unanimously dismissed the challenge. This case note explains the High Court's reasoning and considers how the decision reinforces existing constitutional principles regarding the Parliament's power to determine electoral processes. This case note then examines how the new system fared at the 2016 federal election, and concludes that, while Senate processes may still benefit from further reform, especially in relation to Senate casual vacancies, the 2016 reforms were a victory for Australian democracy.

### II THE POLITICAL CONTEXT

#### *A The 2013 Election and Calls for Reform*

From 1984 the CEA provided for ticket voting with full preferences above the line, and full preferential voting below the line. Under this system, electors who voted above the line did not have control over the preference flows, and effectively accepted the preferences determined by the voting ticket or tickets lodged by the particular group or incumbent senator. Electors had the option of voting below the line by expressing full preferences for all listed candidates. However, in the larger states this was a difficult and time-consuming task, and understandably one in which only a small fraction of voters engaged.<sup>2</sup>

The effect of this system was to allow parties to legally manipulate preference flows through group voting tickets. Micro-parties formed alliances and agreed to preference each other in their tickets ahead of any parties not part of the alliance. This meant

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<sup>1</sup> (2016) 331 ALR 386 ('Day').

<sup>2</sup> At the 2013 federal election, only 3.5% of formal votes were lodged below the line: Antony Green, 'How Voters Reacted to the Senate's New Electoral System' on *Antony Green's Election Blog* (11 October 2016) <<http://blogs.abc.net.au/antonygreen/2016/10/how-voters-reacted-to-the-senates-new-electoral-system.html>>.

that after members of a group who lodged a ticket were elected or excluded, their preferences would be funnelled to the other parties via a series of exchanges. The more parties that joined an alliance, the greater number of preferences to be allocated to the last remaining candidate after all others had been excluded or elected. This system produced unexpected results — most notably the election of the Australian Motoring Enthusiast Party's Ricky Muir to the Senate at the 2013 federal election after the party received just 0.51% of the primary vote.<sup>3</sup> Muir's election relied on preferences from 22 other parties.<sup>4</sup>

In response to concerns that micro-parties were 'gaming' the Senate by engaging in this so-called 'preference harvesting',<sup>5</sup> the Joint Standing Committee on Electoral Matters (JSCEM) was tasked with examining the Senate electoral system. JSCEM's interim report was released in May 2014 and contained the conclusion that 'the 2013 federal election will long be remembered as a time when our system of Senate voting let voters down'.<sup>6</sup> The JSCEM found that the current system allowed for conduct, which, though technically legal, 'distorted the will of the voter'.<sup>7</sup> The JSCEM made a number of recommendations to address the system's flaws, some of which were given effect in the *Commonwealth Electoral Amendment Act 2016* (Cth).

#### B *The Commonwealth Electoral Amendment Act 2016* (Cth)

In February 2016, the Commonwealth introduced the Commonwealth Electoral Amendment Bill 2016 (Cth). The Bill was passed by the Senate, with some amendments, on 18 March 2016 after a marathon 40 hours of debate.<sup>8</sup> The *Commonwealth Electoral Amendment Act 2016* (Cth) abolished group voting tickets and compulsory full preferential voting, instead introducing a requirement that voters allocate at least six preferences above the line and 12 preferences below the line. According to the Explanatory Memorandum, the amendments aimed to 'provide

<sup>3</sup> Australian Electoral Commission, *First Preferences by Candidate — Vic* (18 October 2013) Virtual Tally Room — 2013 Federal Election <<http://results.aec.gov.au/17496/Website/SenateStateFirstPrefs-17496-VIC.htm>>.

<sup>4</sup> Antony Green, 'Ricky Muir's Strange Path to the Senate' on *Antony Green's Election Blog* (7 August 2014) <<http://blogs.abc.net.au/antonygreen/2014/08/ricky-muir-strange-path-to-the-senate.html>>.

<sup>5</sup> 'Calls Mount to End Senate "Gaming" by Micro-Parties', *The Australian* (online), 9 September 2013 <<http://www.theaustralian.com.au/national-affairs/election-2013/calls-mount-to-end-senate-gaming-by-micro-parties/story-fn9qr68y-1226715365251>>.

<sup>6</sup> Joint Standing Committee on Electoral Matters, Parliament of Australia, *Interim Report on the Inquiry into the Conduct of the 2013 Federal Election: Senate Voting Practices* (2014), v.

<sup>7</sup> *Ibid.*

<sup>8</sup> 'Senate Passes Voting Law Changes After Marathon Sitting' *The Sydney Morning Herald* (online), 18 March 2016 <<http://www.smh.com.au/federal-politics/political-news/senate-passes-voting-law-changes-after-marathon-sitting-20160318-gnlvo3.html>>.

confidence to voters that their vote goes to the intended candidate' and 'empower voters, returning control of their preferences to them'.<sup>9</sup>

The amendments also included generous saving provisions, which deemed ballot papers with at least one preference above the line or six consecutive preferences below the line to be a formal vote, to 'capture voter intent and reduce the risk of increased vote informality'.<sup>10</sup> Given that the previous system had been in place from 1984, and subsequently a very large majority of voters had opted to vote above the line, the savings provisions were included to reflect the policy that those who continued to vote in this way should still have their vote counted as formal — even if their choice would not have a 'long life' in terms of preference distributions due to vote exhaustion.<sup>11</sup>

### III THE HIGH COURT CHALLENGE

Family First Senator Bob Day brought an application in the original jurisdiction of the High Court of Australia challenging the validity of certain provisions of the *CEA* as amended by the *Commonwealth Electoral Amendment Act 2016* (Cth). A second action (intended to be 'complementary' to the first action)<sup>12</sup> was then launched by a Senate candidate in Tasmania, Peter Madden, and a group of six electors from the other States and Territories. Given that the grounds of application and relief sought were substantially the same, French CJ ordered that the submissions in the Day proceedings stand as the submissions filed for the purposes of the Madden proceedings.<sup>13</sup>

Together, the plaintiffs raised five arguments:

- 1 The amended *CEA* prescribes two methods of voting, one above the line and one below the line, contrary to s 9 of the *Constitution*.<sup>14</sup>
- 2 The option of above the line voting for one or more registered parties or groups is an indirect method of election, contrary to s 7 of the *Constitution*.<sup>15</sup>

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<sup>9</sup> Explanatory Memorandum, Commonwealth Electoral Amendment Bill 2016 (Cth) 2.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* 8. In simple terms, a ballot paper is 'exhausted' when it has no more preferences marked next to candidates still in the count, and is excluded from the count.

<sup>12</sup> Transcript of Proceedings, *Day v Australian Electoral Officer for the State of South Australia and Anor; Madden v Australian Electoral Officer for the State of Tasmania and Ors* [2016] HCATrans 85 (15 April 2016).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Day* (2016) 331 ALR 386, 399 [38].

<sup>15</sup> *Ibid.* 401 [46].

- 3 The new form of the ballot paper and the provisions for above the line voting infringe a constitutional requirement of ‘directly proportional representation’ in the Senate.<sup>16</sup>
- 4 The new form of the ballot paper and the instructions are likely to mislead or deceive electors, and hinder or interfere with the exercise of a free and informed vote, and constitute a burden on the implied freedom of political communication.<sup>17</sup>
- 5 The new form of the ballot paper impairs the system of representative government.<sup>18</sup>

The consensus among constitutional law experts was that these arguments were likely to fail, with the challenge being described variously as ‘not strong’,<sup>19</sup> ‘unpersuasive, and run[nin]g counter to long-standing doctrine’<sup>20</sup> and, most decisively, ‘doomed from the outset’.<sup>21</sup>

The High Court dismissed the application just 10 days after the hearing, ruling that, as expected, ‘none of the ... arguments has any merit and each can be dealt with briefly.’<sup>22</sup>

#### *A More than One Method of Choosing Senators*

First, the plaintiffs argued that the above the line and below the line voting system provided for in the amended *CEA* constitute two different methods of voting.<sup>23</sup> The plaintiffs argued this was contrary to s 9 of the *Constitution*,<sup>24</sup> which confers on Parliament the power to make laws prescribing the method of choosing Senators, which is to be uniform for all the States.<sup>25</sup>

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<sup>16</sup> Ibid 401 [51].

<sup>17</sup> Ibid 402 [55].

<sup>18</sup> Ibid 402 [57].

<sup>19</sup> Anne Twomey, ‘*Day v Electoral Officer (SA): Senate Voting Reforms Under Challenge*’ (2016) 38 *Sydney Law Review* 231, 241.

<sup>20</sup> George Williams, ‘The Court Case that Could Derail Turnbull’s Early Election Plans’, *The Sydney Morning Herald* (online), 2 May 2016 <<http://www.smh.com.au/comment/the-court-case-that-could-derail-turnbulls-early-election-plans-20160501-goj6h1.html>>.

<sup>21</sup> Tony Blackshield, ‘A Day in Court’ on Swinburne Institute for Public Research, *Inside Story* (20 May 2016) <<http://insidestory.org.au/a-day-in-court>>.

<sup>22</sup> *Day* (2016) 331 ALR 386, 399 [37].

<sup>23</sup> Ibid 399 [38].

<sup>24</sup> Ibid.

<sup>25</sup> *Constitution* s 9.

In characterising the voting process as involving two ‘methods’, the plaintiffs relied on the new definition of ‘dividing line’ in s 4(1) of the amended *CEA*.<sup>26</sup> Section 4(1) defines ‘dividing line’ as a line which separates the voting method described in s 239(1) (below the line voting) from the voting method described in s 239(2) (above the line voting). The Court dismissed this argument, stating that the statutory use of the word ‘method’ in the Act cannot determine the construction of the constitutional term.<sup>27</sup>

The Court considered the origins of s 9 of the *Constitution*, and noted the suggestion by Alfred Deakin at the Adelaide Convention in April 1897 that the term ‘method’ be used in favour of the narrower term ‘manner’.<sup>28</sup> The Court also quoted a passage from Quick and Garran, who in their *Annotated Constitution*<sup>29</sup> expressly embrace the possibility that voters might have the option of expressing their voting choices in two different ways.<sup>30</sup>

Ultimately, the Court held that the purpose of s 9 was to provide a method for choosing Senators that was uniform across the States.<sup>31</sup> There could be ‘more than one way of indicating choice within a single uniform system’.<sup>32</sup> Above the line and below the line voting have the ‘common effect’ that the voter is required to choose between named candidates, and the conferring of discretion on voters about the number of candidates chosen does not create more than one ‘method’ of choosing.<sup>33</sup> The narrow construction of ‘method’ advocated by the plaintiffs was rejected by the Court as imposing a ‘pointlessly formal constraint on parliamentary power to legislate in respect of Senate elections’.<sup>34</sup>

### B *Senators ‘Directly Chosen’ by the People*

Second, the plaintiffs argued that the above the line voting system is an indirect method of election, which contravenes the requirement in s 7 of the *Constitution* that the Senate be composed of senators ‘directly chosen’ by the people.<sup>35</sup> The plaintiffs contended that the *Constitution* requires that candidates be elected ‘without the

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<sup>26</sup> *Day* (2016) 331 ALR 386, 396 [30].

<sup>27</sup> *Ibid.* Chief Justice French alternatively put it during oral argument as the plaintiff’s argument ‘might be said to be a case of a statutory tail waving a constitutional dog’: Transcript of Proceedings, *Day v Australian Electoral Officer for the State of South Australia and Anor* [2016] HCATrans 73 (24 March 2016).

<sup>28</sup> *Day* (2016) 331 ALR 386, 399 [40].

<sup>29</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 426.

<sup>30</sup> *Day* (2016) 331 ALR 386, 400 [41]–[42].

<sup>31</sup> *Ibid.* 400 [44].

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* 400 [45].

<sup>34</sup> *Ibid.* 400 [44].

<sup>35</sup> *Ibid.* 401 [46].

intervention of any intermediary or third party<sup>36</sup> and, because above the line voting is done with reference to political parties, the system is unconstitutional.

The Court found the plaintiffs' assertion 'untenable'.<sup>37</sup> The requirement of a direct choice could exclude indirect choice by an electoral college or another intermediary,<sup>38</sup> but this situation was clearly distinguishable. The Court stated: 'A vote marked above the line is as much a direct vote for individual candidates as a vote below the line. To number a square above the line identifies the candidates appearing beneath that square below the line.'<sup>39</sup>

### *C The 'Directly Proportionality Principle' and Disenfranchisement of Electors*

Third, the plaintiffs asserted, via a series of rather 'elusive'<sup>40</sup> arguments, that the new form of Senate ballot paper contravened a 'direct proportionality principle', disenfranchised electors and discriminated against minor parties.<sup>41</sup>

The plaintiffs argued that a 'direct proportionality principle' could be derived from s 7 of the *Constitution*, read together with ss 24 and 128 of the *Constitution*.<sup>42</sup> The Court tersely rejected this argument, stating that the principle of 'proportional representation' by reference to population is 'plainly not applicable' to the Senate, where each State has equal representation notwithstanding disparities in population.<sup>43</sup>

The plaintiffs argued that the calculation of the quota under s 273 of the *CEA* resulted in 'one seventh of the relevant State electorate being excluded from the count'<sup>44</sup> — that is, disenfranchised.<sup>45</sup> However, the Court rejected this argument, noting that the plaintiffs had not identified 'any relevant constraint on electors in the means

<sup>36</sup> Ibid.

<sup>37</sup> Ibid 401 [50].

<sup>38</sup> Ibid 401 [49] citing *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 21 (Barwick CJ), 44 (Gibbs J), 56 (Stephen J), 61 (Mason J).

<sup>39</sup> *Day* (2016) 331 ALR 386, 401 [48].

<sup>40</sup> Ibid 402 [52].

<sup>41</sup> Ibid 401–2 [51]–[54].

<sup>42</sup> Ibid 401 [51]. Section 24 of the *Constitution* relates to the nexus between the two Houses. Section 128 of the *Constitution* contains the requirement that voters in an affected State approve any alteration of proportionate representation of the State in either House.

<sup>43</sup> *Day* (2016) 331 ALR 386, 401 [51].

<sup>44</sup> Ibid 401 [52].

<sup>45</sup> The quota is calculated according to the Droop system, by dividing the total number of first preference votes by one more than the number of candidates required to be elected and then adding one. At a half-Senate election for six vacancies, successful candidates need to attain one-seventh of the vote (14.3%): ibid 390 [10].

available to them for completing a formal Senate ballot paper'.<sup>46</sup> There was 'no disenfranchisement in the legal effect of the voting process.'<sup>47</sup>

The Court determined that the plaintiffs' true concern was that most electors would be enticed by the 'eye-catching appeal [of] a party vote' and would vote according to the above-the-line voting instructions on the ballot paper.<sup>48</sup> This would supposedly deprive them of the 'the opportunity to cast "a full and effective vote"'.<sup>49</sup> The Court held that while the plaintiffs' arguments focussed on the negative effects likely to be suffered by minor parties, the complaints were really just about the consequences of electors' voting choices, and had no constitutional basis.<sup>50</sup>

#### *DA 'Free and Informed Vote'*

Fourth, the plaintiffs argued that the Senate ballot paper was misleading, and burdened the implied freedom of political communication.<sup>51</sup> The plaintiffs asserted that the ballot paper 'fail[ed] to inform voters that an effective preferential vote require[d] voting for all candidates', and failed to describe 'the full range of voting options'.<sup>52</sup> In particular, the plaintiffs pointed to the omission in the ballot paper of any reference to the vote saving rules, which count the completion of one square above the line, or six squares below the line, as a formal vote.<sup>53</sup>

The Court found this argument 'fails at its threshold' because the ballot paper accurately reflects the statutory requirements.<sup>54</sup> The non-inclusion of the technical vote saving rules on the ballot paper was 'hardly surprising' and did mean that the ballot paper could be said to mislead electors.<sup>55</sup>

#### *E Representative Government*

Finally, the Court dismissed the plaintiffs last-ditch 'catch all' argument that the amended *CEA* impaired the principle of representative government.<sup>56</sup> The arguments under this heading were simply a more broadly stated rerun of the plaintiffs' earlier arguments, which had already been rejected by the Court.<sup>57</sup>

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<sup>46</sup> Ibid 402 [53].

<sup>47</sup> Ibid 402 [54].

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 402 [53].

<sup>50</sup> Ibid 402 [54].

<sup>51</sup> Ibid 402 [55].

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 402 [56].

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 402 [57].

<sup>57</sup> Ibid.

IV THE SENATE AND THE CONSTITUTION:  
DID WE LEARN ANYTHING AT THE END OF THE DAY?

The High Court's judgment is far from revolutionary. Nonetheless, it is useful to briefly reflect on the decision and consider how it reinforces the existing electoral case law.

A fundamental problem with the first three arguments put forward by the plaintiffs was that they 'sought to challenge features of the system that have existed since at least 1983.'<sup>58</sup> Indeed, Day's application implicitly contained what the Commonwealth Solicitor General described as a 'startling proposition' — that Day himself had not even been validly elected.<sup>59</sup> Before the High Court handed down its decision, Twomey argued that the most persuasive way to overcome this obstacle was to focus on the propensity of optional preferential voting to allow a significant number of votes to exhaust.<sup>60</sup> Twomey argued that, drawing on previous High Court jurisprudence on electoral participation,<sup>61</sup> the plaintiffs could argue that representative government is evolutionary and may only evolve in the direction of increasing public participation.<sup>62</sup> The 2016 amendments, by allowing the exhaustion of votes, arguably reduce public participation in the determination of the final Senate seats in each State.<sup>63</sup> While the plaintiffs did briefly consider the relationship between vote exhaustion and representative government in their submissions,<sup>64</sup> their failure to develop this line of argument further represents a missed opportunity to ascertain the Court's view on a more nuanced argument about representative government.

On the constitutional issues that were considered by the High Court, the decision serves to reinforce the existing principle that the Constitution allows the Parliament considerable latitude in determining the operation of the electoral system. The Court cited McHugh J's observations in *Mulholland v Australian Electoral Commission*<sup>65</sup> that 'the Constitution does not mandate any particular electoral system ... the form of representative government, including the matter of electoral systems, is left to the Parliament'.<sup>66</sup> The Court in *Day* also cited the comments of Gummow and Hayne JJ in

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<sup>58</sup> Ibid 399 [37].

<sup>59</sup> Transcript of Proceedings, *Day v Australian Electoral Officer for the State of South Australia and Anor* [2016] HCATrans 73 (24 March 2016).

<sup>60</sup> Twomey, above n 19, 240.

<sup>61</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

<sup>62</sup> Twomey, above n 19, 240.

<sup>63</sup> Ibid.

<sup>64</sup> Day, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer for the State of South Australia and Anor*, Case No S77/2016, 5 April 2016, 15 (Argument E5).

<sup>65</sup> (2004) 220 CLR 181 ('*Mulholland*').

<sup>66</sup> *Day* (2016) 331 ALR 386, 393 [19] citing *Mulholland* (2004) 220 CLR 181, 207 [64] (McHugh J).

*Mulholland* that cautioned against elevating the requirement that Senators be directly chosen by the people to a ‘broad restraint upon legislative development of the federal system of representative government’.<sup>67</sup> These principles ‘weigh[ed] against the plaintiffs’ arguments’ in *Day*.<sup>68</sup> In *Mulholland*, Gummow and Hayne JJ recognised that ‘extreme’ examples (eg legislation mandating political party membership to qualify for election) would be unconstitutional.<sup>69</sup> However, other than such extreme cases, the legislature has the ability to determine matters relating to the electoral process. The Court’s decision in *Day* confirms that the amendments to the *CEA* are matters within the Parliament’s discretion, upon which the *Constitution* provides no basis for the judiciary to intervene.

The arguments in *Day* were evidently driven by political considerations rather than sound constitutional foundations. Consequently, little can be learnt from the case by way of constitutional principle. The plaintiffs’ challenge was, legally speaking, entirely unsuccessful. However, as Blackshield has recognised, at the end of the day, the plaintiffs are likely to judge their success according to more diverse, political, criteria.<sup>70</sup> The High Court challenge attracted substantial media attention and ensured a continued spotlight on the Senate reforms. If this publicity allowed the plaintiffs’ message — that in order to cast the most effective vote, electors should number as many squares as they can on the ballot paper — to be conveyed to some voters, then the plaintiffs might consider the challenge time and money well spent.<sup>71</sup>

#### V THE POLITICAL RAMIFICATIONS — THE 2016 ELECTION AND BEYOND

The new Senate electoral rules were put to test shortly after their commencement in the July 2016 double dissolution election. Of the 76-member Senate, the Coalition, Labor and the Greens won 30, 26 and nine seats respectively. A cross bench of 11 members was elected, consisting of four One Nation Senators, three Nick Xenophon Team Senators and four independents. Despite the cross bench having grown from nine to 11, Prime Minister Turnbull reported that he was satisfied that the Senate electoral reforms had ‘absolutely worked’.<sup>72</sup>

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<sup>67</sup> *Day* (2016) 331 ALR 386, 393 [19] citing *Mulholland* (2004) 220 CLR 181, 237 [156] (Gummow and Hayne JJ).

<sup>68</sup> *Day* (2016) 331 ALR 386, 393 [20].

<sup>69</sup> *Mulholland* (2004) 220 CLR 181, 237 [156] (Gummow and Hayne JJ) quoting *McGinty v Western Australia* (1996) 186 CLR 140, 220 (Gaudron J).

<sup>70</sup> Blackshield, above n 21.

<sup>71</sup> *Ibid.*

<sup>72</sup> Jared Owens, ‘Malcolm Turnbull says Senate Electoral Reforms “Absolutely Worked”’, *The Australian* (online), 5 August 2016 <<http://www.theaustralian.com.au/national-affairs/malcolm-turnbull-says-senate-electoral-reforms-absolutely-worked/news-story/d7415a5667aeb71712e9edc89db52511>>.

Following the election, complaints were aired that the election of some cross-bench Senators, especially the unexpected election of four One Nation senators, was a byproduct to the electoral reforms.<sup>73</sup> However, the figures indicate that the election of Pauline Hanson and her team was more a reflection of the genuine electoral choices of Queenslanders, through both Hanson's primary vote and preference flow, than the operation of the reforms.<sup>74</sup> Interestingly, despite Day's claims in the High Court that the reforms would essentially prevent his re-election, Antony Green's analysis indicates that Day was in fact the first person to win a Senate seat due to preferences.<sup>75</sup> Further, the claims that a vastly increased number of votes would be exhausted had been overstated.<sup>76</sup> The incidence of below the line voting almost doubled from 3.5% in 2013 to 6.5% in 2016.<sup>77</sup> A good example of the positive impact of the reforms in giving the power back to voters is in the election of Tasmanian Senator Lisa Singh, Labor's sixth candidate, who was elected ahead of the fifth placed candidate — the first time in decades that voters' own preferences reordered the candidates on a party ticket.<sup>78</sup>

In an ironic turn of events, Day resigned from political office in November 2016 following the collapse of his housing company.<sup>79</sup> In April 2017, the High Court held that Day's election to the Senate in July 2016 was invalid because he had an indirect pecuniary interest in an agreement with the Commonwealth, contrary to s 44(v) of the *Constitution*.<sup>80</sup> The High Court directed that the Australian Electoral Commission

<sup>73</sup> See, eg, Ben Raue, 'Senate Reform Did Not Cause the Return of Pauline Hanson. Here's Why', *The Guardian* (online) (6 July 2016) <<https://www.theguardian.com/australia-news/2016/jul/06/senate-reform-did-not-cause-pauline-hanson-to-return-heres-why>>, quoting former MP Craig Emerson's tweet: 'The LNP-Greens changes to Senate voting + double dissolution have breathed new life into Pauline Hanson's One Nation Party. Australia loses'. It is relevant to note that because the election was a double dissolution election, the quota was reduced from 14.3% to 7.7%, making it easier for a micro-party to win a seat.

<sup>74</sup> Antony Green, 'How Voters Reacted to the Senate's New Electoral System', above n 2; Rosie Lewis, 'Federal Election 2016: Senate Result "Reflects Will of the People"', *The Australian* (online), 13 July 2016 <<http://www.theaustralian.com.au/federal-election-2016/federal-election-2016-senate-voting-reflects-will-of-the-people/news-story/7d6b170e10f76b7df7bb6326d107c4df>>.

<sup>75</sup> Antony Green, 'South Australia Senate 2016 — Distribution of Preferences' on *Antony Green's Election Blog* (4 August 2016) <<http://blogs.abc.net.au/antonygreen/2016/08/south-australia-senate-2016-distribution-of-preferences.html>>.

<sup>76</sup> Antony Green, 'How Voters Reacted to the Senate's New Electoral System', above n 2.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Stephanie Anderson and Matthew Doran, 'Bob Day Tenders Resignation as Family First Senator', *ABC News* (online), 1 November 2016 <<http://www.abc.net.au/news/2016-11-01/bob-day-resigns/7983088>>.

<sup>80</sup> *Re Day (No 2)* (2017) 91 ALJR 518.

perform a special count of the Senate ballots in South Australia,<sup>81</sup> which led to the election of Lucy Gichuhi.<sup>82</sup>

Although the High Court's decision rendered Day's resignation ineffective, the circumstances highlighted another worthy topic of discussion on Senate electoral reform: the filling of Senate casual vacancies. Section 15 of the *Constitution*<sup>83</sup> provides that a State Parliament, in filling a casual vacancy, is limited to choosing the nominee of the party from which the former Senator had come. There is no requirement that the nominee stood for office at the previous election. Ricky Muir, the biggest target of the dissatisfaction about the proliferation of preference deals, has pointed out the incongruity: the meagre 0.51% of the primary vote he received in 2013 is still more than those Senators appointed following a Senate casual vacancy who were not on the ticket at the time of the election of the seat they took.<sup>84</sup> Muir raises a valid point. While reform of casual Senate vacancies may not be at the forefront of the current political agenda, it does raise serious questions about democratic legitimacy and warrants further consideration.<sup>85</sup>

## VI CONCLUSION

The year 2016 saw the most significant reforms to the Senate electoral process in several decades. Already, the new system has endured a High Court challenge and has been applied in a federal election. The High Court challenge in *Day* revealed little we did not already know about the relationship between the *Constitution* and Parliament's powers to legislate in relation to Senate electoral processes. Of greater interest, however, are the political ramifications of the reforms now that the dust has settled from the 2016 federal election. Although the Senate system may benefit from further reform, particularly in relation to casual Senate vacancies, the 2016 reforms are a step in the right direction.

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<sup>81</sup> Ibid.

<sup>82</sup> Transcript of Proceedings, *In the Matter of Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Mr Robert John Day AO* [2017] HCATRans 86 (19 April 2017).

<sup>83</sup> As amended by the successful constitutional referendum in 1977.

<sup>84</sup> Rosie Lewis, 'Ricky Muir Hits out at Call for Senate Reforms', *The Australian* (online), 29 December 2015 <<http://www.theaustralian.com.au/national-affairs/ricky-muir-hits-out-at-call-for-senate-reforms/news-story/e4a158c5934ba04720f8f1197d80c0e7>>.

<sup>85</sup> See, eg, Michael Maley, 'Senate Electoral Reform' on *AUSPUBLAW* (29 September 2015) <<http://auspublaw.org/2015/09/senate-electoral-reform/>>; Antony Green, 'Senate Casual Vacancies and the Impact of Constitutional Change' on *Antony Green's Election Blog* (6 December 2012) <<http://blogs.abc.net.au/antonygreen/2012/12/senate-casual-vacancies-and-the-impact-of-constitutional-change.html>>; John Nethercote, 'Senate Vacancies: Casual or Contrived?' (Paper presented at Seventeenth Conference of The Samuel Griffith Society, Coolangatta, 8–10 April 2005) 60.



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