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RECONSIDERING THE DEFINITION OF 'ATTACK' AND 'DAMAGE' IN CYBER OPERATIONS DURING ARMED CONFLICT: EMERGING SUBSEQUENT STATE PRACTICE

ABSTRACT

Since the 1977 *Additional Protocols* were concluded, the way the human population lives has drastically changed; technologies which had then barely been imagined have now become ubiquitous parts of our existence. The plain wording of *Additional Protocol I* guards civilians and civilian objects against 'acts of violence', physical damage and injury: the *Tallinn Manual on the International Law Applicable to Cyber Operations*, constrained by this orthodox law, has concluded that a cyber 'attack' is not really an 'attack' within the parameters of international humanitarian law ('IHL') unless it has a physical effect. This limited protection seems inadequate to guard such crucial, yet intangible, civilian infrastructure as internet connectivity and data reserves.

In the past few years, State interpretations have begun to stretch the understanding of what 'attack' and 'damage' are in the context of cyber operations. This article examines how State practice can effect change in the meaning of treaty obligations, and how a modified understanding of protections under IHL, adapted to modern priorities, can more effectively protect civilians from the effects of armed conflict. It will conclude that available State practice in the area suggests that such protections will be found, one way or another, in the existing international law framework.

*

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I INTRODUCTION

Cyber warfare poses a challenge for the application of international humanitarian law (‘IHL’). A framework based around loss of life, physical injury and physical damage¹ is difficult to apply, *mutatis mutandis*, to a domain where offensive action can be undertaken without leaving any physical mark. Yet in the modern world, with everyday life so reliant on computer systems and internet connectivity, there is no disputing that a cyber operation can easily be more devastating to a civilian population than a traditional kinetic attack. Despite the potential difficulty in translation, there is a real need to set clear boundaries on belligerent actions in cyberspace.

Since 2019, many States have finally added their voices to the cyber warfare conversation. If States can reach a common agreement, they are uniquely positioned to determine the way treaty provisions are understood.² The majority of viewpoints that are emerging may eventually lead to a reinterpretation of ‘attack’ and ‘damage’ under existing IHL instruments such as *Additional Protocol I*.³

II CYBER ‘ATTACK’?

In 2016 the United States (‘US’) Cyber Command led a group of coalition cyber forces (known as Joint Task Force Ares) in a cyber operation against the Islamic State’s ‘virtual caliphate’, referred to as Operation Glowing Symphony.⁴ Although the documents eventually released are heavily redacted, the purpose was ostensibly to dismantle the Islamic State propaganda unit’s media stores as far as possible and to support coalition ground operations in Iraq by disabling communications

¹ See, eg, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) arts 51, 57, 85 (*Additional Protocol I*).

² *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(b) (‘VCLT’); International Law Commission, ‘Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties’ in *Report of the International Law Commission on the Work of its Seventieth Session*, UN Doc A/73/10 (2018) 11, 14 (Conclusions 7 and 8) (‘ILC Draft Conclusions’).

³ See *Additional Protocol I* (n 1).

⁴ A redacted copy was released by the National Security Archive on 21 January 2020: United States Cyber Command, *USCYBERCOM 120-Day Assessment of Operation Glowing Symphony: Executive Summary* (USCYBERCOM Document, 15 June 2016) <<https://nsarchive.gwu.edu/sites/default/files/documents/6655597/National-Security-Archive-6-USCYBERCOM.pdf>> (‘120-Day Assessment of Operation Glowing Symphony’). See also Ewan Lawson and Kubo Mačák, *Avoiding Civilian Harm From Military Cyber Operations During Armed Conflicts* (Report, International Committee of the Red Cross Expert Meeting, 21–22 January 2020) 48.

and conducting other interference.⁵ To date, this is the sole instance of a State-acknowledged offensive cyber campaign conducted as part of an armed conflict.⁶

Media sources, when the classified operation became public knowledge, readily referred to it as a cyber ‘attack’: the *New York Times* headline proclaimed that ‘US Cyberattacks Target ISIS’,⁷ while the US Deputy Secretary of Defense was quoted as saying ‘[w]e are dropping cyberbombs’.⁸ Other news sources reported that the participants worked to ‘attack multiple targets simultaneously’,⁹ that the operations were followed up with ‘further cyber-attacks’,¹⁰ and that US Cyber Command spent several months ‘preparing for attack’.¹¹

However, sources within the actual agencies involved have been more circumspect, even euphemistic. This was ‘offensive cyber’, according to then-Director-General of the Australian Signals Directorate, Mike Burgess.¹² It was an attempt to ‘contest the enemy in the information domain’, per the USCYBERCOM briefing documents.¹³ So was this indeed a cyber ‘attack’? Or was this something else, something lesser? Burgess was emphatic that ‘all our operations are conducted in accordance with international and Australian law’.¹⁴ But if this operation — which disabled and suppressed enemy systems in the context of armed conflict — was not an attack, then what was it, and how does international law act to constrain it?

⁵ *120-Day Assessment of Operation Glowing Symphony* (n 4); Lawson and Mačák (n 4); Mike Burgess, ‘Director-General ASD Speech to the Lowy Institute’, (Speech, Lowy Institute, 27 March 2019) <<https://www.asd.gov.au/news-events-speeches/speeches/director-general-asd-speech-lowy-institute>>; Jeremy Fleming, ‘Director’s Speech at Cyber UK 2018’ (Speech, CyberUK, 12 April 2018) <<https://www.gchq.gov.uk/speech/director-cyber-uk-speech-2018>>.

⁶ Lawson and Mačák (n 4) 47.

⁷ David E Sanger, ‘US Cyberattacks Target ISIS in a New Line of Combat’, *The New York Times* (online, 24 April 2016) <<https://www.nytimes.com/2016/04/25/us/politics/us-directs-cyberweapons-at-isis-for-first-time.html>>.

⁸ Ibid.

⁹ Stephanie Borys, ‘Licence to Hack: Using a Keyboard to Fight Islamic State’, *ABC News* (online, 18 December 2019) <<https://www.abc.net.au/news/2019-12-18/inside-the-islamic-state-hack-that-crippled-the-terror-group/11792958?nw=0&r=HtmlFragment>>.

¹⁰ Ibid.

¹¹ Dina Temple-Raston, ‘How the US Hacked ISIS’, *National Public Radio* (online, 26 September 2019) <<https://www.npr.org/2019/09/26/763545811/how-the-u-s-hacked-isis>>.

¹² Burgess (n 5).

¹³ *120-Day Assessment of Operation Glowing Symphony* (n 4) 2.

¹⁴ Burgess (n 5).

III APPLICABILITY OF IHL PRINCIPLES TO CYBER WARFARE

The North Atlantic Treaty Organization (‘NATO’) recognised cyberspace as a new operational domain in 2016,¹⁵ the same year Operation Glowing Symphony was launched. However, damaging cyber operations had been common knowledge for years prior — Estonia in 2007, Georgia in 2008 and the Stuxnet worm attack on Iranian industrial sites in 2010.¹⁶ NATO’s acknowledgement of the cyber domain came three years after the 2013 *Tallinn Manual on the International Law Applicable to Cyber Warfare*, the first in-depth attempt to delineate the application of international law principles, including those of IHL, to conduct in cyberspace.¹⁷ Between 2019 and 2021, many States have added their voices to the debate, confirming their views that the existing rules of IHL also apply to cyber operations.¹⁸ Many of these perspectives were put forward as part of the United Nations (‘UN’) Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security (‘GGE’), which is also the forum where the debate was finally put beyond doubt. The consensus report issued by the GGE,

¹⁵ North Atlantic Council, ‘Warsaw Summit Communiqué’ (Press Release, 9 July 2016) <https://www.nato.int/cps/en/natohq/official_texts_133169.htm>.

¹⁶ See generally: Peter Beaumont, ‘Stuxnet Worm Heralds New Era of Global Cyberwar’, *The Guardian* (online, 1 October 2010) <<https://www.theguardian.com/technology/2010/sep/30/stuxnet-worm-new-era-global-cyberwar>>; Andrzej Kozłowski, ‘Comparative Analysis of Cyberattacks on Estonia, Georgia and Kyrgyzstan’ (2014) 3 (Spec Ed) *European Scientific Journal* 237; Gary D Brown, ‘Why Iran Didn’t Admit Stuxnet was an Attack’ [2011] (63) *Joint Force Quarterly* 70.

¹⁷ Michael N Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge University Press, 2013).

¹⁸ See, eg: *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States Submitted by Participating Governmental Experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security Established Pursuant to General Assembly Resolution 73/266*, UN Doc A/76/136 (13 July 2021) (‘GGE Compendium 2021’), the submissions of Australia at 6, Brazil at 17, 22, Estonia at 23, 26, Germany at 31, 36, Japan at 49, The Netherlands at 59, Norway at 66, 74, Romania at 77, Switzerland at 93, United Kingdom at 118 and the US at 138; Ministère des Armées, *International Law Applied to Operations in Cyberspace* (Position Paper, 2019) 12 (‘French Position Paper’); Roy Schöndorf, ‘Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations’ (2021) 97(1) *International Law Studies* 395, 399; Ministry for Foreign Affairs, *International Law and Cyberspace: Finland’s National Positions* (Position Paper, 2020) (‘Finnish Position Paper’), discussed in Ministry for Foreign Affairs, ‘Finland Published its Positions on Public International Law in Cyberspace’, *Finnish Government* (Web Page, 15 October 2020) <<https://valtioneuvosto.fi/en/-/finland-published-its-positions-on-public-international-law-in-cyberspace>>.

and endorsed by the UN General Assembly, confirmed that IHL principles must be considered to apply to the cyberspace context during armed conflict.¹⁹

It is therefore evident that war can and will be waged online, and that this will be subject to the comprehensive set of binding international laws governing the conduct of armed conflict, including the *Geneva Conventions* and their *Additional Protocols*.²⁰ Even though *Additional Protocol I* has not been universally ratified, unlike the four 1949 *Geneva Conventions*, its central targeting principles are applied by non-party States as customary international law²¹ (and the International Law Commission has determined they are possibly even *jus cogens*).²² The problem is therefore not a lack of agreed law, but rather a difficulty of translation to the cyber context.

¹⁹ *Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, UN Doc A/76/135 (14 July 2021) 18 ('*GGE Final Report 2021*'). See also: Michael Schmitt, 'The Sixth United Nations GGE and International Law in Cyberspace', *Just Security* (online, 10 June 2021) <<https://www.justsecurity.org/76864/the-sixth-united-nations-gge-and-international-law-in-cyberspace/>>; Adina Ponta, 'Responsible State Behavior in Cyberspace: Two New Reports from Parallel UN Processes' (2021) 25(14) *American Society of International Law: Insights* 1; Anna Maria Osula, 'In Search of a Coherent International Approach to Governing Technologies', *Observer Research Foundation: Digital Frontiers* (online, 17 October 2021) <<https://www.orfonline.org/expert-speak/international-approach-to-governing-technologies/>>.

²⁰ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Additional Protocol I* (n 1); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

²¹ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, 51–2; Israeli Defence Force, *The 2014 Gaza Conflict 7 July–26 August 2014: Factual and Legal Aspects* (Report, 2015) 138; Bundesministerium der Verteidigung, *Law of Armed Conflict Manual* (Joint Service Regulation (ZDv) 15/2, 2013) 22 [136]; Norwegian Defence University College, *Manual of the Law of Armed Conflict* (Joint Service Publication, 2013) 14; Department of the Navy, *The Commander's Handbook on the Law of Naval Operations: NWP 1-14M* (Navy Warfare Library, rev ed, 2022) 5-3-5-4, 8-18 [8.10.1].

²² *Report of the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019)* UN Doc A/74/10 (20 August 2019) 207, where the Commission discussed *jus cogens*.

Several tenets of IHL are challenged by cyber operations, primarily due to their intangible mode of action. Perhaps the most jarring disconnect is the traditional understanding that an ‘attack’ must involve some form of physical violence, some type of kinetic effect, such as tangible damage, injury or death. The International Criminal Court considered the definition of attack under IHL in some depth in the *Prosecutor v Ntaganda* appeal,²³ but declined to accept that it could extend beyond acts causing or intended to cause physical injury or destruction.²⁴ In cyber operations, where devastating consequences may be incurred without any visible physical impact, what does an ‘attack’ look like? What can be considered ‘damage’?

IV ‘ATTACK’ AND ‘DAMAGE’ IN *ADDITIONAL PROTOCOL I*

Part IV of *Additional Protocol I* covers protections for the civilian population in armed conflict. Article 49(1) of *Additional Protocol I* provides that “[a]ttacks” means acts of violence against the adversary, whether in offence or defence.²⁵ The term ‘attack’ is also used in the treaty outside pt IV,²⁶ but is not further defined. Whether a cyber operation is considered an ‘attack’ for the purposes of pt IV is important, because the majority of the rules providing specific protections to civilians and civilian objects only apply to ‘attacks’: art 51(2) mandates that civilians ‘shall not be the object of attack’; art 51(4) prohibits ‘[i]ndiscriminate attacks’ (which includes, under art 51(5)(b), an attack expected to be disproportionate); under art 52(1) ‘[c]ivilian objects shall not be the object of attack or of reprisals’; art 57 requires precautions ‘[w]ith respect to attacks’ to minimise civilian harm, cancellation of ‘attacks’ expected to cause excessive harm and, under art 57(2)(c), advance warning to civilians of ‘attacks’ which may affect them.

Part IV also prescribes a specific metric to determine whether: (1) an attack has been subject to appropriate precautions; or (2) should be considered indiscriminate. This is based on considering likely ‘loss of civilian life, injury to civilians and damage to civilian objects’.²⁷ Damage of this kind is therefore one of the triggers for when an attack should be considered unlawful under IHL. For example, expected ‘damage to civilian objects ... excessive in relation to the concrete and direct military advantage anticipated’ can make an attack indiscriminate under art 51(5)(b); arts 57(2)(a)(iii) and 57(2)(b) require an attack expected to cause such disproportionate ‘damage to civilian objects’ to be cancelled; precautions under art 57(2)(a) must also be taken to reduce or avoid ‘damage to civilian objects’. The meaning of ‘damage to civilian objects’ is thus of particular relevance to determine whether the requirements of

²³ *Prosecutor v Ntaganda (Judgment)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-02/06 A A2, 30 March 2021). The context in which ‘attack’ was contemplated was whether pillage of medical equipment (a protected object) could be considered an attack: at 505–7 [1147]–[1152].

²⁴ *Ibid* 511–14 [1164]–[1169].

²⁵ *Additional Protocol I* (n 1) art 49(1).

²⁶ See, eg, *ibid* arts 12, 39, 41, 42, 44, 85.

²⁷ *Ibid* art 57(2).

pt IV have been or will be complied with. The ‘damage’ aspect is especially key in the context of a cyber attack, which may have a more subtle impact than a traditional kinetic attack and thus be unlikely to result in actual physical harm to individuals.

Whether or not cyber ‘attacks’ — in cases where they do not cause an impact recognisably similar to that of a kinetic attack — are constrained by these critical provisions of *Additional Protocol I* will therefore depend to a large extent on construing the meaning of ‘attack’ and ‘damage’.

A *Diplomatic Conference and Travaux Préparatoires*

The definition of ‘attacks’ given in *Additional Protocol I* is brief and not overly illuminating in a cyber context: clearly in 1977 the scale of future military operations conducted by cyber means could hardly have been envisaged and the conduct of armed conflict was necessarily considered in terms of traditional ordnance.

The drafting of pt IV was largely the responsibility of Committee III of the Diplomatic Conference. Committee III had been assigned, among others, the articles covering ‘[g]eneral protection against effects of hostilities’ and ‘[m]ethods and means of combat’.²⁸ Striking the right balance with these articles required them to ‘reconcile military necessity with humanitarian aims’.²⁹ Therefore the definition of what, exactly, should be considered an ‘attack’ was of central importance to their deliberations. Interestingly, Committee III did not seem entirely satisfied with the finalised definition: the representative for the Netherlands noted that ‘the Drafting Committee could possibly find a better wording’.³⁰ The 1987 commentary on *Additional Protocol I* indicated that the original definition intended by the drafters for ‘attack’ was ‘to set upon with hostile action’,³¹ which does not necessarily mandate a resulting or intended kinetic effect. However, the reference to ‘violence’ was eventually retained. Committee III appeared concerned to ensure ‘attacks’ were not confused with ‘military operations’ generally, which they equated with ‘movements or manoeuvres of armed forces in action’.³²

²⁸ See ‘Committee III Report: CDDH/236/Rev1’ in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Application in Armed Conflicts: Geneva (1974–1977)* (Federal Political Department, 1976) vol XV, 377.

²⁹ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Application in Armed Conflicts: Geneva (1974–1977)* (Federal Political Department, 1978) vol VII, 286 [36].

³⁰ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Application in Armed Conflicts: Geneva (1974–1977)* (Federal Political Department, 1978) vol XIV, 128 [8], 85 [4] (*‘Diplomatic Conference Records Vol XIV’*).

³¹ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987) 603 [1879].

³² *Diplomatic Conference Records Vol XIV* (n 30) 44 [4].

‘Violence’, used as the underpinning for the *Additional Protocol I* definition of ‘attack’, is generally associated with physical conflict — ‘rough or injurious action or treatment’.³³ However, it is not necessarily so clear cut, and modern understandings of the concept may extend it to ‘any unjust or unwarranted exertion of force or power’.³⁴ This could conceivably include acts beyond physical aggression, such as those intended to intimidate or coerce an actor into compliance. This alone broadens the possible interpretations of ‘attack’ pursuant to *Additional Protocol I* beyond those that involve physical impact. At the same time, this remains consistent with the distinction drawn in Committee III between, effectively, actions directed against an enemy and other non-combative actions conducted between such engagements.

It is also clear that the Committees involved in the drafting of *Additional Protocol I* did intend to cover the development of any new technologies that could be used in armed conflict.³⁵ It seems relevant that, in circumstances where the interpretation of a term in its application to a new context is ambiguous or unclear, the over-arching intention evidenced through the *travaux préparatoires* should be taken into account to inform the meaning.³⁶ There is also the possibility of recourse to the *travaux* where an interpretive result is ‘manifestly absurd or unreasonable’³⁷ — which appears applicable to any conclusion that belligerents can conduct unfettered offensive cyber operations against civilians in the context of armed conflict.

B Tallinn Manual

Michael Schmitt, general editor of the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare* (now in its second edition)³⁸ (*Tallinn Manual 2.0*) reasoned in 2012 that *Additional Protocol I*’s ‘concern was not so much with acts which were violent, but rather with those that have harmful consequences (or risk them)’.³⁹ ‘Harm’ is a very general concept not limited to physical impact⁴⁰ and at this point in Schmitt’s analysis, the line of reasoning could cover even cyber attacks

³³ *Macquarie Dictionary* (online at 10 May 2022) ‘violence’ (def 2).

³⁴ *Ibid* (def 3).

³⁵ See, eg: *Diplomatic Conference Records Vol XIV* (n 30) 157 [32], 234 [4]; *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Application in Armed Conflicts: Geneva (1974–1977)* (Federal Political Department, 1978) vol V, 8 [4], 126 [46], 144 [16].

³⁶ *VCLT* (n 2) art 32(a).

³⁷ *Ibid* art 32(b).

³⁸ Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare* (Cambridge University Press, 2nd ed, 2017) (*Tallinn Manual 2.0*).

³⁹ Michael N Schmitt, “‘Attack’ as a Term of Art in International Law: The Cyber Operations Context” in C Czosseck, R Ottis and K Ziolkowski (eds), *4th International Conference on Cyber Conflict* (NATO CCD COE, 2012) 283, 290 (“‘Attack’ as a Term of Art in International Law”).

⁴⁰ *Macquarie Dictionary* (online at 10 May 2022) ‘harm’ (def 2); *Oxford English Dictionary* (online at 10 May 2022) ‘harm’ (defs 1a, 1b, 2).

with no visible physical impact: such attacks may have consequences extending to dire harm to both individuals and objects.

However, Schmitt ultimately concludes that under IHL ‘damage’ must be physical, akin to that inflicted by traditional kinetic weapons, and that a cyber operation is not an ‘attack’ unless its consequences extend this far (at the very least requiring a targeted computer system or connected infrastructure to be physically repaired to function again).⁴¹

This is reflected as the majority view in the *Tallinn Manual 2.0*: to qualify as an attack for the purposes of IHL, a cyber operation must cause physical damage ‘requir[ing] replacement of physical components’.⁴²

To some extent, this seems a factually incorrect distinction, conflating physical damage with visible damage. An object can be physically damaged without appearing obviously so. Early swipe credit cards were not visually changed if they passed too close to a magnet — and yet, they were *physically* changed and rendered broken as the magnetic points recorded in the card’s strip were irreversibly removed. This is a physical change involving physical damage, even if the change is not visible. So, too, is the outcome of a cyber operation which remotely forces a computer system with a traditional hard drive to remove the magnetic reference points that represent data from the disk. The disk may be reprogrammed, but the existing drive contents are physically destroyed. However, in line with the majority of *Tallinn Manual 2.0* experts, the hypothetical hard drive itself (or some physical infrastructure to which it is networked) must be broken in some way ‘requir[ing] the replacement of physical components’⁴³ for this to be considered an attack under *Additional Protocol I*.

C A Concerning Conclusion

Regardless of its technological accuracy, this limiting of ‘attack’ and ‘damage’ to the physical seems interpretively questionable considering the whole point of *Additional Protocol I*: ‘to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application’.⁴⁴ As noted by the International Committee of the Red Cross (‘ICRC’) in 2019, ‘[s]uch an overly restrictive understanding of the notion of attack would be difficult to reconcile with the object and purpose of the IHL rules on the conduct of hostilities’ generally.⁴⁵ Kubo Mačák neatly underlined the resulting logical fallacy in 2015: ‘many targets whose physical equivalents are firmly protected by IHL from enemy

⁴¹ Schmitt, ‘“Attack” as a Term of Art in International Law’ (n 39) 291.

⁴² *Tallinn Manual 2.0* (n 38) 417 [10].

⁴³ *Ibid.*

⁴⁴ *Additional Protocol I* (n 1) Preamble.

⁴⁵ International Committee of the Red Cross, *International Humanitarian Law and Cyber Operations during Armed Conflicts* (Position Paper, November 2019) 8.

combat action would be considered fair game as long as the effects of the attack remain confined to cyberspace’.⁴⁶

If an attack must cause visible physical damage, shooting out the tyres of a single civilian delivery truck would be an unlawful attack, but digitally erasing the shipping manifest documentation for a national shipping company would not — despite the vastly greater potential civilian impact. It was reported in 2011 that Estonia’s estimate of the financial loss caused by the 2007 cyber attacks against it was between \$27.5 and \$40 million⁴⁷ — despite being unsophisticated denial of service attacks which left the systems ultimately intact.⁴⁸ The attacks cut off civilian access to personal finances, media and communication.⁴⁹ And yet, under the *Tallinn Manual 2.0* majority view none of these actions (if carried out in the context of an armed conflict) could be characterised as an attack subject to IHL targeting restrictions — and would therefore be acceptable to employ against civilians. In this view, Operation Glowing Symphony was not an ‘attack’ based on a single word (‘violence’) in *Additional Protocol I* — and as a result, it theoretically required no distinction or proportionality assessment and no consideration of precautions in means and methods.

If the target had not been a terrorist organisation, but another State, could this be accepted?

On the day Russia launched its invasion of Ukraine, a multi-pronged cyber attack was launched against Viasat’s KA-SAT network, which provided much of the internet services to Ukraine including to its government. The hackers exploited an error in Viasat’s VPN setup to infect the network servers with malware and wipe the flash memory from over 45,000 individual modems.⁵⁰ This had strategic military advantages for Russia, but — if classified as an attack under *Additional Protocol I* — was also clearly indiscriminate, as the malware targeted and disabled

⁴⁶ Kubo Mačák, ‘Military Objectives 2.0: The Case for Interpreting Computer Data as Objects Under International Humanitarian Law’ (2015) 48(1) *Israel Law Review* 55, 78.

⁴⁷ ‘EU Seeks Unified Cybersecurity Regime’, *United Press International* (online, 16 June 2011) <https://www.upi.com/Top_News/Special/2011/06/16/EU-seeks-unified-cyber-security-regime/87891308219420/>.

⁴⁸ NATO Strategic Communications Centre of Excellence, *Hybrid Threats: A Strategic Communications Perspective* (Report, 2019) 52, 54; Steve Ranger, ‘What is Cyberwar? Everything You Need to Know About the Frightening Future of Digital Conflict’, *ZDNet* (online, 4 December 2018) <<https://www.zdnet.com/article/cyberwar-a-guide-to-the-frightening-future-of-online-conflict/>>.

⁴⁹ Damien McGuinness, ‘How a Cyber Attack Transformed Estonia’, *BBC News* (online, 27 April 2017) <<https://www.bbc.com/news/39655415>>.

⁵⁰ Katrina Manson, ‘The Russian Hack Everyone is Finally Talking About’ (New York, 6 March 2023) *Bloomberg Businessweek* 42, 45. See also Cynthia Brumfield, ‘Incident Response Lessons Learned from the Russian Attack on Viasat’, *CSO* (online, 16 August 2023) <<https://www.csoonline.com/article/649714/incident-response-lessons-learned-from-the-russian-attack-on-viasat.html>>.

end-user devices in the system regardless of whether they were relied on by civilians or combatants. Many of these end-users were not even located in Ukraine, but rather in other neutral States across the world.⁵¹ Although Russia denied responsibility for the hack,⁵² it provides a powerful example of how impactful cyber operations can be in armed conflict — and how important it is to control their potential impact on civilian populations.

D *Beyond Visible and Physical Damage*

Rule 92 of the *Tallinn Manual 2.0* notes the view of some of its group of experts that a cyber operation may qualify as an attack even where there is no visible physical damage, either if repair requires reinstallation of the operating system or other data,⁵³ or if it results in any loss of functionality howsoever caused.⁵⁴ Although these are presented as minority perspectives, this seems a logical reflection of the potentially serious disruptive effect to civilian lives that may result from such operations.

In the light of the treaty's object and purpose, Schmitt's initial statement above on *Additional Protocol I*'s concern with acts 'that have harmful consequences (or risk them)'⁵⁵ seems persuasive. Perhaps a more reasonable general definition of an attack or 'acts of violence'⁵⁶ in a cyber context is an operation producing such consequences.⁵⁷ The recently updated US Department of Defense dictionary provides that a 'cyberspace attack' causes 'degradation, disruption, or destruction' of its objective.⁵⁸ Arguably this definition summarises how 'damage' in the context of cyber warfare ought to be generally conceived of. A hostile action which inflicts such 'damage' should be considered a form of 'violence' under *Additional Protocol I*, making such an action an attack subject to all the targeting requirements mandated by pt IV of that *Protocol*.

However, regardless of the protections that *Additional Protocol I* should provide, the *Tallinn Manual 2.0*'s majority interpretation is reasonable given the general absence, in 2017, of any decisive State practice or agreement with interpretive weight under arts 31(3) or 32 of the *Vienna Convention on the Law of Treaties* ('VCLT'). Interpretation of a treaty term can only be based on relevant available materials, and manuals (aiming for wider utility) generally take a conservative approach to the law.

⁵¹ Manson (n 50) 44.

⁵² Ibid.

⁵³ *Tallinn Manual 2.0* (n 38) 417 [10].

⁵⁴ Ibid 417–18 [11].

⁵⁵ Schmitt, "'Attack' as a Term of Art in International Law" (n 39) 290.

⁵⁶ *Additional Protocol I* (n 1) art 49(1).

⁵⁷ Harvard University Program on Humanitarian Policy and Conflict Research, *Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press, 2013) 126–7 ('HPCR Manual').

⁵⁸ United States Department of Defense, *DOD Dictionary of Military and Associated Terms* (2021) 55 ('US DOD Dictionary').

It is, in fact, noted in rule 92 that the Group of Experts considered how to categorise a cyber operation that ‘does not cause the type of damage set forth above, but that results in large-scale adverse consequences’⁵⁹ and concluded that ‘although there might be logic in characterising the operation as an attack, the law of armed conflict does not presently extend this far’.⁶⁰ Any broadly accepted interpretation of IHL concepts will always require the support of States.

V SUBSEQUENT STATE PRACTICE AND INTERPRETATION UNDER THE *VIENNA CONVENTION ON THE LAW OF TREATIES*

In the context of cyber operations, State practice may influence the interpretation of terms in *Additional Protocol I* under both primary and supplementary interpretive means. Given that the terms ‘attack’ and ‘damage’ are also quite general, there is a further argument that they may have an intrinsically evolving meaning which can also be confirmed by recourse to State practice.

A Primary Interpretation: Article 31(3)(b)

Article 31(3)(b) of the *VCLT* provides that the very meaning of a treaty provision must be informed by ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.⁶¹ The International Law Commission has found that this is not merely a supplementary means of interpretation or confirmation, but can expand or narrow the primary meaning derived from art 31(1).⁶²

As a result, in circumstances where all States parties eventually reach some express or implied agreement between them about how a treaty should be interpreted in various contexts — for example, about what ‘attack’ means in *Additional Protocol I* as applied to cyber operations — this can have a practical impact on how the treaty operates. The catch is that for State practice to be applicable as a primary method of interpretation it must reflect a ‘sufficient common understanding’ between the parties, which such parties recognise as and intend to be evidence of the correct interpretation of the treaty.⁶³ This genuinely requires that *all* parties ‘have taken a position regarding the interpretation’.⁶⁴ So while it is theoretically possible for States to reach such a position, the likelihood seems practically remote.

⁵⁹ *Tallinn Manual 2.0* (n 38) 418 [13].

⁶⁰ *Ibid.*

⁶¹ *VCLT* (n 2) art 31(3)(b).

⁶² International Law Commission, *Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties* by Georg Nolte, *Special Rapporteur*, UN Doc A/CN.4/671 (26 March 2014) 120–1 [20].

⁶³ *Ibid* 125 [43], 128 [55]; ILC Draft Conclusions (n 2) 75–7.

⁶⁴ ILC Draft Conclusions (n 2) 43.

B *Supplementary Interpretation: Article 32*

However, under art 32 of the *VCLT*, even subsequent practice which does not demonstrate specific agreement on interpretation among party States may be used to help determine the meaning of treaty provisions.⁶⁵ Resort to such means is permissible if interpretation under art 31 either ‘leaves the meaning ambiguous or obscure’,⁶⁶ or, gives a result which is ‘manifestly absurd or unreasonable’.⁶⁷ This seems relevant on both counts, given the ongoing confusion discussed above surrounding cyber ‘attack’ and the ‘damage’ caused, and the illogical results of an orthodox interpretation of these terms (which ostensibly permits various offensive action against civilians and civilian infrastructure otherwise protected by IHL).

C *Evolving Meaning of General Terms*

The International Court of Justice has also noted that general terms used in long-standing treaties are expected to evolve in meaning over time: ‘the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning’.⁶⁸ Such intention is confirmed via State practice⁶⁹ — a process we appear to be witnessing in real time with the above reframing of ‘attack’ and ‘damage’. This natural evolution of language can even ‘result in a departure from the original intent on the basis of a tacit agreement’.⁷⁰ With this consideration added to the interpretive influence of State practice, there seems little remaining basis for insisting on the retention of some static, historical meaning for these concepts when States intercede.

VI THE EMERGENCE OF SUBSEQUENT STATE PRACTICE

Until recently, States have seemed reluctant to publicise their views on the law governing cyber operations. This is not surprising — States must strike a balance between, on the one hand, protecting their populations from the fallout of hostile cyber operations and, on the other, retaining their own flexibility and freedom in conducting defence and intelligence activities. There is a limiting finality in any declaration that a certain type of cyber operation is either lawful or unlawful.

Since 2019, however, a number of States are finally starting to take a public stance in regard to some of the interpretive difficulties introduced by the cyber operational

⁶⁵ *VCLT* (n 2) art 32; ILC Draft Conclusions (n 2) 13–14, Conclusions 2(4), 4(3), 5(1), 6(3), 7(2). See also Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press, 2018) 75–6.

⁶⁶ *VCLT* (n 2) art 32(a).

⁶⁷ *Ibid* art 32(b).

⁶⁸ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, 243 [66] (‘*Costa Rica v Nicaragua*’).

⁶⁹ ILC Draft Conclusions (n 2) 14 (Conclusion 8).

⁷⁰ *Costa Rica v Nicaragua* (n 68) 242 [64].

domain. The most recent UN Governmental Group of Experts, which submitted its final report in 2021,⁷¹ prompted a wide array of submissions from States⁷² which added significantly to the number now ‘on the record’ regarding cyber operations and IHL.

Although there is not yet consensus between all participants, States’ views demonstrate an emerging convergence of perspectives. The views publicised thus far, applied under art 32 of the *VCLT* to resolve the ambiguity of how cyber ‘damage’ may be categorised under *Additional Protocol I*, on balance support a less restrictive interpretation of ‘attack’ and ‘damage’.⁷³ It is an encouraging sign that IHL protections extended to cyber infrastructure are more significant than may have been previously understood.

This is a fast-moving area — unusually so in the realm of international law. While this article canvasses many State positions available as at the time of writing, more States are contributing their perspectives each year. Further UN initiatives will continue to prompt more State engagement with this issue, such as the submissions given in response to the ongoing Open Ended Working Group on Information and Communication Technologies.⁷⁴ As States continue to set out their understanding, a firmer or varied conclusion about the appropriate definition of ‘attack’ and ‘damage’ applicable to cyber operations may become possible. The Cyber Law Toolkit project, run jointly by six partner institutions, keeps an accessible online register of national positions as they are released which can be consulted for more information about this ongoing dialogue.⁷⁵

A Specific Statements About ‘Attack’ in the IHL Context

Of direct relevance to the conundrum about cyber ‘attack’, several States have specifically noted that a cyber operation may be considered an ‘attack’ even where it does not result in any physical effects — and, as follows, that ‘damage’ therefore does not have to be physical in nature.

For example, in 2019 France’s Ministère des Armées provided that

[c]ontrary to the *Tallinn Manual*, France considers that an attack within the meaning of Article 49 of AP I may occur even if there is no human injury or loss of life, or physical damage to goods. Thus, a cyberoperation constitutes an attack if the targeted equipment or systems can no longer provide the service for which they were

⁷¹ *GGE Final Report 2021* (n 19).

⁷² *GGE Compendium 2021* (n 18).

⁷³ Under *VCLT* (n 2) art 31(3)(a).

⁷⁴ Associated State submissions available at ‘Open-Ended Working Group on Information and Communication Technologies’, *United Nations Office for Disarmament Affairs* (Web Page) <<https://meetings.unoda.org/meeting/57871/documents>>.

⁷⁵ See ‘Category: National Position’, *Cyber Law Toolkit* (Web Page, 2021) <https://cyberlaw.ccdcoe.org/wiki/Category:National_position>.

implemented, including temporarily or reversibly, where action by the adversary is required in order to restore the infrastructure or the system.⁷⁶

This notably not only eschews the requirement for physical damage, but explicitly includes as potential attacks those which cause only temporary interruptions in functioning. So long as the adversary has to take some action to restore functionality as a consequence of the cyber operation, in the opinion of France this can be considered a cyber ‘attack’.

One of the more recent national positions released, that of Costa Rica, adopts a similar position that even temporary loss of function can be ‘damage’ and the operation resulting in them can therefore be an ‘attack’ under IHL.⁷⁷ It provides that

Costa Rica defines a cyber-attack under IHL as any conduct initiated in or through cyberspace that is designed or can be reasonably expected to cause injury or death to persons or damage or destruction to objects. ... Costa Rica understands damage to include the disabling — temporary or permanent, reversible or not — of the targeted computer, system, or network. For the avoidance of doubt, this means that the existence of physical damage to objects or injury or death to persons is not required for an operation to constitute an attack under IHL.⁷⁸

Costa Rica specifically indicates that ‘encrypting data through ransomware, despite being temporary and reversible, would be considered an attack under IHL and therefore must not be directed against civilian systems’.⁷⁹

Germany’s submission to the UN compendium notes that it considers a cyber operation an ‘attack’ when it ‘cause[s] harmful effects on communication, information or other electronic systems, on the information that is stored, processed or transmitted on these systems or on physical objects or persons’⁸⁰ and further specifies that ‘[t]he occurrence of physical damage, injury or death to persons or damage or destruction to objects comparable to effects of conventional weapons is not required for an attack in the sense of art 49 para 1 [of] *Additional Protocol I*’.⁸¹ This perspective, like that of France, is a notable expansion of the traditional understanding of ‘attack’ — not just extending the definition to include instances where the impact is not felt in terms of physical damage, but also including a very wide array of harmful effects to both the systems themselves and to people and

⁷⁶ French Position Paper (n 18) 13 (emphasis omitted).

⁷⁷ Ministry of Foreign Affairs of Costa Rica, *Costa Rica’s Position on the Application of International Law in Cyberspace* (Position Paper, 21 July 2023) 13 [49] <https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/Costa_Rica_-_Position_Paper_-_International_Law_in_Cyberspace.pdf> (‘Costa Rican Position Paper’).

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ *GGE Compendium 2021* (n 18) 36–7 (submission of Germany).

⁸¹ Ibid 37.

objects reliant on them. Under this framing, even some relatively innocuous cyber operations that are limited in impact to ‘inconvenience, irritation, stress [or] fear’⁸² could arguably be considered an ‘attack’.

Ireland adopted a similar position in 2023, indicating that ‘[t]he concept of an “attack” in IHL ... extends to cyber operations expected to cause loss of functioning to networks or electronic systems’.⁸³ As also argued in this article, Ireland reasons that a more restrictive interpretation of attack would leave civilians and civilian objects unprotected by IHL, which ‘would not be consistent with the object and purpose of the *Geneva Conventions* and their *Additional Protocols*’.⁸⁴

Pakistan’s 2023 national position paper presents a very clear view that a cyber attack is capable of being considered an ‘attack’ in IHL.⁸⁵ It also sets a relatively low threshold for this application, including as examples of prohibited attack: ‘employment of cyber and other digital weapons which undermines the confidentiality, integrity, and the availability of a critical civilian infrastructure’;⁸⁶ ‘[a]ny attempt to delete, destroy and manipulate the data essential for the smooth functioning of [such infrastructure]’; and ‘[e]mployment of cyber and other digital technologies to spread fear and chaos among the civilian population through disinformation’.⁸⁷

Italy’s late 2021 position paper maintains that an attack must be ‘an act of violence’, in accordance with *Additional Protocol I*, but specifies an action could be classified as such if it results in ‘disruption in the functioning of critical infrastructure’ — a clear shift in the understanding of what can be considered ‘damage’ under IHL.⁸⁸

The US mentions that ‘[i]n addition to the potential physical damage that a cyber activity may cause ... parties must assess the potential effects of a cyber attack on civilian objects that are not military objectives’⁸⁹ — this view does not specify what the further ‘potential effects’ to be considered must be, but clearly an attack is conceptualised as having an impact beyond the physical which is relevant to

⁸² Cf *HPCR Manual* (n 57) 20, 96.

⁸³ Ireland Department of Foreign Affairs, *Position Paper on the Application of International Law in Cyberspace* (Position Paper, July 2023) [31] (‘Irish Position Paper’).

⁸⁴ *Ibid.*

⁸⁵ Pakistan Mission to the United Nations, *Pakistan’s Position on the Application of International Law in Cyberspace* (Position Paper, 3 March 2023) 3 [14] (‘Pakistani Position Paper’).

⁸⁶ Pakistan defines such infrastructure very broadly, including ‘but is not limited to health, transportation, energy, banking and financial sector, civilian logistical supply chains, undersea fibre optic cables, satellites, and other telecommunication networks’: *ibid.*

⁸⁷ *Ibid.*

⁸⁸ Ministry of Foreign Affairs and International Cooperation, Presidency of Council of Ministers and the Ministry of Defence, *Italian Position Paper on ‘International Law and Cyberspace’* (Position Paper, Republic of Italy, December 2021) 9–10.

⁸⁹ *GGE Compendium 2021* (n 18) 138 (submission of the US) (emphasis added).

IHL requirements. As previously mentioned, the US Department of Defense *DOD Dictionary of Military and Associated Terms* also defines ‘cyberspace attack’ as ‘[a]ctions taken in cyberspace that create noticeable denial effects (ie, degradation, disruption, or destruction) in cyberspace or manipulation that leads to denial that appears in a physical domain’,⁹⁰ again apparently acknowledging that even where the direct impact of an operation is confined to cyberspace this can still constitute an ‘attack’ if the effects are of sufficient scale.

However, this wave of State practice is not uniform. Israel’s 2020 position paper accords with the *Tallinn Manual 2.0* majority position, in stating that ‘[o]nly when a cyber operation is expected to cause physical damage, will it satisfy this element of an attack under LOAC’.⁹¹ Supporting this understanding is their observation that ‘practices such as certain types of electronic warfare, psychological warfare, economic sanctions, seizure of property, and detention have never been considered to be attacks’ due to the lack of physical damage caused, and there is ‘no other specific rule to the contrary that has evolved in the cyber domain’.⁹² Denmark’s 2023 position paper expresses a similar view, indicating that ‘a cyber operation will constitute an attack if it can be reasonably expected to cause injury, death or physical damage to individuals or objects’.⁹³ Denmark further indicates that data itself should not be considered an object for the purposes of IHL, and an operation to destroy such data would only be classified as an attack where ‘the destruction of data foreseeably results in injury, death or physical damage’.⁹⁴

The Inter-American Juridical Committee of the Organization of American States canvassed numerous State members about cyber operations and international law in 2019. The responses were usefully summarised in November 2020.⁹⁵ Although the full-text State views do not appear to be publicly available, the summary indicates that perspectives vary between the respondent States. Guatemala and Ecuador indicated that a cyber operation leading to loss of functionality (with or without visible damage) can be an attack under IHL,⁹⁶ while Chile and Peru took the view that to meet this threshold would specifically require damage akin to a kinetic attack.⁹⁷ However, the report does note that Peru’s response is ‘a bit ambiguous, as it appears to rely on *jus ad bellum* materials to identify the standards for an

⁹⁰ *US DOD Dictionary* (n 58) 55.

⁹¹ Schöndorf (n 18) 400.

⁹² *Ibid.*

⁹³ Jeppe Mejer Kjelgaard and Ulf Melgaard, ‘Denmark’s Position Paper on the Application of International Law in Cyberspace’ (2023) *Nordic Journal of International Law* 1571–8107: 1–10, 9–10 (‘Danish Position Paper’).

⁹⁴ *Ibid* 10.

⁹⁵ Department of International Law of the Secretariat for Legal Affairs, *Improving Transparency: International Law and State Cyber Operations* (Report, Inter-American Juridical Committee, 1 November 2020) Annex B.

⁹⁶ *Ibid* 45–6 [32].

⁹⁷ *Ibid* 45 [31].

IHL attack’.⁹⁸ Bolivia and Guyana also responded to the inquiry, but were ‘more equivocal’ on this specific issue.⁹⁹

Other States which have not attempted to conclusively expand or limit the definition of ‘attack’ or ‘damage’ have nevertheless raised a need for further clarification of how IHL applies to cyber operations. These include Estonia,¹⁰⁰ Kenya,¹⁰¹ and Switzerland.¹⁰²

VII OTHER NOTED PROTECTIONS AGAINST CYBER ATTACKS UNDER IHL

Some States have also raised other mechanisms within IHL which provide protections to civilian populations from cyber warfare, even if the definition of an ‘attack’ cannot be expanded beyond operations with physical consequences akin to those of a kinetic attack.

A General Civilian Protections and Basic Rule

Australia, for example, notes the ‘general protections afforded to the civilian population ... against dangers arising from military operations’¹⁰³ which belligerents must take into account in all their actions potentially having an adverse impact. This requirement is also emphasised by Pakistan and by Israel (despite the latter State not currently of the view that the concept of ‘attack’ should be interpreted broadly in cyber operations).¹⁰⁴ Germany draws attention to the obligation to ‘take constant care to spare the civilian population’,¹⁰⁵ as does Finland in its 2020 position paper.¹⁰⁶ Brazil quotes the Martens clause as authority that civilian protections must still apply in cases ‘where IHL is silent or ambiguous’.¹⁰⁷

Of relevance to these perspectives, it should be noted that the basic rule of *Additional Protocol I*, art 48, does not actually proscribe ‘attacks’ against civilians per se. Instead, it forbids parties to the conflict from directing their ‘operations’ against civilians or civilian objects. Although the 1987 commentary suggests that this relates to ‘military operations during which violence is used’, it simultaneously

⁹⁸ Ibid 45 n 76.

⁹⁹ Ibid 46 [33].

¹⁰⁰ Ibid 27 (submission of Estonia).

¹⁰¹ Ibid 54 (submission of Kenya).

¹⁰² *GGE Compendium 2021* (n 18) 94 (submission of Switzerland).

¹⁰³ Ibid 6 (submission of Australia).

¹⁰⁴ Pakistani Position Paper (n 85) 3–4; Schöndorf (n 18) 401.

¹⁰⁵ *GGE Compendium 2021* (n 18) 38 (submission of Germany).

¹⁰⁶ Finnish Position Paper 2020 (n 18) 7.

¹⁰⁷ *GGE Compendium 2021* (n 18) 23 (submission of Brazil), citing *Additional Protocol I* (n 1) art 1.

provides that this ‘refers to all movements and acts related to hostilities that are undertaken by armed forces’,¹⁰⁸ the latter of which is more closely supported by the Diplomatic Conference records.¹⁰⁹ Given the extensive use of the term ‘attack’ throughout *Additional Protocol I*, the intentional use of the term ‘operations’ in art 48 (and, similarly, art 51(1)) must have some significance; the two cannot be considered interchangeable, and ‘operation’ must encompass some military activities beyond ‘attacks’. It therefore seems strongly arguable — and was raised by Heather Harrison Dinniss as far back as 2012 — that even if offensive cyber cannot be considered to fall within the concept of ‘attack’, it still can only be employed against military objectives and military personnel.¹¹⁰

B *Proportionality, With or Without ‘Attack’*

Multiple States also raise — regardless of whether they explicitly support the expansion of the definition of ‘attack’ to include instances of non-physical damage — that due to the complexity and interconnectedness of the cyber environment and the difficulty of assessing the impact of a cyber operation, very thorough proportionality assessments are required in conducting such operations and the duty to take all feasible precautions to reduce harm to civilians is even more crucial. Switzerland, for example, notes that ‘the obligation to take all precautionary measures practically possible to spare civilians and civilian objects plays a particularly important role in the use of cyber means and methods of warfare’.¹¹¹ Similar sentiments are echoed by Brazil,¹¹² the US,¹¹³ Denmark¹¹⁴ and France.¹¹⁵ France, in particular, suggests that proportionality assessments in cyber operations must consider all direct and indirect damage that may result, such as the scale of impact of malfunctioning systems.¹¹⁶

C *Data as a Protected Civilian Object*

Several States have also expressed a belief that civilian data is in fact a civilian ‘object’ requiring protection¹¹⁷ (as afforded to civilian objects by arts 48, 49, 51 and especially 52 of *Additional Protocol I*). This is contrary to the majority view in the *Tallinn Manual 2.0* — which suggested that general civilian data per se is

¹⁰⁸ Sandoz, Swinarski and Zimmermann (n 31) 600 [1875].

¹⁰⁹ *Diplomatic Conference Records Vol XIV* (n 30) 44 [4].

¹¹⁰ Heather Harrison Dinniss, *Cyber Warfare and the Laws of War* (Cambridge University Press, 2012) 199.

¹¹¹ *GGE Compendium 2021* (n 18) 94 (submission of Switzerland).

¹¹² *Ibid* 23 (submission of Brazil).

¹¹³ *Ibid* 139 (submission of the US).

¹¹⁴ Kjelgaard and Melgaard, ‘Danish Position Paper’ (n 93) 10.

¹¹⁵ French Position Paper (n 18) 16.

¹¹⁶ *Ibid*.

¹¹⁷ *GGE Compendium 2021* (n 18) 37 (submission of Germany), 78 (submission of Romania); French Position Paper (n 18) 14; Costa Rican Position Paper (n 77) 13–14 [50].

only protected in cases where injury, death or other physical damage would result from its destruction.¹¹⁸ If civilian data can be considered to have status as a civilian object, this would engage the protective principles of distinction, proportionality and precautions in means and methods for any entity reliant on such civilian data.

Of course, this protection may be subsidiary where States have also supported a reconceptualisation of ‘attack’ to include non-visible damage. As summarised in an article written by three ICRC legal advisers:

if data are deleted or manipulated in a manner that is designed or expected to cause, directly or indirectly, death or injury to a person, or damage to (*including — in our view — by disabling*) a physical object, the operation is an attack regardless of whether data themselves constitute objects for the purpose of IHL.¹¹⁹

VIII RELEVANT STATEMENTS REGARDING *JUS AD BELLUM*

In cases where States have not specifically addressed the *jus in bello* definition of ‘attack’, they may nevertheless identify disruptive cyber operations as a potential ‘use of force’ even where they do not inflict physical damage — confirming, if nothing else, that such operations would not be passively accepted. Thresholds specified in regard to armed attack, which enlivens a right to act in self-defence,¹²⁰ may be particularly relevant. This is because at least two States which explicitly recognise that ‘attack’ under IHL can include loss of functioning in cyber assets have nevertheless specified that there is a higher threshold (requiring damage akin to a kinetic attack) for an *initial* attack capable of instigating an armed conflict.¹²¹ If a State considers that even an ‘armed attack’ in the *jus ad bellum* context potentially does not require observable damage, this may suggest they would ascribe to a fairly low threshold for ‘attack’ in the context of IHL.

States which have made potentially relevant statements include:

- Australia, which indicates that in determining if a cyber activity amounts to a use of force, it is relevant whether the action is likely to result in ‘damage or destruction (*including to their functioning*) to objects or critical infrastructure’;¹²²
- The Netherlands, specifying that ‘a cyber operation with a very serious financial or economic impact may qualify as the use of force’;¹²³

¹¹⁸ *Tallinn Manual 2.0* (n 38) 416 [6], 437 [6].

¹¹⁹ Laurent Gisel, Tilman Rodenhäuser and Knut Dörmann, ‘Twenty Years On: International Humanitarian Law and The Protection of Civilians Against the Effects of Cyber Operations During Armed Conflicts’ (2020) 102(913) *International Review of the Red Cross* 287, 317 (emphasis added).

¹²⁰ *Charter of the United Nations* art 51.

¹²¹ See, eg: Irish Position Paper (n 83) [30]; Costa Rican Position Paper (n 77) 12 [42].

¹²² *GGE Compendium 2021* (n 18) 5 (submission of Australia) (emphasis added).

¹²³ *Ibid* 58 (submission of The Netherlands).

- Norway, which indicates that ‘a cyber operation causing severe disruption to the functioning of the State such as the use of crypto viruses or other forms of digital sabotage ... could amount to the use of force in violation of Article 2(4)’;¹²⁴
- Poland, which notes that where a cyber attack ‘caus[es] similar effects to those caused by a classic armed attack’ it may be considered equivalent, and gives the example of a cyber operation which damages a power plant, deactivates a missile defence system or takes control of an aircraft or ocean vessel in order to cause a collision;¹²⁵ and
- Singapore, which notes that ‘malicious cyber activity may amount to an armed attack even if it does not necessarily cause death, injury, physical damage or destruction’ and provides the example of ‘a targeted cyber operation causing sustained and long-term outage of Singapore’s critical infrastructure’.¹²⁶

Despite the context in which these were raised, they do add to the broader reframing of the significance and potential severity of cyber operations in relation to conflict between States.

IX A POSITION OF COMPROMISE

An expansion of the concepts of ‘attack’ and ‘damage’ under *Additional Protocol I* to encompass all situations where there is non-trivial loss of functionality provides significantly greater protection to civilians affected by armed conflict. Modern examples have clearly demonstrated the chaos and significant loss that can result from cyber operations.¹²⁷ Requiring that military forces consider more broadly potential collateral damage beyond the physical impact of their actions is now simply mandated by the world’s reliance on digital infrastructure.

A more nuanced interpretation of ‘attack’ and ‘damage’, via the operation of State practice, can only assist with upholding the object and purpose of *Additional Protocol I*. This would have flow-on effects in expanding the protective mechanisms accorded to civilians and civilian institutions — especially in application to proportionality assessments and the obligation to take precautions in the means and method of attack.¹²⁸ This would not prevent military forces from making use of disabling cyber operations, but would firmly (and appropriately) disallow civilian cyber infrastructure to be their target in armed conflict. At the same time, it would require military forces to comprehensively assess the collateral impact to civilian systems when conducting such operations against valid military targets, even where this is achieved without any damage to infrastructure hardware.¹²⁹

¹²⁴ Ibid 70 (submission of Norway).

¹²⁵ Council of Ministers, *The Republic of Poland’s Position on the Application of International Law in Cyberspace* (Position Paper, Republic of Poland, December 2022) 5 [4].

¹²⁶ *GGE Compendium 2021* (n 18) 84 (submission of Singapore).

¹²⁷ See, eg, Beaumont (n 16).

¹²⁸ Under *Additional Protocol I* (n 1) arts 57(2)(a)(ii)–(iii), 57(2)(b).

¹²⁹ Ibid art 52.

X CONCLUSION

At this stage, there are only limited indications of how States interpret *Additional Protocol I* as it applies to a cyber ‘attack’ and ‘damage’ under IHL. Many more States remain absent from the conversation, while others have provided only preliminary and tentative views. However, the State positions available suggest that States are not reluctant to reconsider and reinterpret IHL principles to fill the gaps identified in their application to the cyber domain.

States have put forward multiple mechanisms in extant law that protect civilians in armed conflict situations from the impact of cyber operations. The 2015 Group of Governmental Experts, comprised of 20 State contributors, had proposed as a ‘voluntary, non-binding norm’ that a State should ‘not conduct or knowingly support ICT activity contrary to its obligations under international law that intentionally damages critical infrastructure or otherwise impairs the use and operation of critical infrastructure to provide services to the public’.¹³⁰

In 2019, the year that the subsequent GGE began its deliberations, Michael Schmitt resorted to policy recommendations intended to shore up a system of black letter law which — in his view, taking the traditional perspective of ‘attack’ — failed to ensure the intended protections for civilian populations.¹³¹ The influx of State viewpoints discussed above followed soon after; these provided a stark and perhaps unexpected contrast of view. In them is an overriding confirmation that, one way or another, cyber operations which impose dire consequences on civilians will not be considered lawful, regardless of whether they cause damage in the traditional, kinetic sense. The litany of considerations States stipulate must be accounted for by those planning cyber operations is reminiscent of another minority position stated in the *Tallinn Manual 2.0*: ‘should an armed conflict involving such cyber operations break out, the international community would generally regard them as an attack’.¹³² There is every expectation, based on the emerging State practice, that this will hold true. As more comprehensive State practice enables a firm reinterpretation, it is likely that the crucial protections IHL provides to civilian populations affected by war will be fully transposed to the cyber context in accordance with the overriding object and purpose of this body of law.

¹³⁰ Group of Governmental Experts on Development in the Field of Information and Telecommunications in the Context of International Security, *Report of the Group of Governmental Experts on Development in the Field of Information and Telecommunications in the Context of International Security*, UN Doc A/70/174 (22 July 2015) 8 [13(f)]. This was confirmed by the subsequent 2019–21 GGE in *GGE Final Report 2021* (n 19) 8.

¹³¹ Michael Schmitt, ‘Wired Warfare 3.0: Protecting the Civilian Population During Cyber Operations’ (2019) 101(1) *International Review of the Red Cross* 333, 343.

¹³² *Tallinn Manual 2.0* (n 38) 418 [13].

LEGAL PROFESSIONAL PRIVILEGE AND CORPORATE WRONGDOING

ABSTRACT

This article analyses how legal professional privilege, which limits the disclosure of certain communications between a client and their lawyer, may be deployed by corporations in the face of public enforcement actions against them for suspected wrongdoing. It evaluates the merits of concerns regarding misuse in this context, and examines regulator responses in rhetoric, public enforcement actions, and litigation. It assesses whether and how legal professional privilege subverts the administration of justice in respect of suspected criminality by corporations, and challenges the human rights protection for corporations that accrues in this context. It concludes by considering a limitation of the privilege in respect of corporations, highlighting the need for further empirical research.

I INTRODUCTION

Corporate crime (which includes crime in, by, and for corporations) ‘is estimated to cost Australia more than \$8.5 billion per year’, and may account for ‘40% of the total cost of crime in Australia’.¹ Though ‘the extent and nature of corporate crime is largely unknown’, it appears to be concentrated in specific industry sectors, with some recidivist corporate groups.² Thus, there is a longstanding yet urgent need to develop better ways of revealing and responding to corporate crime. This is exemplified by the Australian Law Reform Commission’s

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¹ Attorney-General’s Department, Australian Government, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (Public Consultation Paper, March 2017) 1.

² David Bartlett et al, ‘Corporate Crime in Australia: The Extent of the Problem’ (Trends & Issues in Crime and Criminal Justice No 613, Australian Institute of Criminology, December 2020) 1, 10–11.

Corporate Criminal Responsibility report³ and the hearings and reports of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* ('Banking Royal Commission').⁴ These initiatives indicate the damage caused by corporate criminality in various domains — in communities, to the environment, and to commerce — and how the failure to respond adequately can undermine trust in the state as well as in markets. A significant challenge in regulation and enforcement lies in the fact that a lot of corporate crime goes undetected,⁵ and that acquiring sufficient and admissible evidence of such criminality, when committed by corporations especially, is difficult. This is illustrated by the fact that the prosecution of organisations (as opposed to the individuals within them) remains rare — less than 1% of defendants in Australian criminal courts in the 2018–19 financial year were organisations.⁶

The potential harms in and of commercial enterprise are well-examined in legal and criminological research.⁷ What is less studied is the control of information by corporations to prevent these harms being detected and/or proven to the requisite standard in litigated public enforcement actions. There are various potential strategies by corporates to limit such flows of information, this could be through the pursuit of potential whistle-blowers who might reveal compromising matters;⁸ the use of public relations firms to manage the circulation and nature of information;⁹ and/or through reliance on the concept of legal professional privilege ('LPP').

The focus of this article is the latter. This article analyses how LPP — which limits the disclosure of certain communications between a client and their lawyer — is relied on by corporations, and assesses whether its use can subvert the administration

³ Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020).

⁴ See, eg, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 ('Banking Royal Commission').

⁵ John Braithwaite and Gilbert Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28(2) *Crime and Delinquency* 292, 294–5.

⁶ *Corporate Criminal Responsibility* (n 3) 97 [3.73].

⁷ See, eg: Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001); Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002); Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (Routledge, 2015); Jennifer Arlen (ed), *Research Handbook on Corporate Crime and Financial Misdealing* (Edward Elgar, 2018).

⁸ See generally Sulette Lombard and Vivienne Brand, 'External Regulation and Internal Whistleblowing Frameworks: An Australian Perspective' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (Springer, 2020) 113.

⁹ David Whyte, 'It's Common Sense, Stupid! Corporate Crime and Techniques of Neutralization in the Automobile Industry' (2016) 66(2) *Crime, Law and Social Change* 165, 174.

of justice in respect of crime by corporations. Two decades ago, concerns about the misuse of LPP claims emerged in the British American Tobacco litigation¹⁰ and the Australian Wheat Board Royal Commission,¹¹ while the privilege was abrogated in relation to the investigation into the manufacture of asbestos products by building materials company James Hardie Industries plc.¹² This article revisits and updates the debate that crystallised then.

This article examines how LPP may be used by corporations to limit the disclosure of information in a way that obstructs public enforcement actions. It examines LPP's complexion in jurisprudence, as well as the responses by regulators. More broadly, it assesses whether and how LPP subverts the administration of justice in respect of criminality by corporations, and challenges the human rights protection for corporations in this context.

In terms of structure, Part II outlines the meaning and scope of the privilege. Part III looks at concerns raised about LPP's apparent misuse, and the extent of empirical evidence on this phenomenon. Part IV focuses on the responses of regulators, as

¹⁰ This litigation began with a civil action taken by Rolah McCabe against British American Tobacco Australia Services Ltd ('BAT'), arguing that BAT 'had been negligent in its manufacturing and marketing of cigarettes, and that its negligence had caused her lung cancer': 'The McCabe Case', *McCabe Centre for Law & Cancer* (Web Page) <<https://www.mccabecentre.org/about/the-mccabe-case>>. Finding in McCabe's favour, the trial judge, Eames J, stated that 'the process of discovery in this case was subverted by the defendant and its solicitor ... with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful': *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73, [385] ('*McCabe*'). BAT sought to extend claims of privilege: at [20]; thousands of relevant documents had been destroyed: at [308]–[309]; with others 'warehoused' to put them beyond the scope of discovery: at [324]; and the Court was misled over what had happened to the documents: at [354]. This decision was overturned on appeal, with the Victorian Court of Appeal preferring an 'innocent' reading of BAT's 'document retention policy': *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, 555 [73]. For further detail, see below Part III.

¹¹ At the turn of the century, the Australian Wheat Board ('AWB') held a very large share of the Iraqi wheat market and was involved in the United Nations ('UN') humanitarian Oil-for-Food Programme, established to allow Iraq to sell oil on the world market in exchange for humanitarian goods: Terence RH Cole, *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (Report, November 2006) vol 1, xiii ('*AWB Royal Commission*'). After the invasion of Iraq in 2003, a UN inquiry was launched, revealing that many companies involved in the Oil-for-Food Programme had paid kickbacks to the Iraqi regime to secure Iraqi business: see Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Manipulation of the Oil-For-Food Programme by the Iraqi Regime* (Report, 27 October 2005) 4–6. Following the UN's inquiry, the AWB Royal Commission was established — in which LPP was a major impediment. For further detail, see below Part III.

¹² See below Part V.

regards policy and litigation practice. Part V assesses some avenues for reform. Part VI concludes by endorsing the restriction of LPP for corporations.

II THE MEANING AND SCOPE OF THE PRIVILEGE

LPP limits the disclosure of information or documents which would reveal communications between a client and their lawyer, where those communications were made for the dominant purpose of giving or obtaining legal advice or services, or in preparation for litigation.¹³ Crucially, the privilege belongs to the client rather than the lawyer, and so is characterised as ‘client legal privilege’ in the Uniform Evidence Law.¹⁴ Most fundamentally, recognition of the privilege is seen to be crucial to the rule of law.¹⁵ LPP may be conceived of in an instrumental as well as in a deontological sense, that is, LPP encourages frank disclosure which: (1) is of practical benefit to the administration of justice; (2) encourages compliance with the law; and (3) safeguards rights of the individual against state power.¹⁶ LPP ‘exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers’,¹⁷ and is of ‘great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law’.¹⁸

LPP is a substantive common law right,¹⁹ and is also provided for by the Uniform Evidence Law.²⁰ These provisions apply to all Federal Court of Australia (‘Federal Court’) proceedings,²¹ to the adducing of evidence at trial as well as to the pre-trial stage in the majority of Australian jurisdictions which adopt the Uniform Evidence Law privileges. The statutory Uniform Evidence Law provisions override the

¹³ See, eg: *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552 [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (‘*Daniels*’); *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2003) 195 ALR 717, 726 [39]; *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, 440 [9].

¹⁴ See, eg, *Evidence Act 1995* (Cth) pt 3.10 div 1 (‘*Cth Evidence Act*’).

¹⁵ Justice Mark Weinberg, ‘Some Recent Developments in Corporate Regulation: ASIC from a Judicial Perspective’ (Seminar Paper, Monash University Law School, 16 October 2013) 11 [37].

¹⁶ See Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, December 2007) 50–1 [2.10]–[2.14], 55–6 [2.36] (‘*Privilege in Perspective*’).

¹⁷ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 64 [35] (Gleeson CJ, Gaudron and Gummow JJ) (‘*Esso*’).

¹⁸ *A-G (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J) (‘*Maurice*’).

¹⁹ See: *Corporations and Securities Panel v Bristle Investments Pty Ltd* (1999) 152 FLR 469, 472 [11] (‘*Bristle Investments*’); *Daniels* (n 13) 553 [11], quoted in *Watkins v Queensland* [2008] 1 Qd R 564, 594 [63] (Keane JA).

²⁰ See, eg, *Cth Evidence Act* (n 14) ss 118–19.

²¹ *Ibid* s 4(1), Dictionary pt 1 (definition of ‘federal court’).

common law, where they apply. Otherwise, claims of privilege will be determined on common law principles.

LPP precludes the disclosure of certain communications between a lawyer and a client, when these communications are: (1) for the dominant purpose of seeking or providing legal advice; or (2) for use in ‘actual or anticipated’ (not merely possible) legal proceedings.²² These subdivisions are referred to as ‘advice privilege’ and ‘litigation privilege’, respectively, where the former protects communications made for the dominant purpose of giving or obtaining legal advice and the latter pertains to communications that were created or undertaken for use in pending or contemplated litigation. Indeed, Australian courts have not kept the two heads of privilege as distinct as in England and Wales,²³ though the courts here do adopt the two categories to assess whether LPP can be claimed.²⁴

LPP may be waived, either expressly or impliedly, by acting in a way that is inconsistent with the confidentiality of the communications.²⁵ For instance, in *Australian Securities and Investments Commission v RI Advice Group Pty Ltd* (*ASIC v RI Advice*), the Federal Court found that a privilege claim by RI Advice Group Pty Ltd (*RI Advice*) over an internal report, which it said had been prepared at the direction of an in-house lawyer for the purposes of the lawyer giving legal advice, could not be upheld.²⁶ Previously RI Advice had produced copies of the report to the Australian Securities and Investments Commission (*ASIC*) in response to notices issued under the *Australian Securities and Investments Commission Act 2001* (Cth), meaning that even if the report had been privileged, RI Advice would have waived its privilege by producing copies to ASIC without objection.²⁷ In contrast, in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd [No 2]*, ASIC argued unsuccessfully that the Respondent had waived privilege by referring to the existence of legal advice in open correspondence.²⁸ The Court found that the letter touched on, but did not reveal, the substance of the advice, and accordingly, the claim was upheld.²⁹ Then, in *TerraCom Ltd v Australian Securities and Investments Commission*, the Federal Court considered whether a waiver of privilege over part of a privileged investigation report would result in privilege being waived

²² See: *Baker v Campbell* (1983) 153 CLR 52, 122–3 (Dawson J) (*‘Baker’*); *Esso* (n 17) 64–5 [35]; *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332, 333 [3] (Callaway JA), 335–6 [8], 341 [19] (Batt JA, Charles JA agreeing at 333 [1]) (*‘Mitsubishi’*).

²³ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd [No 2]* (2009) 180 FCR 1, 4–5 [8].

²⁴ Ronald J Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis Butterworths, 3rd ed, 2017) 31.

²⁵ *Maurice* (n 18) 497–8 (Dawson J); *Mann v Carnell* (1999) 201 CLR 1, 13 [28]–[29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

²⁶ (2020) 148 ACSR 1, 6–7 [35], 10 [53] (*ASIC v RI Advice*).

²⁷ *Ibid* 11 [58].

²⁸ [2020] FCA 1013.

²⁹ *Ibid* [32]–[33].

over the entirety of the report.³⁰ The Court found that the company waived LPP attaching to a report prepared by PricewaterhouseCoopers ('PwC') by means of a letter to shareholders and an Australian Securities Exchange announcement which conveyed the proposed conclusion of the report's subject matter.³¹

Moreover, material already in the public domain is not privileged. On this point, in *Glencore International AG v Federal Commissioner of Taxation* ('Glencore'), companies within the Glencore plc group ('Glencore group') sought to restrain the Australian Taxation Office ('ATO') from using documents leaked in the so-called 'Paradise Papers',³² through injunctive relief based on LPP.³³ In unanimously rejecting the Glencore group's claim, the High Court of Australia ('High Court') emphasised that LPP is an immunity rather than an actionable right,³⁴ in other words, a shield and not a sword. Here, the documents on which the ATO sought to rely were already available publicly (or at least had lost confidentiality), and so LPP could not operate to prevent the defendant's continued use of the documents.³⁵

As for the extent of the advice privilege, in limited instances communications between a client or lawyer and a third party such as an accountant may be privileged, provided that the dominant purpose was for the client to receive legal advice.³⁶ This might include a situation where an accountant provides accounting records to a lawyer that enable the lawyer to provide legal advice to a client. Moreover, LPP protects communications with in-house counsel as long as that 'legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client'.³⁷

³⁰ (2022) 401 ALR 143 ('TerraCom').

³¹ Ibid 155 [61]–[62], 156–7 [66]–[67].

³² The 'Paradise Papers' were 13.4 million confidential electronic documents relating to offshore investments and tax arrangements that were leaked to the International Consortium of Investigative Journalists and journalists globally by German newspaper Süddeutsche Zeitung, in late-2017: ICIJ, 'Offshore Trove Exposes Trump–Russia Links and Piggy Banks of the Wealthiest 1 Percent', *International Consortium of Investigative Journalists* (online, 5 November 2017) <<https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/>>. See generally David Chaikin and Gordon Hook (eds), *Corporate and Trust Structures: Legal and Illegal Dimensions* (Australian Scholarly, 2018).

³³ (2019) 265 CLR 646 ('Glencore').

³⁴ Ibid 659–60 [21]–[25].

³⁵ See Talitha Fishburn, 'Paradise Lost: Glencore Loses High Court Bid To Extend Legal Professional Privilege' [2019] (59) *Law Society Journal* 90, 90.

³⁶ See, eg, *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 136 FCR 357 ('Pratt Holdings'), where the Federal Court considered whether LPP extends to documents prepared by a firm of accountants for the client.

³⁷ *Waterford v Commonwealth* (1987) 163 CLR 54, 95–6 (Dawson J) ('Waterford'). There is some circularity here: communications are regarded as confidential because privilege attaches to them, and vice versa.

In *Federal Commissioner of Taxation v PricewaterhouseCoopers* ('*PricewaterhouseCoopers*'),³⁸ the Federal Commissioner of Taxation ('Commissioner') asked the Federal Court to determine:

- whether the form of the engagements between multidisciplinary partnership, PwC, and certain Australian subsidiaries of JBS SA, a Brazilian multinational company, 'establish[ed] a relationship of lawyer and client sufficient to ground a claim for' LPP;³⁹
- whether the services provided by PwC to certain Australian subsidiaries of JBS SA were 'provided pursuant to a relationship of lawyer and client sufficient to ground a claim for' LPP;⁴⁰ and
- whether the documents in dispute were 'made for the dominant purpose of giving or obtaining ... legal advice from one or more lawyers' of PwC.⁴¹

Justice Moshinsky held that the form of the engagements established a relationship of lawyer and client sufficient to ground privilege claims,⁴² and that the services were provided under a relationship of lawyer and client sufficient to ground such claims.⁴³ Furthermore, the Federal Court carried out a documentary analysis of a sample of 116 documents to ascertain if they were made for the dominant purpose of giving or obtaining legal advice.⁴⁴ The Court also appointed three amici curiae to assist it in relation to the sample documents.⁴⁵ Justice Moshinsky stated: 'Whether or not the Documents in Dispute are privileged is to be determined by reference to whether, as to each particular document, it constitutes or records a communication made for the dominant purpose of giving or obtaining legal advice.'⁴⁶ Moreover, the onus of proof was found to rest with the party claiming the privilege.⁴⁷

Justice Moshinsky observed instances of 'non-legal advice being "routed" through' Glenn Russell, an Australian legal practitioner, 'in order to obtain the protection of legal professional privilege'⁴⁸ — noting that this does not attract the protection of LPP.⁴⁹ Notably, PwC requested an undertaking from the ATO that it would not recommend prosecution if PwC lost, such that neither the firm nor its personnel could be charged with 'tax crimes'. After initial refusal and lengthy discussions,

³⁸ (2022) 114 ATR 335 ('*PricewaterhouseCoopers*').

³⁹ Ibid 340 [8].

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid 386 [190].

⁴³ Ibid 389 [207].

⁴⁴ Ibid 341–2 [21]–[22].

⁴⁵ Ibid 341 [14].

⁴⁶ Ibid 388 [205].

⁴⁷ Ibid 384 [178].

⁴⁸ Ibid 444 [611], 446 [624], 460 [726], 462 [739].

⁴⁹ Ibid 382 [170], citing *Baker* (n 22) 112 (Deane J) and *Pratt Holdings* (n 36) [46] (Finn J, Merkel J agreeing). For further discussion, see below Part II(A).

the ATO agreed that it was prepared to ‘give comfort’ to PwC that it would not prosecute.⁵⁰

The privilege may be ‘denied to a communication which is made for the purpose of frustrating the processes of the law itself, even though no crime or fraud is contemplated’.⁵¹ Furthermore, LPP does not accrue where there is evidence of illegality or improper purpose by a party, such as involvement in fraud or other misconduct.⁵² The question is whether the communication is on a prima facie basis ‘made in furtherance of, or as a step preparatory to, the commission of the fraud or wrongdoing’.⁵³ The principles governing the crime or fraud exception were articulated helpfully by Matthews J in the context of s 125 of the *Evidence Act 2008* (Vic) in *Andrianakis v Uber Technologies Inc* (*‘Andrianakis’*).⁵⁴ Her Honour adopted the summary of the principles from *Talacko v Talacko*,⁵⁵ including: that the Court need only be satisfied that there are ‘reasonable grounds’ that the offence, fraud or penalty act was committed; that knowing involvement by the client in the offence, fraud or penalty act is required; that subsequent conduct may or may not be in furtherance of an offence; and that the legal advice sought about how to conceal the fraud is not privileged.⁵⁶

A The Dominant Purpose Test and Corporations

A critical factor in determining whether LPP applies lies in the purpose for which communications were made or created. The party asserting privilege over a document or communication bears the onus of establishing that the dominant purpose was to receive or provide legal advice, or for use in litigation.⁵⁷ The word ‘dominant’ means ‘the ruling, prevailing, or most influential purpose ... clear paramountcy should be the touchstone’.⁵⁸ The dominant purpose test is germane to both the common law and statutory privilege.

There have been some significant jurisprudential shifts in respect of the relevant purpose test in Australia for a claim of privilege. In *Grant v Downs* (*‘Grant’*) a majority of the High Court (Stephen, Mason and Murphy JJ) preferred a sole purpose

⁵⁰ Spencer Fowler Steen, ‘ATO Won’t Promise Not To Prosecute PwC for Tax Offences’, *Lawyerly* (online, 3 February 2021) <<https://www.lawyerly.com.au/>>; Miklos Bolza, ‘ATO Prepared To Rule Out Prosecuting PwC for Tax Offences after Privilege Fight’, *Lawyerly* (online, 16 April 2021) <<https://www.lawyerly.com.au/ato-prepared-not-to-prosecute-pwc-for-tax-offenses-after-privilege-fight/>>.

⁵¹ *A-G (NT) v Kearney* (1985) 158 CLR 500, 515 (Gibbs CJ).

⁵² See *R v Bell; Ex parte Lees* (1980) 146 CLR 141, 145 (Gibbs J).

⁵³ *AWB Ltd v Cole [No 5]* (2006) 155 FCR 30, 89–90 [218].

⁵⁴ [2022] VSC 196, [211] (*‘Andrianakis’*).

⁵⁵ [2014] VSC 328.

⁵⁶ *Andrianakis* (n 54) [211], quoting *ibid* [15].

⁵⁷ See *Esso* (n 17) 64 [35].

⁵⁸ *Mitsubishi* (n 22) 336–7 [10].

test (that is, the only/single purpose for the creation of the document or communication was to receive or provide legal advice),⁵⁹ with Barwick CJ preferring the dominant purpose test.⁶⁰ Thus, post-*Grant*, the common law deployed the sole purpose test, while the co-existing provisions in ss 118 and 119 of the *Evidence Act 1995* (Cth) ('*Cth Evidence Act*') hinged on the dominant purpose test.⁶¹ As the sole purpose test is more amenable to disclosure than the dominant purpose test, this meant that there was a divergence depending on the nature of and forum for the proceedings.

Then, in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*, Esso Australia Resources Ltd commenced proceedings challenging assessments of income tax.⁶² Esso Australia Resources Ltd claimed LPP regarding a number of documents on the basis that 'they had been prepared for the dominant purpose of giving or receiving legal advice'.⁶³ While the aforementioned statutory provisions centre on considering the dominant purpose of providing legal advice or services in connection with litigation, it was unclear whether this standard also extended to ancillary processes such as discovery and inspection.⁶⁴ The Full Court of the Federal Court considered which was the correct test for claiming privilege in relation to the production of discovered documents. The 'plain language' of ss 118 and 119 was deemed to provide that the 'dominant purpose' test applied in court, whereas the common law 'sole purpose' test applied to all processes ancillary to these proceedings.⁶⁵ Then, on appeal, the High Court set aside the orders of the Federal Court, and in their place ordered that the dominant purpose test was the correct test at common law for claiming LPP.⁶⁶ The High Court disputed the appearance of the sole purpose test as a 'bright-line test, easily understood and capable of ready application'.⁶⁷ Chief Justice Gleeson, Gaudron and Gummow JJ observed that the rigid application of this test would mean that 'one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may be, and even though, without the legal purpose, the document would never have come into existence, will defeat the privilege'.⁶⁸ In the past, this had led to a less than strict application of the test, such as in *Waterford v Commonwealth* ('*Waterford*'), where Deane J in the High Court held that for a document to be protected 'the cause of its existence, in the sense of both *causans* and *sine qua non*, must be the seeking or provision of

⁵⁹ (1976) 135 CLR 674, 688 ('*Grant*').

⁶⁰ Ibid 677.

⁶¹ Section 118 provides for legal advice privilege and s 119 covers litigation privilege.

⁶² (1998) 83 FCR 511.

⁶³ Ibid 514 (Black CJ and Sundberg J) (emphasis omitted).

⁶⁴ Ibid 515.

⁶⁵ Ibid 518–9; Suzanne B McNicol, 'Esso Australia Resources Ltd v Federal Commissioner of Taxation' (1999) 21(4) *Sydney Law Review* 656, 657.

⁶⁶ *Esso* (n 17).

⁶⁷ Ibid 72 [58] (Gleeson CJ, Gaudron and Gummow JJ).

⁶⁸ Ibid.

professional legal advice'.⁶⁹ Dilution of the sole purpose test led to a lack of clarity.⁷⁰ The majority of the court in *Esso* thus preferred the dominant purpose test, as it 'strikes a just balance ... and it brings the common law of Australia into conformity with other common law jurisdictions'.⁷¹

Now the dominant purpose test applies across the board: in common law, in the Uniform Evidence Law, and in any legislation that does not expressly depart or allow departure from it. However, in a practical sense, an assertion of privilege or a pro forma statement on a document about this will not suffice; rather, the dominant purpose will be determined objectively by the court taking into account all relevant circumstances surrounding its creation and use.⁷²

The use of the dominant purpose test in Australia, as well as the clarification of when litigation is deemed to be in contemplation, strengthens protection from disclosure of corporate documentation, and makes a real difference to decisions taken about production, in contrast to the sole purpose test.⁷³ Of course, many communications have multiple purposes, and this is particularly relevant in relation to corporations. Previously, under the sole purpose test, this aspect of documentation would have precluded a successful claim of privilege, but now there may be co-existing purposes. On this note, the Australian Law Reform Commission ('ALRC') highlighted the criticism that the sole purpose test discriminated unfairly against corporations, which, unlike natural persons, must communicate by written report.⁷⁴ In that respect, a secondary purpose — that of informing 'central management of the corporation with actual knowledge of what its agents have done' — would be enough to deny the privilege under the sole purpose test.⁷⁵

Likewise, in *Esso* Callinan J considered that the sole purpose test disadvantaged corporations unfairly, given that documents prepared for several purposes — which is likely to be the case in relation to corporations that are required to communicate internally by written report — might not attract the privilege.⁷⁶ In contrast, Kirby J (in dissent), considered that the expansion of the privilege would be to unduly benefit corporations:

⁶⁹ *Waterford* (n 37) 85, discussed in *ibid*.

⁷⁰ *Esso* (n 17) 72 [58].

⁷¹ *Ibid* 73 [61]. Justice Callinan also held that the dominant purpose test was appropriate: at 107 [173].

⁷² See: *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266, 278 [30]; *Barnes v Federal Commissioner of Taxation* (2007) 242 ALR 601, 605 [18].

⁷³ See *Esso* (n 17) 76 [71] (McHugh J). For an example of the application of the dominant purpose test, see: *Green v AMP Life* [2005] NSWSC 95.

⁷⁴ Australian Law Reform Commission, *Evidence* (Report No 26, 1985) vol 1, 251 [439].

⁷⁵ *Grant* (n 60) 686–8.

⁷⁶ See *Esso* (n 17) 103 [162].

the dominant purpose test is, of its nature, more likely to advantage corporations and administration at the cost of ordinary individuals. ... Any slippage from the sole purpose test potentially allows a very large amount of ... material to be the subject of a claim for the privilege so as to exclude it from the purview of the opposite party and the ultimate decision-maker. In this way, as a matter of practicality, a larger privilege will typically be accorded to the corporation or administration than would ordinarily be accorded to the individual.⁷⁷

Moreover, McHugh J observed that '[c]ourts will have less information before them. How much less is impossible to tell.'⁷⁸ This unquantifiable harm to the administration of justice in respect of addressing wrongdoing by corporations is compounded by the limitation on the availability of information for prosecutors. This has the concomitant effect of making the decision to prosecute or to agree to defer prosecution less informed, and, it would seem, less reliable. Given that prosecutorial discretion is a manifestation of a public interest,⁷⁹ it is hard to see how a prosecutor being more hamstrung can be seen as improving rule of law compliance.

Requiring the communication to be for the dominant purpose of legal advice or litigation means that mere transmission of the information through lawyers will not suffice for a claim of privilege.⁸⁰ However, as Andrew Higgins remarks, 'routing information through lawyers does make it easier for a party to prove' that the communication was made to obtain legal assistance, so one 'potential weakness of the dominant purpose test is that it allows corporations to legitimately structure their communications in a way that will protect significant parts of its operations from disclosure'.⁸¹ This approach was exemplified in *PricewaterhouseCoopers*, outlined in Part II above, where communications were routed through a legal practitioner.⁸² Moreover, echoing the sentiment of Kirby J in *Esso*, Higgins notes rightly that the dominant purpose test provides greater protection to corporations than to individuals, because of how the former interact with lawyers and use legal services.⁸³ Whereas individuals consult lawyers usually for legal advice only, corporate memoranda can have administrative, commercial and legal purposes. The increased use of lawyers

⁷⁷ Ibid 91 [109].

⁷⁸ Ibid 76 [71].

⁷⁹ The Prosecution Policy of the Commonwealth Director of Public Prosecutions ('CDPP') lists a range of criteria that should be considered in deciding whether to prosecute, including whether there is a reasonable prospect of obtaining a conviction and whether the public interest requires the commencement of a prosecution: see Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (19 July 2021) 4 [2.5], 5–6 [2.8]–[2.12] ('*Prosecution Policy of the Commonwealth*').

⁸⁰ *PricewaterhouseCoopers* (n 38) 382 [170], citing: *Baker* (n 22) 112 (Deane J); *Pratt Holdings* (n 36) [46] (Finn J, Merkel J agreeing).

⁸¹ Andrew Higgins, 'Legal Advice Privilege and Its Relevance to Corporations' (2010) 73(3) *Modern Law Review* 371, 395 (emphasis omitted).

⁸² See above n 48 and accompanying text.

⁸³ Higgins (n 81) 395.

in other contexts may well provide protection to corporations regarding documents that would otherwise not have been created. As long as the legal purpose predominates, the document will qualify for privilege.⁸⁴

This shows how the difference between the corporation and the natural person in the context of LPP is central. Though corporations may range from sole-director entities through to enormous multinationals, the benefits that accrue are significant, regardless of size. Corporations may grow exponentially; they endure beyond their members; they gather and communicate information through documentation; they rely on systems, processes and lawyers; and they have a far greater capacity for harm than humans. All of this is salient in relation to LPP.

B *Legal Professional Privilege and Other Privileges*

LPP is cognate to, but distinct from, the privilege against self-incrimination and the penalty privilege. The privilege against self-incrimination means ‘that a person (not company) is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime’.⁸⁵ As is evident from the preceding quotation, in Australia the privilege against self-incrimination extends to natural persons but not to corporations,⁸⁶ in contrast to LPP. This point will be returned to in Part V in the context of reform possibilities.

In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (*‘Caltex’*), a majority of the High Court (Mason CJ, Brennan, Toohey and McHugh JJ) held in three separate judgments that an incorporated company is not entitled to the privilege against self-incrimination.⁸⁷ Given the uncertain state of authority, the matter was determined by considering the history of, and rationale for, the privilege. The privilege against self-incrimination was noted to be a human right, which protects personal freedom and human dignity, and seeks to prevent torture and other inhumane treatment.⁸⁸ In contrast, their Honours agreed that corporations have no need for protection from such abuse of power and loss of dignity.⁸⁹ Moreover, McHugh J rejected the argument that the privilege is necessary nonetheless to protect individual members against the consequences of punishing the corporation, an especially pressing point in relation to small or sole-director companies:

an individual witness is not entitled to the benefit of the privilege against self-incrimination if the only ground for the claim is that he or she will be adversely

⁸⁴ Ibid.

⁸⁵ *Griffin v Pantzer* (2004) 137 FCR 209, 227 [37] (Allsop J).

⁸⁶ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501, 504 (Mason CJ and Toohey J) (*‘Caltex’*).

⁸⁷ Ibid.

⁸⁸ Ibid 499–500 (Mason CJ and Toohey J).

⁸⁹ Ibid 499–500 (Mason CJ and Toohey J), 548 (McHugh J).

affected by the production of the evidence. Members of a corporation may be adversely affected by the conviction of a corporation, but they are not convicted. It is difficult to see why any adverse effect on the members should entitle the corporation to refuse to produce evidence.⁹⁰

Confining the privilege against self-incrimination to natural persons was seen as warranted on the basis that ‘a corporation is usually in a stronger position vis-à-vis the state’, and also given the resources and advantages which corporations tend to enjoy.⁹¹ The complexity of corporate conduct was noted also:

Assessment of a corporation’s conduct may only be possible through an examination of its documents. This is particularly so in cases where the alleged wrong is committed as a result of the failure of a system set up by a corporation. A true understanding of the corporation’s procedures is likely to be gained only through evidence from the corporation itself, particularly from its records. The difficulty in obtaining independent evidence against corporations is sometimes exacerbated by the inability to identify a victim of corporate behaviour who can testify. Often, the victim is an ‘amorphous entity such as a market’. Furthermore, corporations are often well equipped to cover up their activities and to fund their defences.⁹²

Justice McHugh further spoke of ‘the harm to the administration of justice resulting from allowing corporations to claim the privilege [against self-incrimination]’.⁹³

In a joint dissenting judgment, the minority in *Caltex* (Deane, Dawson and Gaudron JJ) regarded the desire to deny corporations the privilege against self-incrimination as something ‘dictated by pragmatism rather than principle’.⁹⁴ The minority found that there was ‘no sufficient reason in principle for saying that the doctrine ... has no application to corporations’, and suggested that any denial of the privilege’s application to corporations would be a matter for the legislature rather than the courts.⁹⁵ Following *Caltex*, s 187 of the *Cth Evidence Act* enacted the abolition of the privilege against self-incrimination for bodies corporate, with the provision being seemingly uncontroversial since.⁹⁶

⁹⁰ Ibid 549 (citations omitted).

⁹¹ Ibid 500–1 (Mason CJ and Toohey J).

⁹² Ibid 554 (McHugh J) (citations omitted).

⁹³ Ibid 553.

⁹⁴ Ibid 534. See generally Jennifer Hill, ‘Corporate Rights and Accountability: The Privilege against Self-Incrimination and the Implications of *Environment Protection Authority v Caltex Refining Co Pty Ltd*’ (1994) 7(1) *Corporate and Business Law Journal* 127.

⁹⁵ *Caltex* (n 86) 534.

⁹⁶ Section 68 of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) and s 1316A of the *Corporations Act 2001* (Cth) also abrogate privilege against self-incrimination for corporations.

Following the decision in *Caltex*, the Full Court of the Federal Court in *Trade Practices Commission v Abbco Iceworks Pty Ltd* (*Abbco Iceworks*) held that a corporation is not entitled to the privilege against self-exposure to a penalty.⁹⁷ The penalty privilege is akin to the privilege against self-incrimination, although with some important differences, such as the penalty privilege arguably being restricted to civil judicial proceedings.⁹⁸ However, in *Pyneboard*, Mason ACJ, Wilson and Dawson JJ stated that their Honours were ‘not prepared to hold that the [penalty] privilege is inherently incapable of application in non-judicial proceedings’.⁹⁹ Then, in *Meneses v Directed Electronics OE Pty Ltd* (*Meneses*), the Full Court of the Federal Court confirmed that the sole director of a corporation enjoyed the penalty privilege.¹⁰⁰ The Court observed that while ‘there is a close affinity between the privilege against self-incrimination and the penalty privilege, they are distinct’.¹⁰¹ Moreover, the Court reaffirmed that ‘[n]either of the privileges is available to a corporation’,¹⁰² unlike LPP.

III THE PERCEIVED MISUSE OF LEGAL PROFESSIONAL PRIVILEGE

Achieving accountability for corporate crime is a pervasive yet elusive concern globally, and is confounded by difficulties in detecting wrongdoing and then proving liability to the requisite standard. Strikingly, corporations often are the sources and gatekeepers of information on which public enforcement action would be predicated. One means of detection is through self-reporting — in other words, by the corporation divulging its own wrongful behaviour to the relevant authority or regulator. This voluntary disclosure is an idiosyncrasy of corporate regulation that is uncommon in other criminal justice contexts, but represents a central element of routine corporate compliance.¹⁰³ Revelations of non-compliance through to criminality by corporations may generate or assist with criminal investigations or charges, and often will result in settlements and/or leniency, such as is the case for guilty pleas by human offenders.¹⁰⁴

⁹⁷ (1994) 52 FCR 96 (*Abbco Iceworks*).

⁹⁸ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 337–8 (Mason ACJ, Wilson and Dawson JJ) (*Pyneboard*).

⁹⁹ *Ibid* 341.

¹⁰⁰ (2019) 273 FCR 638, 678 [152] (*Meneses*).

¹⁰¹ *Ibid* 660 [87], citing: *Pyneboard* (n 98) 336–7 (Mason ACJ, Wilson and Dawson JJ); *Abbco Iceworks* (n 97) 111 (Burchett J, Black CJ and Davies J agreeing); *Daniels* (n 13) [12]–[13] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁰² *Meneses* (n 100) 660 [88].

¹⁰³ See generally Nicholas Lord, ‘Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany’ (2013) 60(2) *Crime, Law and Social Change* 127, 136–7. A self-reporting obligation is now contained within ss 912D and 912DAA of the *Corporations Act 2001* (Cth) which require Australian financial services licensees to lodge a report with ASIC in ‘reportable situations’ such as a significant breach of a ‘core obligation’.

¹⁰⁴ See, eg, *Crimes Act 1914* (Cth) ss 16A(2)(h), 16AC (*Crimes Act*).

Thus, self-reporting's appeal, despite the apparent disclosure it entails, lies in the likely moderation of enforcement action by the state. Conversely, corporations demur from self-reporting if resisting investigation and/or contesting charges would be preferable strategically. All of this means that corporate control over the flow of information before and during any enforcement action is critical, both in terms of potential liability as well as for corporate reputational purposes.¹⁰⁵

A key mechanism for controlling information is the use of LPP. The Australian Federal Police has indicated that 'blanket LPP claims can make it very difficult to obtain admissible evidence to support prosecutions' and that the resolution of LPP claims can take a 'significant period of time'.¹⁰⁶ Further, the ATO has indicated that '[r]eckless LPP claims over non-privileged documents unduly hinder ATO investigations and lead to extended disputes about information gathering, instead of focussing on the resolution of the substantive issue'.¹⁰⁷ While the number of spurious or false claims of LPP is unknown, the perception is that the situation is far from ideal. In mid-2019, it was reported that 24 multinational corporate groups responded to ATO audits with blanket LPP claims, constituting one in five large audits.¹⁰⁸ These issues are exemplified by cases like *PricewaterhouseCoopers*, with the 'routing' of communications through lawyers,¹⁰⁹ and the inquiry into The Star Casino in Sydney, New South Wales, where the casino was found to have had an 'immature' approach to anti-money laundering and counter-terrorism financing ('AML/CTF') with 'serious shortcomings' evident in its AML/CTF Program.¹¹⁰ Further, The Star's most senior in-house lawyers had an 'unsatisfactory understanding of the circumstances in which legal professional privilege should be claimed'.¹¹¹

¹⁰⁵ For an examination of how this was done by United States lawyers, see Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, 1985).

¹⁰⁶ Attorney-General's Department, Submission No 32 to Senate Standing Committee on Economics, Parliament of Australia, *Inquiry into Foreign Bribery* (September 2015) 13. For a comparable United Kingdom position, see Stuart Alford, 'Enforcing the UK Bribery Act: The UK Serious Fraud Office's Perspective' (Speech, Anti-Corruption in Oil and Gas Conference, 17 November 2014).

¹⁰⁷ Australia Taxation Office, 'ATO Provides Certainty on Legal Professional Privilege Claims' (Media Release QC 69918, 22 June 2022) <<https://www.ato.gov.au/Media-centre/Media-releases/ATO-provides-certainty-on-Legal-Professional-Privilege-claims/>>.

¹⁰⁸ Tom McIlroy, 'Legal Privilege Claims in 20 Per Cent of ATO Multinational Cases', *The Australian Financial Review* (online, 26 June 2019) <<https://www.afr.com/policy/tax-and-super/legal-privilege-claims-in-20-per-cent-of-ato-multinational-cases-20190626-p521h3>>.

¹⁰⁹ See above n 48 and accompanying text.

¹¹⁰ *Review of The Star Pty Ltd: Inquiry under Sections 143 and 143A of the Casino Control Act 1992 (NSW)* (Report, 31 August 2022) vol 1, 18 [88], 20 [102] ('*Star Inquiry*'). See also Liz Campbell, 'The Mis/Use of Client Legal Privilege: Obscuring Criminal Behaviour?' in Penny Crofts (ed), *Evil Corporations* (Routledge, forthcoming) ('Mis/Use of Client Legal Privilege').

¹¹¹ *Star Inquiry* (n 110) 20 [101].

So, the reliance on LPP, though ostensibly about enabling the administration of justice, may in fact undermine or obstruct it,¹¹² by ‘frustrating the court’s search for truth’.¹¹³ Moreover, concern about LPP is not limited to extra-judicial commentary. In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*, Kirby J expressed the view that

a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into ‘disrepute’, principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.¹¹⁴

In its 2007 report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, the ALRC noted a common theme in submissions regarding the difficulty in establishing when an LPP claim amounts to abuse.¹¹⁵ The ALRC concluded that while there was ‘no clear evidence of chronic abuse of claims of client legal privilege, there is evident distrust on the part of federal investigatory bodies that claims are not being made legitimately in some cases’.¹¹⁶ This is not to say that such claims are made in bad faith necessarily. The crux of the issue is that the very nature and purpose of LPP renders it difficult to gauge the extent of any abuse.¹¹⁷

Wrongdoing by corporations concealed behind LPP is a live problem in contemporary law, regulation, and corporate and public governance. This phenomenon incorporates the harms of wrongful or criminal behaviour as well as the misuse of LPP, and these distinct wrongs exacerbate each other. The misuse of LPP imposes profound costs on human individuals and the legitimacy of the regulatory and justice system, yet remains largely unexplored empirically. That said, there is some evidence that LPP is being used for the specific purpose of concealing wrongdoing, and that wrongdoing is indeed being concealed. This is exemplified by numerous cases over the past decades. For instance, the British American Tobacco litigation exposed ‘warehousing’ and destruction of documentation, on advice from leading law firm Clayton Utz.¹¹⁸ Of course, the destruction of documents can be a routine and legal part of corporate document retention/house-keeping practices. This is in contrast to their destruction for the purposes of compromising foreseeable litigation

¹¹² Higgins (n 81) 393; Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 3rd ed, 2018) 298.

¹¹³ Ray Finkelstein, ‘The Adversarial System and the Search for Truth’ (2011) 37(1) *Monash University Law Review* 135, 144.

¹¹⁴ (1997) 188 CLR 501, 581 (citations omitted).

¹¹⁵ *Privilege in Perspective* (n 16) 494 [9.24].

¹¹⁶ *Ibid* 497 [9.35].

¹¹⁷ *Ibid* 497 [9.36].

¹¹⁸ *McCabe* (n 10) [20], [289], [324], [330]–[336]. See generally: Jonathan Liberman and Jonathan Clough, ‘Corporations that Kill: The Criminal Liability of Tobacco Manufacturers’ (2002) 26(4) *Criminal Law Journal* 223; Matthew Harvey and Suzanne LeMire, ‘Playing for Keeps? Tobacco Litigation, Document Retention, Corporate Culture and Legal Ethics’ (2008) 34(1) *Monash University Law Review* 163.

so that they can never be discovered — this is illegal and is fundamentally different in nature to claiming that a document which exists does not have to be produced because it is the subject of LPP (which is a legitimate claim to make). That said, both strategies were deployed in the British American Tobacco litigation,¹¹⁹ one ostensibly legitimate and the other certainly not. In direct response to this case, the *Crimes Act 1958* (Vic) was amended to include the indictable offence of knowingly destroying or concealing documents or anything reasonably likely to be required in any ongoing or potential future legal proceedings with the intention of preventing such use in a legal proceeding.¹²⁰ No subsequent prosecution has been taken.¹²¹

Furthermore, LPP was a major impediment to the Royal Commission into the Australian Wheat Board's bribery in the United Nations' Oil-for-Food Programme and its breach of United Nations' sanctions. Commissioner Cole was faced with extensive claims to privilege and Federal Court proceedings challenging his right, as Commissioner, to determine privilege claims — leading to extensive delays.¹²² LPP also appears to impose high costs on the community apart from the inefficiencies from the lack of trust in regulation and the law. As was revealed in the Paradise Papers and examined in *Glencore*,¹²³ LPP can shield tax avoidance, which increases social inequality at the national and global levels. The inquiry into The Star Casino provides another example of harms being concealed by LPP, as well as enforcement actions being delayed.¹²⁴

The relationship between LPP, public enforcement, and crime by corporations in particular is not well-understood in Australia — no socio-legal scholarship yet examines empirically the interrelationship between LPP and crime by corporations, and how this privilege might affect enforcement actions in practice. Indeed, globally, there is very limited empirical analysis of the use of the privilege in the context of corporations, and its effects on corporate behaviour. In 1989, Vincent Alexander carried out 182 interviews in New York City, collecting data on 'the assumptions underlying the corporate privilege, the forms and processes of corporate attorney–client communications and the adjudication of privilege claims'.¹²⁵ This study suggested that the attorney–client privilege 'encourage[d] candor in communications between attorneys and corporate management', though it did not prove

¹¹⁹ Thousands of relevant documents were destroyed: *McCabe* (n 10) [308]–[309]; with other documents 'warehoused' to put them beyond the scope of discovery: at [324].

¹²⁰ *Crimes Act 1958* (Vic) s 254, as inserted by *Crimes (Document Destruction) Act 2006* (Vic) s 3; Harvey and LeMire (n 118) 173–5. See also the offence for concealment and destruction of documents in s 67 of the *ASIC Act* (n 96).

¹²¹ Parker and Evans (n 112) 290.

¹²² *AWB Royal Commission* (n 11) vol 1, 183–9 [7.42]–[7.64].

¹²³ *Glencore* (n 33).

¹²⁴ Campbell, 'Mis/Use of Client Legal Privilege' (n 110).

¹²⁵ Vincent C Alexander, 'The Corporate Attorney–Client Privilege: A Study of the Participants' (1989) 63(2) *St John's Law Review* 191, 193.

this decisively.¹²⁶ Alexander's study found that 'the circumstances in which the privilege plays a major role in influencing candor seem to be relatively rare'.¹²⁷ A related and more recent project is by Petter Gottschalk, who identified and assessed the information control strategies adopted by defence lawyers in Norwegian court cases involving white-collar crimes.¹²⁸ Such 'information control strateg[ies]' intersected with the use of LPP.¹²⁹ There is no comparable study of lawyers and in-house counsel in respect of LPP specifically in Australia,¹³⁰ meaning that claims about the privilege's use, value or misuse are anecdotal or conjectural. The lack of data does not imply the absence of a problem, however, as seen in The Star inquiry, and other cases outlined above.

IV REGULATORS' RESPONSES

In this environment, regulators now are more proactive in confronting and disputing claims of LPP, with the ATO being described as 'bellicose'¹³¹ and ASIC announcing that it is prepared to take court action to resolve 'inappropriate' claims.¹³² Regulators and the Commonwealth Director of Public Prosecutions ('CDPP') are taking frequent legal action to push back against claims of privilege, and in doing so have delineated the scope of the privilege as well as their powers.

In terms of policy and operating legislative frameworks, ASIC and the Australian Competition and Consumer Commission ('ACCC') encourage but do not require the production of privileged communications.¹³³

¹²⁶ Ibid 414.

¹²⁷ Ibid.

¹²⁸ Petter Gottschalk, *Financial Crime and Knowledge Workers: An Empirical Study of Defense Lawyers and White-Collar Criminals* (Palgrave Macmillan, 2014).

¹²⁹ Ibid 64.

¹³⁰ Likewise, the New Zealand Law Commission has highlighted the absence of empirical data and the need for an empirical foundation for reform initiatives: see New Zealand Law Commission, *Evidence Law: Privilege* (Preliminary Paper No 23, May 1994) 6 [13], 20 [52]–[53].

¹³¹ Eu-Jin Teo, "'Under pressure'? Section 39 of the Legal Profession Uniform Law and the Federal Commissioner of Taxation' (2022) 37(2) *Australian Tax Forum* 273, 273.

¹³² Australian Securities and Investments Commission, 'AMP and Clayton Utz Surrender in ASIC Court Battle over Failure To Produce Documents' (Media Release 19-052MR, 11 March 2019) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-052mr-amp-and-clayton-utz-surrender-in-asic-court-battle-over-failure-to-produce-documents/>>.

¹³³ Australian Securities and Investments Commission, 'Claims of Legal Professional Privilege' (Information Sheet No 165, December 2012) <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/claims-of-legal-professional-privilege/>> ('ASIC Information Sheet No 165'). See Australian Competition and Consumer Commission, 'ACCC Cooperation Policy for Enforcement Matters' (Policy, July 2002) 2 <<https://www.accc.gov.au/about-us/publications/accc-cooperation-policy-for-enforcement->

ASIC believes there can be a public benefit in accepting privileged documents (or documents claimed to be privileged) ... as it may assist in the effective and efficient conclusion of ASIC's investigation and determination of consequential steps (which might include no further regulatory action). It may also assist the parties to identify efficiently, and with precision, the critical issues to be addressed in an investigation. It will often be in the public interest for ASIC, in seeking to perform its regulatory functions, to have access to LPP material and it will often not be detrimental to the privilege holder for this to occur.¹³⁴

Notably, ASIC's current practice is inconsistent with the decision in *Corporate Affairs Commission (NSW) v Yuill* ('*Yuill*')¹³⁵ and does not have any statutory backing.¹³⁶

In *Australian Securities and Investments Commission, re Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd*, ASIC sought successfully to adduce in evidence otherwise privileged documents acquired through its compulsory information gathering powers.¹³⁷ Since criticism from the *Banking Royal Commission* about its enforcement practices,¹³⁸ ASIC has ramped up its use of its investigative powers. ASIC's intent has been characterised as forcing legal challenges regarding the scope of privilege claims.¹³⁹ This puts a fresh complexion on expectations regarding waiver of privilege, and shows the receptiveness of agencies to a more combative and contested approach early in the public enforcement process.¹⁴⁰

Likewise, the ATO's appetite for challenging privilege claims is highlighted by cases outlined above such as *PricewaterhouseCoopers*,¹⁴¹ as well as its drafting

matters> ('ACCC Cooperation Policy'). This policy does not refer to LPP but rather to the disclosure of documents. See also Tom Middleton, 'The Role of Lawyers in the Context of ASIC's Investigative and Enforcement Powers' (2010) 28(2) *Company and Securities Law Journal* 107, 119–20.

¹³⁴ 'ASIC Information Sheet No 165' (n 133).

¹³⁵ The High Court held in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 ('*Yuill*') that s 308 of the *Companies (New South Wales) Code 1981* (now s 69 of the *ASIC Act* (n 96)) by implication overrode the client's LPP in the context of ASIC's investigative powers. The decision in *Yuill* was followed in *Australian Securities Commission v Dalleagles Pty Ltd* (1992) 36 FCR 350 and *Bristle Investments* (n 19) 477 [27].

¹³⁶ Middleton (n 133) 120.

¹³⁷ [2017] FCA 324.

¹³⁸ *Banking Royal Commission* (n 4) vol 1, 206 [4.1.2], 446, recommendation 6.2.

¹³⁹ Tim Bednall, 'Understanding ASIC's New Thinking on Compulsory Powers', *The Australian Financial Review* (online, 5 February 2020) <<https://www.afr.com/companies/financial-services/don-t-run-has-already-run-understanding-asic-s-new-thinking-on-compulsory-powers-20200204-p53xmo>>.

¹⁴⁰ See, eg: *ASIC v RI Advice* (n 26); *TerraCom* (n 30).

¹⁴¹ See above nn 38–49 and accompanying text.

of, and consultation on, its *LPP Protocol*.¹⁴² In *CUB Australia Holding Pty Ltd v Federal Commissioner of Taxation*, the Federal Court decided that the ATO's statutory powers extend to seeking particulars of LPP claims, where CUB Australia Holding Pty Ltd sought to use the privilege to withhold requested documents during a tax audit.¹⁴³

In terms of its *LPP Protocol*, the ATO articulated its concerns about:

- '[c]ommunications exclusively between non-legal persons in circumstances where the non-legal persons do not perform functions in furtherance of a solicitor-client relationship';
- '[c]ontrived arrangements or relationships which purport to attract LPP where there is a purpose of concealing communications from us' including 'where LPP is actively promoted as a feature of tax advice';
- '[r]outing advice through a lawyer merely for the purpose of obtaining privilege'; and
- '[l]egal engagements entered into after the substance of advice was provided by non-legal persons'.¹⁴⁴

The *LPP Protocol* indicates approaches to privilege that are not recommended by the ATO, such as '[m]aking "blanket claims" across bundles of unreviewed documents or all documents on a computer or storage device' and '[u]sing assumptions or pre-determined judgements to assess if LPP applies without regard to the merits of each communication'.¹⁴⁵ Instead, according to the ATO, the recommended approach to making a claim of LPP is to evaluate whether the relevant 'overarching service, engagement or relationship' is 'capable of establishing the requisite lawyer-client relationship'.¹⁴⁶ The ATO was careful to characterise the *LPP Protocol* as aiming 'to support the provision of high-quality LPP claims' rather than seeking 'to create unintended waiver of LPP'.¹⁴⁷ Of course, the *LPP Protocol* represents the ATO's views on particular matters, and may be subject to challenge in the courts.

As for the ACCC, its Cooperation Policy states that '[l]eniency is most likely to be considered for a corporation which', amongst other factors, 'comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings' and which 'provides the Commission with full and frank disclosure of the activity and all

¹⁴² Australian Taxation Office, *Compliance with Formal Notices: Claiming Legal Professional Privilege in Response to Formal Notices* (Protocol, June 2022) ('*LPP Protocol*').

¹⁴³ (2021) 385 ALR 731.

¹⁴⁴ *LPP Protocol* (n 142) 16 [12].

¹⁴⁵ *Ibid* 7.

¹⁴⁶ *Ibid* 8 [22].

¹⁴⁷ *Ibid* 17 [1].

relevant documentary and other evidence available to it, and cooperates fully with the Commission's investigation and any ensuing litigation'.¹⁴⁸

The ACCC has an *Immunity and Cooperation Policy for Cartel Conduct* ('*Immunity Policy*'), which guides applications for immunity from proceedings initiated by the ACCC or the Office of the CDPP in relation to cartel conduct, and indicates 'how cooperation provided to the ACCC by cartel participants will be recognised'.¹⁴⁹ A reference to privilege is in the *ACCC Immunity and Cooperation Policy: Frequently Asked Questions* guide which considers whether the information provided by the applicant will be disclosed to the public, in which the ACCC states that it 'may be able to claim privilege ... to protect confidential information from disclosure'.¹⁵⁰ In *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd* ('*Citigroup*'), the Federal Court handed down an important decision concerning the ACCC's *Immunity Policy* and the impact on LPP,¹⁵¹ given the tension for an immunity applicant between: (1) 'provid[ing] full, frank and truthful disclosure' and 'cooperat[ing] fully' with the ACCC so as to be eligible for conditional immunity under the *Immunity Policy*,¹⁵² and (2) maintaining privilege over witness accounts provided to lawyers at an early stage in an investigation.¹⁵³ The Federal Court held that the dominant purpose of the internal review in this case was to provide confidential legal advice to the applicant, and accepted that the documents were

¹⁴⁸ 'ACCC Cooperation Policy' (n 133) 2.

¹⁴⁹ Australian Competition and Consumer Commission, *ACCC Immunity and Cooperation Policy for Cartel Conduct* (Policy, October 2019) 2 [1] <<https://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct-october-2019>> ('*Immunity Policy*'). See also Ayman Guirguis and Mei Gong, 'Piercing the Privilege Veil in Criminal Cartels in Australia: Practical Considerations for Immunity (and Leniency) Applicants in Seeking To Reconcile Their Disclosure Obligations', *Kluwer Competition Law Blog* (Blog Post, 15 July 2022) <<https://competitionlawblog.kluwercompetitionlaw.com/2022/07/15/piercing-the-privilege-veil-in-criminal-cartels-in-australia-practical-considerations-for-immunity-and-leniency-applicants-in-seeking-to-reconcile-their-disclosure-obligations/>>. See generally Brent Fisse, 'Australian Cartel Law: Recent Developments' (2023) 51(2) *Australian Business Law Review* 70.

¹⁵⁰ Australian Competition and Consumer Commission, *ACCC Immunity and Cooperation Policy: Frequently Asked Questions* (Guide, May 2023) 12–13 <<https://www.accc.gov.au/about-us/publications/accc-immunity-and-cooperation-policy-frequently-asked-questions>>. LPP is also discussed in the context of full, frank and truthful disclosure: at 17.

¹⁵¹ [2021] FCA 511 ('*Citigroup*').

¹⁵² *Immunity Policy* (n 149) 5 [22].

¹⁵³ See *Citigroup* (n 151) [155]. ASIC's *Immunity Policy*, which provides immunity to certain reporting individuals in connection with contraventions of pt 7.10 of the *Corporations Act 2001* (Cth), such as market manipulation, insider trading and dishonest conduct in the course of carrying on a financial services business, says nothing regarding LPP, though considers privacy and confidentiality: Australian Securities and Investments Commission, *ASIC Immunity Policy* (February 2021) <<https://asic.gov.au/about-asic/dealing-with-asic/asic-immunity-policy/>>.

privileged.¹⁵⁴ That said, the partial disclosure of the content of the documents to the CDPP by reading out passages of the outlines was inconsistent with the maintenance of confidentiality over the remainder of the content and the applicant thereby waived privilege over the whole of the documents (save for any legal advice).¹⁵⁵ The imposition of the condition by the ACCC and the CDPP, and the immunity applicant's acceptance of the condition that it provide 'full, frank and truthful disclosure and cooperation ... including by withholding nothing of relevance', was not inconsistent with maintaining the confidentiality of the communications.¹⁵⁶

The Court noted that 'the ACCC respected the existence of the privilege', indicating that doing so facilitated the reporting of cartel conduct to it.¹⁵⁷ Indeed, the privilege is not of use to private entities only — ASIC has successfully upheld claims of privilege over its own documents.¹⁵⁸

Likewise, ASIC sets out the situations in which it would recommend leniency in sentencing for a defendant, including by voluntarily participating in ASIC's interviews, or volunteering information about contraventions of the law that result in the prosecution of another person.¹⁵⁹ Indeed, the fact that a person voluntarily provides such assistance may influence ASIC's decision about the type of enforcement proceedings it commences.¹⁶⁰ And the *Prosecution Policy of the Commonwealth* provides that whether the defendant 'co-operate[d] in the investigation or prosecution of others' may be relevant to the CDPP's prosecution decisions.¹⁶¹

¹⁵⁴ *Citigroup* (n 151) [116], [121], [123], [125].

¹⁵⁵ *Ibid* [175].

¹⁵⁶ *Ibid* [194].

¹⁵⁷ *Ibid* [192].

¹⁵⁸ See, eg: *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd [No 2]* (2011) 283 ALR 299; *Bolton and Australian Securities and Investments Commission* [2018] AATA 4640; *Australian Securities and Investments Commission v Mitchell* [2019] FCA 1484. In relation to circumstances in which the CDPP can claim LPP, see Adam Murphy, 'Check Your Privilege: The Foundation of Legal Professional Privilege within the Commonwealth Director of Public Prosecutions' (2021) 45(3) *Criminal Law Journal* 153.

¹⁵⁹ Australian Securities and Investments Commission, 'Cooperating with ASIC' (Information Sheet No 172, February 2021) <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/cooperating-with-asic/>>.

¹⁶⁰ Australian Securities and Investments Commission, 'ASIC's Approach to Enforcement' (Information Sheet No 151, August 2023) <<https://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>>.

¹⁶¹ *Prosecution Policy of the Commonwealth* (n 79) 5–6 [2.10(r)].

On this, one indicator of genuine and proactive cooperation provided by a corporation during an investigation is ‘taking a cooperative and practical approach’ to any privilege claims, such as by obtaining independent verification of the claims or agreeing to the appointment of an independent expert to resolve any disputed claims.¹⁶²

A comparable sentiment towards the waiver of LPP comes through in the now-stalled scheme of deferred prosecution agreements (‘DPAs’) for corporate crime. These are non-trial resolutions¹⁶³ which enable prosecutors to enter into agreements with corporations to defer or suspend criminal proceedings, despite the admission of wrongdoing.¹⁶⁴ DPAs were proposed by means of the now-lapsed Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) (‘Combatting Corporate Crime Bill’), which emulated to a large extent the English scheme, in place since 2013.¹⁶⁵ If enacted, DPAs would not be available to individuals, and would apply to certain offences and prosecution agencies only.¹⁶⁶ Waiver of privilege, at least in part, forms a central component of what prosecutors in England and Wales and the United States consider full cooperation in order for a company to be eligible for a DPA.¹⁶⁷ In the same way, the draft Australian *Deferred Prosecution Agreement Scheme Code of Practice* stated that, in assessing whether it is in the public interest to agree to a DPA, ‘[c]orporations will not be expected to waive legitimate claims of legal professional privilege in order to demonstrate co-operation, but waiving

¹⁶² Australian Federal Police, Corporate Cooperation Guidance (Report, November 2021) 5, 12 <<https://www.afp.gov.au/sites/default/files/PDF/AFPCorporateCooperationGuidance.pdf>>.

¹⁶³ See generally OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (Report, 2019) <<https://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm>>.

¹⁶⁴ Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 sch 2 pt 3 (‘Combatting Corporate Crime Bill’).

¹⁶⁵ See Liz Campbell, ‘Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales’ (2021) 43(2) *Sydney Law Review* 187 (‘Revisiting and Re-Situating Deferred Prosecution Agreements’).

¹⁶⁶ Under sch 2 pt 1 of the Combatting Corporate Crime Bill (n 164) the CDPP could enter into a DPA with a person *other than an individual* for offences under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), offences of market misconduct and other prohibited conduct relating to financial products and financial services under the *Corporations Act 2001* (Cth), and various property offences under the *Criminal Code Act 1995* (Cth), such as theft, proceeds of crime offences, and bribery of a foreign official.

¹⁶⁷ See generally: Lisa Kern Griffin, ‘Compelled Cooperation and the New Corporate Criminal Procedure’ (2007) 82(2) *New York University Law Review* 311; Cindy A Schipani, ‘The Future of the Attorney–Client Privilege in Corporate Criminal Investigations’ (2009) 34(3) *Delaware Journal of Corporate Law* 921; Campbell, ‘Revisiting and Re-Situating Deferred Prosecution’ (n 165).

privilege may demonstrate a high degree of co-operation'.¹⁶⁸ Extant jurisprudence in England and Wales indicates that communications made for the purpose of considering whether it is appropriate to agree to a DPA 'rather than defend a prosecution, or for the purpose of avoiding prosecution by enhancing the likelihood that a DPA might be obtained', should 'be classified as falling within the ambit of the privilege'.¹⁶⁹ The benefit works in two ways: (1) these communications are protected by the privilege; and (2) the careful (and not comprehensive) waiver by corporations of the privilege is regarded positively by prosecutors, and then the court, in terms of the agreement to and approval of a DPA. This indicates the centrality of LPP and its use in relation to different mooted mechanisms against corporate crime.

V REFORMING THE PRIVILEGE

The preceding description of the law on LPP and its use by corporations suggests that further reflection on the scope of LPP is merited. Indeed, suggestions for reform¹⁷⁰ have gained little traction, though at the time of writing the Treasury and Attorney-General's Department announced a joint review of the use of LPP in Commonwealth investigations, 'to respond to concerns that some claims of privilege are being used to obstruct or frustrate investigations'.¹⁷¹ Contemporary inquiries have not interrogated the relevance or impact of LPP in the context of the broad terrain of corporate accountability,¹⁷² though it arises in specific instances already mentioned such as The Star inquiry.¹⁷³ Notably, law firms and professional bodies are united in its defence, despite (or perhaps because of) its impact on regulation and prosecution and its uneven impact on the different parties to whom/which it accrues. It is fair to say that removing privilege from all communications with

¹⁶⁸ Attorney General's Department, *Deferred Prosecution Agreement Scheme Code of Practice* (Consultation Draft, May 2018) 21 [7.6]. For a critique of this in the United States, see: Earl J Silbert and Demme Doufekias Joannou, 'Under Pressure To Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System' (2006) 43(3) *American Criminal Law Review* 1225; John A Gallagher, 'Legislation Is Necessary for Deferred Prosecution of Corporate Crime' (2010) 43(2) *Suffolk University Law Review* 447.

¹⁶⁹ Rebecca Mitchell and Michael Stockdale, 'Legal Professional Privilege in Corporate Criminal Investigations: Challenges and Solutions in the Modern Age' (2018) 82(4) *Journal of Criminal Law* 321, 325–6.

¹⁷⁰ See *Privilege in Perspective* (n 16).

¹⁷¹ 'Government Taking Decisive Action in Response to PwC Tax Leaks Scandal' (Media Release, Ministers Treasury Portfolio, 6 August 2023) <<https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/government-taking-decisive-action-response-pwc-tax-leaks>>.

¹⁷² There was no mention of the privilege in the *Banking Royal Commission* (n 4), and the account at 161–2 of *Corporate Criminal Responsibility* (n 3) does not critique its use.

¹⁷³ Campbell, 'Mis/Use of Client Legal Privilege' (n 110).

corporate lawyers ‘would encounter overwhelming opposition from the profession and would be politically lethal’.¹⁷⁴

Beyond maintenance of the status quo with proactive and well-resourced regulators, options for reform include reversion to the sole purpose test for corporations; the abrogation of LPP for certain crimes/investigations; or, most radically, the removal of LPP for corporations, as is the case regarding the privilege against self-incrimination. A further option lies in providing the courts with the discretion to include privileged evidence as they see fit.

A Reversion to the Sole Purpose Test

One option for reform could be a reversion to the sole purpose test for corporations. As became apparent in the *Esso* judgment outlined in Part II(A) above, there is no ideal equilibrium in respect of corporations.¹⁷⁵ The sole purpose test seems too narrow, while the dominant purpose test is unduly advantageous to corporations when compared to individuals in rendering the privilege remarkably broad, given the multiple purposes for much corporate documentation.¹⁷⁶ Though deploying the sole purpose test could lead to a lack of clarity regarding the extent of the privilege, it would prevent its more egregious misuse at least, and require more cautious creation of documents by corporations and less expansive claims of privilege.

B Abrogation of Legal Professional Privilege for Certain Crimes/Investigations

Federal and state Parliaments may legislate to abrogate LPP in relation to a particular investigation or power where exceptional circumstances exist.¹⁷⁷ Such laws are rare, but the possibility of extending the use of this legislative ability should be considered.

Abrogation of LPP occurred in relation to James Hardie Industries plc (‘JHIL’), which was involved in the manufacture and distribution of products containing asbestos until 1987.¹⁷⁸ These products caused diseases like mesothelioma and cancers,¹⁷⁹ and JHIL set up the Medical Research and Compensation Foundation Ltd (‘Foundation’) to meet consequent asbestos-related liabilities.¹⁸⁰ A public inquiry was set up in New South Wales to examine the creation of the Foundation,

¹⁷⁴ Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press, 2011) 264.

¹⁷⁵ *Esso* (n 17) 91 [109] (Kirby J), 103 [162] (Callinan J).

¹⁷⁶ See above nn 76–77 and accompanying text.

¹⁷⁷ *Privilege in Perspective* (n 16) 9, recommendation 6–1.

¹⁷⁸ DF Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (September 2004) 13.

¹⁷⁹ *Ibid* 17.

¹⁸⁰ *Ibid* 28–9.

its assets, and capacity to meet its liabilities,¹⁸¹ and this in turn prompted the passing of the *James Hardie (Investigations and Proceedings) Act 2004* (Cth) (*JH(IP) Act*) which abrogated LPP in certain circumstances. The *JH(IP) Act* allowed ASIC and the CDPP to obtain and use records produced to the inquiry and produced under ASIC's information-gathering powers.¹⁸² The *JH(IP) Act* is historical and does not provide for a wider abrogation of the privilege.

A comparable example is evident at the Victorian state level in relation to the Crown Casino. In October 2021, the *Royal Commission into the Casino Operator and Licence* found Crown Melbourne Ltd unsuitable to hold Victoria's casino licence, and recommended Crown Melbourne be permitted to continue operating under stringent oversight conditions for two years during which period reform was required to be achieved.¹⁸³ LPP has been stripped from Crown Casino under specific legislation in some circumstances, though with a use immunity in terms of the evidence gathered being inadmissible in subsequent proceedings.¹⁸⁴ The limitation on LPP in this legislation was described as 'reasonable and demonstrably justified'.¹⁸⁵ Notably, both of these legal changes followed public inquiries into wrongdoing by JHIL and Crown, rather than being pre-emptive or general abrogations.

Beyond these examples of abrogation for certain specific investigations, the *Crimes Act 1914* (Cth) (*Crimes Act*) includes powers to obtain documents relating to serious terrorism offences and relating to serious offences,¹⁸⁶ and a person is not excused from producing a document under these sections on the ground that doing so 'would disclose material that is protected against disclosure by legal professional privilege or any other duty of confidence'.¹⁸⁷ That said, any evidence obtained is not admissible against the person other than in proceedings for offences of providing false or misleading information or documents to the Commonwealth, or obstructing Commonwealth officials.¹⁸⁸ Moreover, there is residual default Commonwealth

¹⁸¹ Ibid 1.

¹⁸² *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 4 (*JH(IP) Act*).

¹⁸³ *Royal Commission into the Casino Operator and Licence* (Report PP No 277, October 2021) vol 1, 4–5.

¹⁸⁴ See *Casino and Gambling Legislation Amendment Act 2021* (Vic) ss 10, 18, inserting *Casino Control Act 1991* (Vic) ss 23(3B)–(3C), 36F(7).

¹⁸⁵ See Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4661 (Jaclyn Symes, Attorney-General).

¹⁸⁶ *Crimes Act* (n 104) ss 3ZQN–3ZQO.

¹⁸⁷ Ibid s 3ZQR(1)(c). As the ALRC highlights, the Explanatory Memorandum does not 'explain why the privilege was abrogated' in this instance: Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 350 [12.57] (*Traditional Rights and Freedoms*). My more recent search of Hansard does not provide any more illumination.

¹⁸⁸ *Crimes Act* (n 104) s 3ZQR(2). These are offences under ss 137.1, 137.2 and 149.1 of the *Criminal Code Act 1995* (Cth). Section 3ZX of the *Crimes Act* preserves LPP in the context of *Crimes Act* search warrants.

law on legal professional privilege in s 47(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ('*Regulatory Powers Act*') which preserves the operation of LPP in the context of a regulator's investigative powers. Similarly, s 206 of the *Proceeds of Crime Act 2002* (Cth) ('*Proceeds of Crime Act*') overrides the privilege for the purpose of production orders issued under s 202, but this is not admissible in criminal proceedings against a natural person.¹⁸⁹

Many crimes committed by corporations are comparable, in terms of gravity, sophistication, and harms caused, to other serious criminal offences, as well as throwing up the same difficulties in investigating and prosecuting them. It is not inconceivable to consider the replication of provisions such as those outlined in the *Crimes Act* and *Proceeds of Crime Act* for some corporate offences. Another possibility is a replication of the JHIL and Crown legislation in respect of certain specific investigations, though as noted these were predicated on initial exposure of wrongdoing in inquiries. Both of these options are proposed and endorsed here, as robust and workable limitations on LPP for entities that might otherwise evade justice. Undeniably, these mooted reforms would conflict with the current practice of regulators like ASIC, as well as provisions like s 47(2) of the *Regulatory Powers Act* and s 3ZX of the *Crimes Act* which preserve LPP in certain instances, but that is neither insoluble nor necessarily fatal to the proposals.

C Removal of Legal Professional Privilege

A more radical option for reform would be to remove LPP for corporations, mirroring the situation in respect of the privilege against self-incrimination and the penalty privilege outlined in Part II above. Though such a possibility has previously been dismissed out of hand,¹⁹⁰ this article proposes that extending the reasoning in *Caltex* to question the position of LPP for corporations is logical in both a pragmatic and principled sense.

LPP has instrumental as well as rights-based rationales, in encouraging frank disclosure in gaining legal advice and incentivising compliance with the law, as well as in protecting the individual party against state power.¹⁹¹ Of course, the rationale that is relied upon for LPP has consequences when considering justifications for removing it.¹⁹²

¹⁸⁹ Likewise, the ALRC draws attention to the lack of explanation in the Explanatory Memorandum of why the privilege was abrogated, or why in relation to civil proceedings only: *Traditional Rights and Freedoms* (n 187) 350 [12.58].

¹⁹⁰ PA Keane, "'No Body To Be Kicked or Soul To Be Damned': The Limits of a Legal Fiction" (Harold Ford Memorial Lecture, Melbourne Law School, 17 May 2022) 12 <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/keanej/KeaneJ_17%20May2022.pdf>.

¹⁹¹ See above nn 16–17 and accompanying text.

¹⁹² *Traditional Rights and Freedoms* (n 187) 341 [12.22].

In terms of a rights-based approach, LPP is seen as a counterweight to the imbalance of power between the individual and the state. In this respect, there has been an evolution in the characterisation of LPP from something that protects rights, to a right in itself. In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* ('*Daniels*'), the High Court considered the impact on LPP of s 155 of the *Trade Practices Act 1974* (Cth) ('*TPA*')¹⁹³ — now the *Competition and Consumer Act 2010* (Cth) ('*CCA*'). Section 155 allows the ACCC to issue a notice requiring a person to provide information or documents relating to a suspected contravention of the *CCA*. Refusing to comply with a s 155 notice can attract criminal penalties.¹⁹⁴ The High Court determined that s 155 of the *TPA* did not require the production of information to which LPP attached.¹⁹⁵ The majority stated that

[L]egal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.¹⁹⁶

This notion of an immunity was central for McHugh J:

Legal professional privilege describes a person's immunity from compulsion to produce documents that evidence confidential communications about legal matters made between a lawyer and client or between a lawyer and a third party for the benefit of a client. The immunity also protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of a client, such as research memoranda. The immunity embodies a substantive legal right.¹⁹⁷

And it is notable that Kirby J described LPP as a right in itself, rather than as a protective device:

this Court ... has consistently emphasised the importance of the privilege as a basic doctrine of the law and a 'practical guarantee of fundamental rights', not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings. It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by the law. Of course, derogations appropriate to the needs of a democratic society may be contemplated. However, vigilance is required against accidental and unintended erosions of the right.¹⁹⁸

¹⁹³ *Daniels* (n 13).

¹⁹⁴ *Competition and Consumer Act 2010* (Cth) s 155(6A) ('*CCA*').

¹⁹⁵ *Daniels* (n 13). In respect of the prior decision of the Federal Court, see Alex Bruce, 'The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege' (2002) 30(2) *Federal Law Review* 373, 377.

¹⁹⁶ *Daniels* (n 13) 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁹⁷ *Ibid* 563 [44] (citations omitted).

¹⁹⁸ *Ibid* 575–6 [85] (citations omitted).

Moreover, the High Court held that there was no indication that the retention of the privilege would significantly impair the functions of the ACCC or render s 155 practically useless, futile or inoperative.¹⁹⁹

Justice Kirby observed that '[t]he entitlement to sound legal advice, immune from compulsory disclosure to investigating or prosecuting public authorities, is arguably necessary both for natural and artificial persons'.²⁰⁰ His Honour differentiated between LPP and the privilege against self-incrimination on the basis of them 'rest[ing] upon different historical, legal and policy considerations', almost all of which 'related to individual human beings' in respect of protection from self-incrimination.²⁰¹

The human rights framing of LPP brings the application of the doctrine to corporations into sharp relief, with Sue McNicol suggesting that such a rationale renders it less clear that corporations should be entitled to the privilege's benefit.²⁰²

Anna Grear describes the foundation of human rights as 'human embodied vulnerability', which must be a key qualifying feature of the human rights subject.²⁰³ This would guard 'an ethically important space ... between the corporation and the human being for the purposes of human rights attribution',²⁰⁴ as opposed to the current 'corporate colonisation' of human rights.²⁰⁵ The ALRC met this sort of observation head-on, concluding that any characterisation of the privilege as a right 'should be viewed more in terms of a right to access to a fair hearing or trial or access to legal advice', rather than one which can be ascribed to humans only.²⁰⁶ That is fair, and indeed this article does not seek to engage in detail with the wider debate on whether corporate actors are moral agents, like humans, which enjoy corresponding rights and duties.²⁰⁷ Rather, the suggestion is that if the privilege is a

¹⁹⁹ See *ibid* 560 [35] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 563–4 [45], 567 [55] (McHugh J). Section 155(7B) of the *TPA* (now s 155(7B) of the *CCA*) was introduced after the decision in *Daniels* (n 13) and expressly provides that a person cannot be required to produce a document that would disclose information that is the subject of LPP.

²⁰⁰ *Daniels* (n 13) 581 [103].

²⁰¹ *Ibid*.

²⁰² Sue McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege: The Demise of Implied Statutory Abrogation?' in Peter Mirfield and Roger Smith (eds), *Essays for Colin Tapper* (LexisNexis UK, 2003) 48, 62–3.

²⁰³ Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan, 2010) 161.

²⁰⁴ *Ibid* 32.

²⁰⁵ Anna Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) *Human Rights Law Review* 511, 513.

²⁰⁶ *Privilege in Perspective* (n 16) 104 [3.106].

²⁰⁷ See generally: Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); Nick Friedman, 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations' (2020) 83(2) *Modern Law Review* 255.

right, it is one which can be abrogated in respect of certain categories of offences or on a case-by-case basis, and is on less firm foundation in respect of corporate actors than individuals, due to their very ontology.

Limited abrogation of LPP in relation to certain crimes or particular investigations would not cause untoward negative impacts. The traditional conception of human rights, relating to the dynamic between the individual and the Leviathan state, is hard to reconcile with the reality of powerful multinational corporations. Contrary to the inequality of arms which the right to a fair trial seeks to mitigate, now the inequality of arms often arises from the state being outgunned by the resources of large corporations and their lawyers.²⁰⁸ Relatedly, the perceived primacy of the privilege in accusatorial processes is confounded by the increasing tendency to negotiate with corporations, exemplified by the commitment in *PricewaterhouseCoopers* not to prosecute as well as the mooted DPA scheme.²⁰⁹ Again, this does not render protections such as LPP redundant, but makes their entrenched status less robust, when corporations are benefiting from the capacity to negotiate and thereby extend control over the process, often from a position of significant power.

A co-existing or alternative rationale for LPP is an instrumental one, in its incentivising and enabling of full disclosure to lawyers who can provide competent and independent legal advice. This serves the ‘broad public interest in the effective administration of justice’.²¹⁰ As Allsop J commented in *Kennedy v Wallace*: ‘The purpose and rationale of the privilege is to enable persons in a civilised complex modern society to be able to conduct their affairs with the assistance of legal advice.’²¹¹ This is true both in relation to civil and criminal matters.

On this point, McHugh J in *Caltex* compared the privilege against self-incrimination and LPP, the latter of which is

privileged because the judgment of the common law is that the privilege of non-production ... serves an aspect of the public interest which, on balance, is superior to the public interest in having available all probative evidence relevant to an issue to be tried in judicial proceedings.²¹²

²⁰⁸ See Michael Levi, ‘Lawyers as Money Laundering Enablers? An Evolving and Contentious Relationship’ (2022) 23(2) *Global Crime* 126, 136.

²⁰⁹ See generally: Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan, 2018); Simon Bronitt, ‘Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements’ in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 211.

²¹⁰ *Privilege in Perspective* (n 16) 235 [6.1].

²¹¹ (2004) 142 FCR 185, 221 [201]. See also *Baker* (n 22) 95 (Wilson J).

²¹² *Caltex* (n 86) 553–4.

While there is certainly a public interest in non-disclosure and the enabling of candour in certain instances, the enduring paucity of accountability for corporate wrongdoing²¹³ means that ongoing prioritisation of the public interest in non-disclosure of information is questionable.

Grounding the privilege in public policy in this way can be regarded as producing ‘fragility’,²¹⁴ due to the ability to calibrate and adjust the privilege against other imperatives and interests, and the nebulous nature of public interest/policy. While that is true, there is little evidence that this allows the undue dilution of the privilege, for corporations especially. In relation to corporate actors, the instrumental benefits from legal advice privilege in particular are to achieve legal compliance. Higgins argues persuasively that corporate advice privilege specifically is losing its rationale due to co-existing rules that require corporate agents to achieve compliance, thereby necessitating legal advice to ensure obligations such as directors’ duties are fulfilled.²¹⁵ In many contexts, ‘the privilege’s role in encouraging corporate agents to comply with the law has been overtaken’ by coexisting laws and policies designed to require and achieve compliance of directors and senior managers, meaning that far more legal advice about company affairs and compliance is sought and given, regardless of the privilege.²¹⁶ This is not to say that the privilege is superfluous, but that its role has been co-opted in certain respects by coexisting requirements. While this argument certainly has merit, it does not resolve the fact that the privilege is something that the company enjoys itself rather than the natural persons within it. Moreover, litigation privilege still serves a practical and strategic purpose for corporations, and so withstands this claim of redundancy. Therefore, though the instrumental rationale might indicate that abolition is feasible and would not be indiscriminate in its impact, this is a partial argument only.

Further, and undeniably, altering the law on corporate privilege would impact individuals. Forcing abrogation in certain contexts in respect of corporate communications may reveal information that would be detrimental to individual employees. One way to guard against this would be to preclude subsequent use in criminal proceedings against that person, though this would not remedy any non-legal or professional repercussions.

The decision of the Full Court of the Federal Court in *Meneses*, that sole directors enjoy the penalty privilege,²¹⁷ is salient here, and indicates that the removal of LPP for corporates is conceivable and workable in relation to its impact on individual directors to whom it would still accrue. The Court stressed that it was material

²¹³ See Australian Law Reform Commission, *Corporate Criminal Responsibility: Individual Liability for Corporate Misconduct* (Update Report, March 2020) 9 [21].

²¹⁴ Desiatnik (n 24) 90.

²¹⁵ Higgins (n 81) 372–3.

²¹⁶ See *ibid*.

²¹⁷ See above n 100 and accompanying text; *Meneses* (n 100) 663–4 [95]–[96], discussing *Australian Securities and Investments Commission v Mining Projects Group Ltd* [No 2] [2008] FCA 951, [7].

that ‘the privileges are against *self*-incrimination and *self*-exposure to a penalty’.²¹⁸ For one-person companies where that person could rely on the privileges to resist production of the documents, it is necessary to consider mechanisms by which the company could produce the documents (other than by the person doing so), such as the appointment of a receiver:

It is important and necessary that such a mechanism exist; otherwise, a one-person company ... would be effectively immune from producing documents in its control notwithstanding that it is not entitled to claim the privilege against self-incrimination or the penalty privilege.²¹⁹

Beyond these considerations, whenever a corporation exercises LPP or waives it, an individual may be affected negatively.²²⁰ For instance, where an internal investigation has taken place within a corporation and individual employees have given statements, the subsequent disclosure of this may be detrimental to them personally, professionally and/or in respect of litigation.²²¹ Furthermore, if individual employees know disclosure is likely, they may have an incentive to conceal the truth. So, standardised abrogation of corporate LPP in certain contexts may in fact be more certain and clearly defined than ad hoc waiver which may implicate or scapegoat certain employees. In this vein, Rebecca Mitchell, Edward Imwinkelried and Michael Stockdale contend rightly that

[d]e-coupling waiver and cooperation ... is in the interests of employees. ... [This is because without the anxiety] that their statements to corporate counsel would always come into the possession of prosecutors investigating corporate misconduct, their statements would tend to be more truthful.²²²

D *Discretion for Courts*

An alternative or supplementary approach would be the possibility of giving courts ‘discretion to admit privileged evidence, where the interests of justice require’.²²³

²¹⁸ *Meneses* (n 100) 661–2 [90] (emphasis in original), citing *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392–3 (Gibbs CJ, Mason and Dawson JJ).

²¹⁹ *Meneses* (n 100) 678–9 [153].

²²⁰ See also Aleksandra Jordanoska, ‘Regulatory Enforcement against Organizational Insiders: Interactions in the Pursuit of Individual Accountability’ (2021) 15(2) *Regulation and Governance* 298, 306.

²²¹ See Leah Hengemuhle, ‘Mea Culpa: Why Corporate Waivers of Attorney–Client Privilege Have Not Increased the Prosecution of Corporate Executives’ (2019) 60(5) *Boston College Law Review* 1415, 1449.

²²² Rebecca Mitchell, Edward Imwinkelried and Michael Stockdale, ‘Deferred Prosecution Agreements and Legal Professional Privilege/Attorney–Client Privilege: English and US Experience Compared’ (2021) 8(1) *Journal of International and Comparative Law* 283, 313.

²²³ Finkelstein (n 113) 144.

This sensible suggestion would apply in both the civil and criminal contexts, and would remedy the situation whereby contested litigation is obstructed or constrained by claims of privilege. That said, while this would resolve problems at the latter end of the litigation process, it would not address situations whereby investigations fail to ‘get off the ground’ due to claims of privilege, or where the significance of privileged material remains unknown. When this occurs, legal challenges from public enforcement entities are required (as now occur frequently with ASIC and the ATO) which certainly delay the process of investigation and enforcement and have significant resource implications. So, what is needed is a recalibration of the concept of the interests of justice towards more ready disclosure regarding corporations specifically.

VI CONCLUSION

This article has sought to examine the longstanding and unresolved debate around the use of LPP by corporations and to make some suggestions as to the need for reform. Critical empirical questions remain unanswered, and merit further study beyond this article — how often and in what ways are LPP claims being made by corporations in order to resist the production or use of documents in the course of public enforcement actions against crime by corporations? What types of, and how many, investigations are stymied in this way? And most importantly, what is the societal impact of the use of LPP in this manner?

In the absence of fuller empirical data which might warrant more radical change, this article proposes modest and incremental reforms to LPP, predicated on existing measures and practices. Resources should continue to be provided for regulators to pursue a risky and combative approach to testing claims of LPP, even if this may result in protracted and unsuccessful proceedings. Furthermore, the possibility of duplicating the legislative approach adopted regarding the JHIL investigation should be kept in mind, as should the use of the serious crime exception in respect of bribery and other corporate crimes.²²⁴

Reliance on LPP provides a veneer of commitment to the rule of law and the administration of justice while in fact hindering state intervention. Rather than enabling the public interest, there is a compromising of the state’s ability to intervene against corporate wrongdoing and enable accountability. We can characterise the reliance on LPP in this way as a form of ‘creative compliance’, whereby lawyers ‘us[e] the law to escape legal control without ... violating legal rules’.²²⁵ This insight brings a new dimension in understanding how compliance with the law itself can be subversive and inappropriate. As Doreen McBarnet and Christopher Whelan emphasise, law

²²⁴ See above Part V(B).

²²⁵ See Doreen McBarnet and Christopher Whelan, ‘The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control’ (1991) 54(6) *Modern Law Review* 848, 848.

is always two-sided, and acts both as a means of control and of escaping control.²²⁶ They explain that '[r]ules are constructed not just by regulators but through the actions of the regulated ... [through] acquiring legal opinions or initiating judicial limitation via carefully selected court cases'.²²⁷

Ultimately, the corporation as a 'creature of the State' and an 'artificial entity'²²⁸ enjoys certain benefits of incorporation, namely separate legal personality and limited liability. The limitation of LPP for certain offences or investigations is 'not too great a price to pay for the prize of limited liability', given the need to intervene effectively in respect of large corporations with extensive economic power.²²⁹ Abrogating privilege in a limited way would be a necessary and proportionate means of assisting in the detection and deterrence of crime by corporations, such as bribery, market abuse, and cartel conduct. As outlined above, the instrumental value of LPP for corporations is becoming unnecessary in certain contexts, and its human rights protection unwarranted, so reform is crucial. As Toohey J in *Carter v The Managing Partner, Northmore Hale Davey & Leake* reminds us: 'Important, indeed entrenched, as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and enhancing the administration of justice. It is not an end in itself.'²³⁰

²²⁶ Ibid.

²²⁷ Ibid 864.

²²⁸ *Caltex* (n 86) 491 (Mason CJ and Toohey J), 549, 553 (McHugh J).

²²⁹ Higgins (n 81) 392. For a general critique of limited liability, see Harry Glasbeek, *Class Privilege: How Law Shelters Shareholders and Coddles Capitalism* (Between the Lines, 2017).

²³⁰ (1995) 183 CLR 121, 147.

‘A TURBID ADMIXTURE’: THE LONG SHADOW OF THE COMMON LAW PROCEDURE ACT 1854

ABSTRACT

The innovations of the pre-judicature period continue to haunt us. In the 1850s, in response to agitation for procedural fusion, reforms were introduced to allow for the grafting of equitable remedies onto common law courts and vice versa. This well-intentioned blending of jurisdiction spawned two novel remedies that are with us to this day: equitable damages and the lesser known ‘common law injunction’. This article explores the Australian jurisprudence that has coalesced around the common law injunction and surveys the difficult theoretical problems that come to the fore when attempting to define its nature and scope.

I INTRODUCTION

In or about 1902, Walter Ashburner penned his now famous metaphor describing the effect of the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 and *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77 (*Judicature Acts*) on the relationship between law and equity. He said:

the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters. The distinction between legal and equitable claims — between legal and equitable defences — and between legal and equitable remedies — has not been broken down in any respect by recent legislation.¹

This metaphor does not quite tell the whole story. By the time the *Judicature Acts* were passed, the waters of law and equity had already mingled into something of a turbid admixture, courtesy of the well-intentioned but ultimately unsuccessful efforts of law reformers in the 1850s. The *Judicature Acts* fused only the administration of law and equity but the same cannot be said of the reform statutes that preceded them, in particular the *Common Law Procedure Act 1854*, 17 & 18 Vict, c 125 (*‘1854 Act’*) and the *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27 (*‘1858 Act’*). The former sought to empower common law courts to grant injunctions in aid

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¹ Walter Ashburner, *Principles of Equity* (Butterworth, 1st ed, 1902) 23.

of legal rights; the latter sought to empower courts of equity to grant common law damages. This arrangement prompted one dissatisfied observer, writing in 1872, to comment as follows:

Division of jurisdiction, leaving the two systems of law and equity to run in distinct channels, will, at least until a perfect system of fusion is discovered, secure more satisfactory results than the turbid admixture which even now is manifest as a result of the equitable clauses of the Common Law Procedure Acts.²

Like the *Judicature Acts*, both the *1854 Act* and the *1858 Act* were directed at reducing the delay and double litigation that plagued the English court system.³ But in the 1850s the idea of uniting 'the Courts into one Court of universal Jurisdiction'⁴ had not yet come into its own. It was at that time resisted by Chancery lawyers sceptical of a system in which judges who were formerly 'common law judge[s]' would be called on to administer both common law and equity in one court.⁵ The preferred approach was to effect 'a transfer or blending of jurisdiction ... as [would] render each Court competent to administer complete justice in the cases which fall under its cognizance'.⁶

This approach, which eventually fell out of favour, precipitated certain unintended developments. For one, courts of equity developed the power to award damages 'in new, specifically equitable directions'⁷ to the point where it could be said that 'Chancery judges [had] developed a new kind of remedy, exclusive to equity, from [the *1858 Act*]'.⁸ Similarly, early commentators on the *1854 Act* wrestled with whether the *1854 Act* permitted common law courts to issue injunctions more readily and on a more liberal basis than courts of equity would.⁹

² Comment, 'Equity in Common Law Courts' (1872) 8(1) *Canada Law Journal* 130, 130.

³ Patricia I McMahon, 'Field, Fusion and the 1850s: How an American Law Reformer Influenced the Judicature Act of 1875' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 424, 442.

⁴ Chancery Commission, *First Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery, &c* (Report, 1852) 3 ('1852 Report').

⁵ Michael Lobban, 'Field, Fusion and the 1850s: A Commentary' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 463, 464, 467, 469.

⁶ *1852 Report* (n 4) 3.

⁷ Lobban (n 5) 470.

⁸ *Ibid.*

⁹ See the differing analyses set out in: Henry Thurstan Holland and Thomas Chandless, *The Common Law Procedure Act MDCCCLIV with Treatises on Injunction and Relief* (S Sweet, 1854) 87–8; Charles Collett, *A Treatise on the Law of Injunctions, and the Appointment of Receivers, under the Code of Civil Procedure, Act VIII of 1859* (Higginbotham, 2nd ed, 1869) 1–2. See also Joseph Phillips, *The Common Law Procedure Act, 1854: with Explanatory Notes and Index* (William G Benning, 1854)

All of this may have become entirely academic had the remedial provisions of the *1854 Act* and *1858 Act* been reversed by the *Judicature Acts* or by some other subsequent legislation.¹⁰ As it happened, no such reversal took place, which explains why the Supreme Court of Judicature thought it necessary to engage in what one author has described as ‘minute analysis of pre-Judicature Act jurisdiction’¹¹ to establish the extent of its amalgamated jurisdiction.

The *1858 Act* came to be understood as a conferral ‘upon the Court of Chancery, and ... in course of time ... the Supreme Court of Judicature, [of] a discretionary jurisdiction to award damages which could not have been awarded at common law’.¹² The jurisprudence that grew up around the *1854 Act* charted a similar trajectory. In time, English courts confirmed that the *1854 Act* permitted the granting of injunctions to restrain defamations, something that courts of equity had consistently disclaimed jurisdiction to do.¹³

48 for the view that the powers set out in the *Common Law Procedure Act 1854*, 17 & 18 Vict, c 125 (*‘1854 Act’*) should not be limited by reference to the practice and principles developed by the courts of equity.

¹⁰ The *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27 was progressively repealed but it is generally understood that jurisdiction to award equitable damages was preserved by s 16 of the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66, s 3 of the *Statute Law Revision and Civil Procedure Act 1883*, 46 & 47 Vict, c 49, the Schedule to the *Statute Law Revision Act 1898*, 61 & 62 Vict, c 22 and s 18 of the *Supreme Court of Judicature (Consolidation) Act 1925*, 15 & 16 Geo V, c 49: Peter M McDermott, *Equitable Damages* (Butterworths, 1994) 42. But see PS Atiyah, ‘Common Law and Statute Law’ (1985) 48(1) *Modern Law Review* 1, 10–11.

¹¹ Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 1983) 53.

¹² JA Jolowicz, ‘Damages in Equity: A Study of Lord Cairns’ Act’ (1975) 34(2) *Cambridge Law Journal* 224, 227. See also *Leeds Industrial Co-Operative Society, Ltd v Slack* [1924] AC 851, 863 (Viscount Finlay) (*‘Leeds’*).

¹³ *Prudential Assurance Co v Knott* (1875) LR 10 Ch App 142, 145–6 (Lord Cairns LC). See also: *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; 43 ER 119, 125 (Turner LJ); *Emperor of Austria v Day* (1861) 3 De G F & J 217; 45 ER 861, 870–1 (Lord Campbell LC); *White v Mellin* [1895] AC 154, 169–70 (Lord Macnaghten) (*‘White’*).

Equity’s inability to injunct defamations is generally understood as a corollary of it only having jurisdiction in matters involving a proprietary right: David Rolph, *Defamation Law* (Thomson Reuters, 2016) 340 [16.20]; JD Heydon and MJ Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 9th ed, 2019) 1181 [40.7]; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2013) 579–80 [24.3].

An alternative explanation put forward for equity’s inability to injunct defamations is the long standing requirement, first set out in *Libel Act 1792*, 32 Geo III, c 60 (also known as *Fox’s Libel Act*) that libels be tried by jury and the fact that equity did not offer that mode of trial: JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 719 [21-125]; ICF Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Lawbook, 9th ed, 2014)

Common law injunctions continue to be sought and granted in the field of defamation.¹⁴ Outside this field, the exact nature and scope of the common law injunction remains uncertain.¹⁵ Equitable auxiliary injunctions on the other hand are much better understood and their use extends to virtually every field in which legal rights arise. Equitable auxiliary injunctions are often sought in relation to disputes involving contracts (for example, to restrain a threatened breach of contract)¹⁶ and property (for example, to restrain a threatened trespass to land).¹⁷ In an increasing number of fields, equitable auxiliary injunctions overlap substantially with statutory injunctions (for example, in fields involving corporations, intellectual property and family or domestic violence). It is necessary to reflect on the history of the jurisprudence surrounding common law injunctions to understand the uncertainty around the nature and scope of this remedy.

What then is the nature of the so-called 'common law injunction'¹⁸ and how does its continued existence affect the law of injunctions generally? For example, is it correct that the common law injunction does away with the inadequacy of damages requirement, a requirement held out again and again as embodying '[t]he very first principle of injunction law'?¹⁹

More generally, do the principles that govern the granting of common law injunctions differ materially from those that govern the granting of injunctions in equity's auxiliary jurisdiction? Is the common law jurisdiction to grant injunctions in aid of legal rights now broader in all respects than the equivalent equitable jurisdiction? This article is an attempt to sketch out an answer to these questions.

335. These matters, however, do not explain why courts of equity refused to grant final injunctions restraining defamation after a jury in a court of law had returned a verdict of libel, a point noted by Lindley J in *Saxby v Easterbrook* (1878) 3 CPD 339, 343.

¹⁴ See, eg: *Harbour Radio Pty Ltd v Wagner* (2019) 2 QR 468 ('Wagner'); *Chau v Australian Broadcasting Corporation [No 3]* (2021) 386 ALR 36 ('Chau'). There is also judicial support for the notion that the equitable auxiliary jurisdiction is an additional or alternative source of power to restrain defamations: *Carolan v Fairfax Media Publications Pty Ltd [No 7]* [2017] NSWSC 351, [11]; *Chau* (n 14) 81–2 [181]–[182]. Cf *Wagner* (n 14) 488 [50] (Fraser JA).

¹⁵ See Heydon, Leeming and Turner (n 13) 709.

¹⁶ *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 ('Curro').

¹⁷ *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464.

¹⁸ 'Common law injunction', not to be confused with 'common injunction', is the nomenclature adopted in Heydon, Leeming and Turner (n 13). The term 'legal injunction' is preferred in Spry (n 13). The appellation 'common law injunction' is used in this article for convenience only. Its use is not intended to prejudge the very question with which this article grapples, namely whether the common law injunction differs materially from other injunctions granted in aid of legal rights, such that it should be regarded as a distinct remedy.

¹⁹ *London & Blackwall Railway Co v Cross* (1886) 31 Ch D 354, 369 (Lindley LJ), quoted with approval in *Irving v Emu & Prospect Gravel & Road Metal Co Ltd* (1909) 26 WN (NSW) 137, 137.

Part II examines the language of relevant sections of the *1854 Act* and comments on the apparent legislative intent behind the *1854 Act* generally and the injunction provisions in particular.

Part III sets out the generally accepted understanding in Australia of the nature and scope of the common law injunction, including vis-à-vis the equitable auxiliary injunction. This is done by reference to work done by Australian equity scholars in the 1970s and 1980s in this area, which continues to exert influence, both at the practitioner level and in academic circles, on the way in which the common law injunction is understood.

Parts IV and V deal with the interesting question of whether the common law injunction is subject to the inadequacy of damages principle. Part IV considers whether the inadequacy of damages principle operates as a prerequisite or jurisdictional threshold to obtaining a common law injunction. The answer to that question is far from clear, and depends ultimately, it will be argued, on a distinction that presents as straightforward but is in fact rather abstract, namely the distinction between a legal remedy and an equitable one.

Part V grapples with the separate but related question of whether the inadequacy of damages principle, if not a jurisdictional requirement, can nevertheless operate as a consideration going to a court's discretion to grant a common law injunction.

II LEGISLATIVE BACKGROUND AND TEXTUAL ANALYSIS

A *The Policy Behind the 1854 Act*

The *1854 Act* was a multi-faceted Act dealing with subjects as diverse as arbitration, cross-examination, oaths, appeals and remedies. The policy behind the remedial provisions of the *1854 Act* can best be explained by reference to the law reform environment of the 1850s.

The 1850s saw the first organised push for procedural fusion: the administration of law and equity by a single court or system of courts. The notion of procedural fusion had acquired impressive momentum on the back of David Dudley Field's seminal visit to England in 1850.²⁰ Field had, in the 1840s, made a name for himself by pioneering the procedural fusion of law and equity in New York, and it was only in the aftermath of his visit that the debates about fusion began in earnest.²¹ In 1850, two royal commissions were established: a 'Chancery Commission' comprised of seven, and later 13, commissioners;²² and a 'Common Law Commission' comprised of five, and later six, common law lawyers.²³

²⁰ See generally McMahon (n 3) 426–7, 437.

²¹ See generally *ibid* 426–7, 430–7.

²² JM Collinge (ed), *Office-Holders in Modern Britain: Officials of Royal Commissions of Inquiry 1815–1870* (University of London, 1984) vol 9, 43.

²³ *Ibid* 41.

The goal of procedural fusion would, however, have to wait until the 1870s to be realised.²⁴ In the 1850s, Chancery lawyers were generally averse to the idea of judges with common law backgrounds only being called on to administer equity.²⁵ In a report tabled in 1852, the Chancery Commission advocated, as an alternative to procedural fusion, for 'a transfer or blending of jurisdiction'.²⁶

A year later, the Common Law Commission published its report ('1853 Report').²⁷ The *1853 Report* borrowed heavily from a report published in 1831 ('1831 Report')²⁸ by an earlier commission also comprised of common law lawyers, and on the subject of remedies, the *1853 Report* adopted and reproduced verbatim certain parts of the *1831 Report*.²⁹ Relevantly, the *1853 Report* reiterated that

[t]here seems to be no reason why a court of law should not exercise the same jurisdiction, and restrain violations of legal rights in the cases in which an injunction now issues for that purpose from the courts of equity ... it would obviously be attended with great advantage and convenience, that where common law rights are concerned, the whole litigation relating to them should fall within the cognizance of a common law court ...³⁰

The *1853 Report* also reproduced unaltered a number of draft provisions relating to remedies that had first been proposed in the *1831 Report*, including draft provisions that would form the basis for the injunction provisions in the *1854 Act*. The draft provision that corresponds to s 79 of the *1854 Act* was as follows:

That in all cases of injury or breach of contract, or threatened injury or breach of contract, for which an Action at Law for damages may be maintained, ... application shall, upon proper affidavit, be allowed to be made by way of motion in any of the Courts of Common Law at Westminster, or in vacation time to a Judge at Chambers, for a Writ of Prohibition; and that if the Court or Judge shall be satisfied that the case is such that the recovery of damages would be an inadequate-remedy, or that the amount of damages could not be precisely or conveniently ascertained, a rule or order shall be made for issuing a Writ of Prohibition forthwith, ... prohibiting him or them from the commission or further commission of the acts which are the subject of complaint.³¹

²⁴ McMahon (n 3) 425, 461.

²⁵ Lobban (n 5) 467, 469.

²⁶ *1852 Report* (n 4) 3.

²⁷ Common Law Commission, *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law, &c* (House of Lords Paper No 172, Session 1852–3) ('1853 Report').

²⁸ Common Law Commission, *Third Report Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law* (House of Lords Paper No 99, Session 1831) ('1831 Report').

²⁹ *1853 Report* (n 27) 42–4.

³⁰ *Ibid* 43, quoting *1831 Report* (n 28) 18–19 (emphasis omitted).

³¹ *1831 Report* (n 28) 74 [30].

By 1854, the draft provisions in the *1853 Report* had been converted into the Common Law Procedure Bill 1854 ('1854 Bill'), and in that process the draft provision corresponding to s 79 was amended to refer to injunctions instead of writs of prohibition. The draft provision was also shorn of the requirement that a court or judge be satisfied that recovery of damages would be an inadequate remedy. Finally, the draft provision was amended so as not to apply in respect of merely threatened legal wrongs. Quia timet injunctions in aid of legal rights would remain the preserve of equity.

The 1854 Bill was favourably received and Lord Cranworth LC, who spoke in Parliament in favour of the 1854 Bill, echoed the enthusiasm of his Lordship's fellow Chancery Commissioners for cross-jurisdictional grafting, as against procedural fusion. His speech is recorded in Hansard as follows:

They had heard of late a great deal about the expediency of what was called a fusion of the courts of law and equity, so that each court should be competent to administer justice either as a court of law or of equity. ... He was not, however, one of those who held the opinion, considering the position in which we were now placed, that so much advantage would result from the proposed fusion of law and equity as many persons seemed to imagine. ... But, although this was the view he took, he was far from not agreeing that, if they could so far assimilate the two that a party, by going to law, could obtain all he could now get by going to law and equity, so as to have everything done in one court, it would not be a most desirable object.³²

This speech neatly summarises the legislative intent behind the *1854 Act*. The *1854 Act* was an attempt to give effect to a compromise position formulated in response to calls for procedural fusion. The stated purpose of the *1854 Act* was to replicate unaltered, in the context of the common law courts, the powers that courts of equity had to restrain the commission of legal wrongs and, as originally drafted, the remedial provisions of the *1854 Act* appear to give effect to that purpose.³³ At the time the injunction provisions of the *1854 Act* were enacted, there was no inkling that they would give rise to a jurisdiction to issue injunctions that was, in some key respects, more expansive than the equitable jurisdiction on which it was based. But, according to authorities such as *Quartz Hill Consolidated Gold Mining v Beall* ('*Quartz Hill*')³⁴ and *Bonnard v Perryman* ('*Bonnard*')³⁵ (discussed in greater detail in Part III(A) below), an expansive appraisal of the scope of the common law jurisdiction is warranted, and even required, by the broad and general language of the injunction provisions, as enacted, and it is to that language which we now turn.

³² United Kingdom, *Parliamentary Debates*, House of Lords, 27 February 1854, vol 130, col 1343.

³³ See *1854 Act* (n 9) ss 68–82.

³⁴ (1882) 20 Ch D 501 ('*Quartz Hill*').

³⁵ [1891] 2 Ch 269 ('*Bonnard*').

B *Textual Analysis*³⁶1 *Relevant Provisions*

The injunction provisions of the *1854 Act* are set out at ss 79–82. Relevantly for the Australian position, these sections were reproduced in substance in legislation enacted in New South Wales,³⁷ Queensland,³⁸ South Australia,³⁹ Tasmania,⁴⁰ Victoria⁴¹ and Western Australia.⁴²

Section 79 of the *1854 Act* is as follows:

In all Cases of Breach of Contract or other Injury, where the Party injured is entitled to maintain and has brought an Action, he may, in like Case and Manner as herein-before provided with respect to Mandamus, claim a Writ of Injunction against the Repetition or Continuance of such Breach of Contract, or other Injury, or the Committal of any Breach of Contract or Injury of a like kind, arising out of the same Contract, or

³⁶ The arguments advanced in this article depend almost entirely on the assumption that the *1854 Act* and its Australian equivalents will be given full effect according to their terms by courts, except to the extent they are affected by subsequent statutes. This is the rationale for the close analysis in this Part of the article of the language used in the relevant provisions of the *1854 Act*.

Against this assumption, it has been argued that there ought to be 'judicial power to sunset some statutes', particularly with respect to statutes that have failed to achieve their purposes: Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) 82, 105, 164. An appraisal of Calabresi's proposal is beyond the scope of this article. The interested reader may consult Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9(2) *Journal of Equity* 108 for a treatment of Calabresi's arguments from an Australian perspective.

The debate around Calabresi's proposal also overlaps with the question of how strictly and textually courts should interpret statutes that are obviously defective. In Australia, a strict approach is preferred: *Taylor v The Owners — Strata Plan No 11564* (2014) 253 CLR 531, 549 [39]–[40] (French CJ, Crennan and Bell JJ). See also the distinction drawn in Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 20 between 'enactment intentions' and 'application intentions'. Cf *McGirt v Oklahoma*, 591 US 1, 14 (2020) (Roberts CJ), citing *Johnson v United States*, 163 F 30, 32 (1908) (Holmes J) which illustrates the more flexible approach used from time to time by courts in the United States. A discussion of these divergent approaches is also beyond the scope of this article.

³⁷ *Common Law Procedure Act 1857* (NSW) ss 44–7; *Common Law Procedure Act 1899* (NSW) ss 176–9; *Supreme Court Act 1970* (NSW) s 66(1), as enacted.

³⁸ *Interdict Act 1867* (Qld) ss 52–5; *Supreme Court Act 1995* (Qld) ss 180–3; *Civil Proceedings Act 2011* (Qld) s 9.

³⁹ *Supreme Court Procedure Act 1856* (SA) ss 69–72.

⁴⁰ *Common Law Procedure Act (No 2) 1855* (Tas) ss 63–6.

⁴¹ *Common Law Procedure Statute 1865* (Vic) ss 239–42.

⁴² *Supreme Court Ordinance 1861* (WA) s 4.

relating to the same Property or Right; and he may also in the same Action include a Claim for Damages or other Redress.

The provisions of the *1854 Act* that relate to mandamus⁴³ are too lengthy to set out here but they essentially established a procedure for the bringing of a statutory action of mandamus made available under the *1854 Act*, which was to be in addition to the prerogative writ of mandamus.

Section 82 expressly provides for the granting of common law injunctions in response to an *ex parte* application and on an interim basis. It has been understood as empowering courts to allow ‘*ex parte* injunctions in every case where a final injunction could be granted under the 79th section’.⁴⁴ Section 82 also provides that a court or judge could grant or refuse an application for an injunction under the *1854 Act* on such terms as shall seem reasonable and just. For convenient reference, s 82 is set out below in its entirety:

It shall be lawful for the Plaintiff at any Time after the Commencement of the Action, and whether before or after Judgment, to apply *ex parte* to the Court or a Judge for a Writ of Injunction to restrain the Defendant in such Action from the Repetition or Continuance of the wrongful Act or Breach of Contract complained of, or the Committal of any Breach of Contract, or Injury of a like kind, arising out of the same Contract, or relating to the same Property or Right; and such Writ may be granted or denied by the Court or Judge upon such Terms as to the Duration of the Writ, keeping an Account, giving Security, or otherwise, as to such Court or Judge shall seem reasonable and just, and in case of Disobedience such Writ may be enforced by Attachment by the Court, or, when such Courts shall not be sitting, by a Judge: Provided always, that any Order for a Writ of Injunction made by a Judge, or any Writ issued by virtue thereof, may be discharged or varied or set aside by the Court, on Application made thereto by any Party dissatisfied with such Order.

Finally, while not itself a source of power to grant injunctive relief, s 81 of the *1854 Act* is nonetheless relevant to any discussion of the nature of the common law injunction. It relevantly provides ‘in such Action Judgment may be given that the Writ of Injunction do or do not issue, as Justice may require’.

2 *Analysis of Section 79*

As mentioned already, s 79 differs in significant respects from its draft. It is, on its face, broader in scope than the draft and its apparent breadth was noted by early commentators on the *1854 Act*.⁴⁵

⁴³ *1854 Act* (n 9) ss 68–77.

⁴⁴ *Quartz Hill* (n 34) 507 (Jessel MR).

⁴⁵ See above n 9.

Most notable and worth mentioning is the commentary written by Henry Thurstan Holland and Thomas Chandless, which went to press that same year. Holland and Chandless made the following observations in respect of s 79:

in one point of view, the jurisdiction of the Courts of Law under this act may, perhaps, be held to be more extensive than that of Courts of Equity; inasmuch as the latter Courts have, except in the case of infants, lunatics, &c., no jurisdiction over persons, but only in respect of property. They would not interfere in respect of merely personal wrongs, such as to restrain the repetition of a libel, or the continuance of any other act merely affecting personal character. It may be a question, whether the power of the Common Law Courts will not be more extensive; but we apprehend that such question must be answered in the negative, as it would seem, from the use of the words 'property or right' in the latter part of sect. 79, that such extension was not contemplated; and, further, in most cases where personal character is affected by libel, or otherwise, it would probably be considered that damages would be a sufficient compensation, and that, therefore, the Courts of Common Law, acting upon the principle laid down in Equity, would not interfere by injunction.⁴⁶

The above commentary is telling in that Holland was secretary to the Common Law Commission and appears to have been responsible for preparing the draft provisions in the *1853 Report*.⁴⁷ Holland and Chandless, quite presciently, note the possibility of s 79 being interpreted as conferring a more expansive jurisdiction on the common law courts than enjoyed by courts of equity, and note its possible application to cases in which courts of equity have historically disclaimed jurisdiction (for example, instances where litigants seeking an injunction do not have a requisite proprietary interest).

Ultimately, Holland and Chandless conclude against an expansive reading of s 79 and they argue for that view by reference to the words 'property or right' (which did not feature in the draft provisions in the *1853 Report*). A close reading of s 79, however, casts doubt on whether the inference argued for by Holland and Chandless can be sustained. The words 'property or right', if anything, support the opposite inference that the jurisdiction conferred on the common law courts was not confined to property but extended to rights that were merely personal rights. If 'right' is to be read down to mean 'proprietary right', the phrase 'property or right' becomes a tautology.

It is also interesting that Holland and Chandless assume that the inadequacy of damages requirement will regulate the availability of injunctive relief under s 79. As noted above, that requirement was expressly provided for in the draft but was deleted in the redrafting process leading up to the introduction of the 1854 Bill. Holland and Chandless' assumption surfaces again (albeit tangentially) as an uncontroversial proposition in the case of *Sutton v The South Eastern Railway Co.*⁴⁸

⁴⁶ Holland and Chandless (n 9) 87–8 (citations omitted).

⁴⁷ Collinge (n 22) 41.

⁴⁸ (1865) LR 1 Ex 32, 36 (Field QC, Phear and FM White) (during argument), 40 (Channell B).

One can see how this assumption was arrived at. The deletion of the reference to the inadequacy of damages requirement occurred roughly contemporaneously with the decision to substitute the words ‘an injunction’ for the words ‘a writ of prohibition’. That substitution may have been taken as implying what had previously been expressly stated, in which case it was the substitution that likely prompted the deletion of the reference to the inadequacy of damages requirement. On this view, the inadequacy of damages requirement is an integral feature of any injunction. In other words, it is a requirement that runs with the remedy.

The draftspersons working on the 1854 Bill may also have assumed that the proprietary right requirement, similarly, ran with the remedy. Or they may have not turned their mind to the proprietary right requirement, seeing that it did not feature in the draft provisions in the *1853 Report*. As it happened, it was the decision not to make express reference to that requirement that provided the textual foundation for the expansive interpretation of s 79 adopted in *Quartz Hill*⁴⁹ and *Bonnard*.⁵⁰

There is however a sense in which s 79 is narrower than its draft. Section 79 requires an injured party seeking an injunction to have ‘brought an Action’ that they are entitled to maintain. As such, unlike its draft, s 79 does not apply in respect of a merely threatened injury or breach of contract. The power to grant quia timet injunctions was seen, by Chancery lawyers, as a feature of ‘core ... equity jurisdiction’ and, in the lead up to the introduction of the 1854 Bill, Chancery lawyers stridently opposed the conferral of similar powers on common law courts.⁵¹

3 *Analysis of Other Relevant Sections*

Consistently with s 79, s 82 is stated in broad terms and without reference to either the proprietary right requirement or the inadequacy of damages requirement. Moreover, s 82 applies only after the commencement of an action, which again implies the unavailability of quia timet injunctive relief at law.

Section 82 is also noteworthy in that it refers to a writ of injunction being granted or denied by a court or judge upon such terms as shall seem reasonable and just. This is suggestive of an element of discretion on the part of the issuing judge and is redolent of the discretionary considerations that inform the granting of injunctions in equity’s auxiliary and exclusive jurisdictions.

Section 81, similarly, allows a court or judge to issue or not to issue an injunction, ‘as Justice may require’.

What these provisions do not address, in terms, is whether common law courts are required to apply the same discretionary considerations that guide courts of equity

⁴⁹ *Quartz Hill* (n 34) 507 (Jessel MR), 509–10 (Baggallay LJ).

⁵⁰ *Bonnard* (n 35) 283 (Lord Coleridge CJ for Lord Coleridge CJ, Lord Esher MR, Lindley, Bowen and Lopes LJJ, Kay LJ agreeing at 285).

⁵¹ See Lobban (n 5) 467–8. An unsuccessful attempt was made in 1860 to amend the *1854 Act* to empower the common law courts to injunct on a quia timet basis which was vehemently opposed by Chancery lawyers: at 469.

in disposing of injunction applications or whether there is scope, on the part of common law courts, for dispensing with certain discretionary considerations and embracing novel considerations. *Astor Electronics Pty Ltd v Japan Electron Optics Laboratory Co Ltd* (*Astor Electronics*)⁵² provides a partial answer to this question and will be discussed in greater detail in Part III.

III ENGLISH AND AUSTRALIAN PERSPECTIVES ON THE COMMON LAW INJUNCTION

A The Expansive Approach Adopted by English Courts

In Australia, the generally accepted understanding of the nature and scope of the common law injunction is informed by the expansive approach to the construction of the *1854 Act* adopted by English courts in the post-judicature period. That expansive approach emerged in a series of defamation cases, beginning with the 1882 case of *Quartz Hill*.⁵³

Quartz Hill was concerned with the publication of an allegedly defamatory circular to a company's shareholders.⁵⁴ In that case, it was argued that the Court lacked jurisdiction to injunct defamations.⁵⁵ Lord Justice of Appeal Baggallay disagreed and explained the effect of the *1854 Act* in these terms:

From the time when the *Common Law Procedure Act*, 1854, became law until the passing of the Judicature Acts, the Courts of Common Law had a more extensive jurisdiction as regards the granting of injunctions than the Court of Chancery. The cases in which the Court of Chancery could grant injunctions were of certain limited though well ascertained classes, but the language of the *Common Law Procedure Act* authorized the granting of an injunction in all cases of breach of contract or other injury where the party injured is entitled to maintain and has brought an action.⁵⁶

⁵² [1966] 2 NSW 419 (*Astor Electronics*).

⁵³ There is a dearth of authority considering the proper construction of the *1854 Act* prior to *Quartz Hill*. It is suggested in *Quartz Hill* that the power to grant injunctions in accordance with ss 79 and 82 of the *1854 Act* was very seldom exercised prior to 1875: *Quartz Hill* (n 34) 510 (Baggallay LJ). See also *Monson v Tussauds Ltd* [1894] 1 QB 671, 692–3 (Lopes LJ). One contemporary source, *Solicitor's Journal and Reporter*, noted that common lawyers had initially invested considerable time reading up on specific performance and injunctions, but in the end 'relinquished their study of equity' such that 'the equitable jurisdiction under the [Act] became nearly a dead letter': Comment, 'The Law and Equity Bill' (1859–60) 4(1) *Solicitors Journal and Reporter* 300, 301. A similar observation was made in relation to the Canadian equivalents of the *1854 Act*: Review, 'The Law and Practice of Injunctions in Equity and the Common Law by William Joyce' (1872) 8(1) *Canada Law Journal* 229, 230.

⁵⁴ *Quartz Hill* (n 34) 502.

⁵⁵ *Ibid* 506 (Higgins QC and Beddall) (during argument).

⁵⁶ *Ibid* 509–10 (Baggallay LJ, Jessel MR agreeing at 507).

The issue arose again in *Bonnard*. The plaintiff there sought, by injunction, to restrain the defendant publisher and defendant printer from selling or circulating copies of a particular article, and printing or publishing any other material that imputed dishonest or fraudulent conduct to the plaintiff.⁵⁷ In response to the suggestion, in argument, that the Court had no jurisdiction to injunct defamations (at least not where a defendant deposed to being able to justify the relevant defamations at trial),⁵⁸ Lord Coleridge CJ made the following observations:

Prior to the [*1854 Act*], neither Courts of Law nor Courts of Equity could issue injunctions in such a case as this: not Courts of Equity, because cases of libel could not come before them; not Courts of Law, because prior to 1854 they could not issue injunctions at all. But the 79th and 82nd sections of the [*1854 Act*] undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation.⁵⁹

Quartz Hill and *Bonnard* are not without their critics.⁶⁰ But those decisions have been consistently followed, both in the United Kingdom ('UK')⁶¹ and in those Australian jurisdictions that have enacted local equivalents to ss 79 and 82 of the *1854 Act*.⁶² The jurisdiction of Australian superior courts to injunct defamations is not seriously doubted⁶³ and the High Court has signalled, in dicta, that it is now too

⁵⁷ *Bonnard* (n 35) 269–70.

⁵⁸ Ibid 279 (Cozens-Hardy QC and WE Vernon) (during argument).

⁵⁹ Ibid 283 (citations omitted).

⁶⁰ See especially Roscoe Pound, 'Equitable Relief against Defamation and Injuries to Personality' (1916) 29(6) *Harvard Law Review* 640, 665–6. See also: Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) 84–7; HAJ Ford, 'A Note on the Protection of Reputation in Equity' (1953) 6(3) *Res Judicatae* 345, 348–9. But see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 126–7 [198]–[199], 130 [206], 133 [211] (Heydon J) ('O'Neill').

⁶¹ See, eg, *White* (n 13) 163 (Lord Herschell LC).

⁶² See, eg: *Stocker v McElhinney [No 2]* [1961] NSWLR 1043, 1048 ('Stocker'); *Wagner* (n 14) 488 [50] (Fraser JA); *Chau* (n 14) 80–2 [176]–[183].

⁶³ The position of inferior courts is much less clear. For example, in *Martin v Najem* [2022] NSWDC 479 ('*Najem*'), the District Court of New South Wales, at [128], asserted jurisdiction to grant permanent injunctions restraining defamation. The basis for that assertion was reasoning set out in the dissenting judgments of McHugh and Kirby JJ in *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435, 456–62 [71]–[84] (McHugh J), 473–83 [117]–[142] (Kirby J). *Najem* is yet to be considered by an appellate court and was decided against the backdrop of the New South Wales Court of Appeal, in *Mahommed v Unicom* [2017] NSWCA 65 ('*Unicom*'), declining to provide appellate guidance on the issue of the limits of the District Court's jurisdiction on account of *Unicom* not being a suitable vehicle for argument on that issue: at [57]–[58] (Ward JA, Macfarlan JA agreeing at [1], McDougall J agreeing at [64]).

late to depart from the construction of the *1854 Act* adopted in cases such as *Quartz Hill* and *Bonnard*.⁶⁴

Quartz Hill and *Bonnard* also represent the high-water mark of judicial engagement with the injunction provisions of the *1854 Act*, at least in the UK. Consideration of the common law injunction in subsequent UK case law is sporadic and cursory. It appears that, with the onset of the judicature system, the common law injunction failed to attract sustained interest and perhaps even faded from institutional memory. Alternatively or additionally, common law injunctions may have fallen out of usage on account of the inability to obtain such injunctions on a *quia timet* basis.

In Australia, matters would ultimately take a slightly different course.

B *The Astor Electronics Decision*

In Australia, the common law injunction resurfaced in 1966, in the case of *Astor Electronics*. *Astor Electronics* was decided in New South Wales and the facts of that case were made possible by the unusual history of the Supreme Court in that state.

The Supreme Court of New South Wales, at the time it was established in 1824, was a single Court administering both law and equity.⁶⁵ This changed in time and legislation was enacted, in 1840 and 1841,⁶⁶ which brought about the formal separation of the equitable jurisdiction of the Supreme Court of New South Wales from its common law jurisdiction.⁶⁷ Once this separation of jurisdictions was established, it proved to be surprisingly persistent. The peculiarity of one Supreme Court exercising (never simultaneously) two separate jurisdictions lasted until 1972.⁶⁸

⁶⁴ *O'Neill* (n 60) 81 [64] (Gummow and Hayne JJ, Heydon J dissenting at 128–30 [202]–[204]).

⁶⁵ *New South Wales Act 1823* (Imp) 4 Geo 4, c 96, ss 2, 9.

⁶⁶ *Administration of Justice Act 1840* (NSW) s 20; *Advancement of Justice Act 1841* (NSW) s 1.

⁶⁷ The separation had in practice been observed prior to 1840. As early as 1825, rules and orders of the Supreme Court were propounded with a view to bringing the judiciary in New South Wales in line with the pre-judicature structure of the English courts: ML Smith, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72(1) *Australian Law Journal* 799, 800; MJ Leeming, 'Five Judicature Fallacies' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, 169, 179 n 51.

A detailed account of how this separation came about is set out in Mark Leeming, 'Fusion–Fission–Fusion: Pre-Judicature Equity Jurisdiction in New South Wales, 1824–1972' in John CP Goldberg, Henry E Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019) 118.

⁶⁸ *Supreme Court Act 1970* (NSW) s 5. See also Mark Leeming, 'Equity, The Judicature Acts and Restitution' (2011) 5(3) *Journal of Equity* 199, 221–2, 222 n 156.

New South Wales also kept in place its local equivalent of the *1854 Act*. Sections 79–82 of the *1854 Act* were replicated in ss 44–7 of the *Common Law Procedure Act 1857* (NSW), which in turn were restated, first, in the *Common Law Procedure Act 1899* (NSW) as ss 176–9, and then a second time (and in more modern language) in s 66(1) of the *Supreme Court Act 1970* (NSW).

It was in this context that the common law injunction assumed some importance. Admittedly, and as in the case of the UK, the common law injunction appears to have not been regularly invoked in New South Wales.⁶⁹ That said, there is reason to suppose that astute practitioners were aware of it, seeing that it served the practical purpose of allowing a litigant bringing an action on the common law side of the Supreme Court to access injunctive relief without commencing proceedings on the equity side.

In *Astor Electronics*, Japan Electron Optics Laboratory Co Ltd ('Japan Electron') took issue with common law injunctions that had been issued against it at the request of the plaintiff, Astor Electronics Pty Ltd.⁷⁰ Japan Electron had been appointed by the plaintiff as its exclusive distributor in Australia, and on 11 February 1966, it purported to terminate its distributorship agreement with the plaintiff on the ground that the plaintiff was in breach of a condition that it would use its best endeavours to sell a certain number of its products.⁷¹ In response, '[t]he plaintiff alleged that [the] purported cancellation was a wrongful repudiation ... which it did not accept'.⁷² Shortly afterwards, Japan Electron commenced distribution to Jeolco (Australasia) Pty Ltd ('Jeolco'), a company jointly owned by a former employee of the plaintiff and a former employee of the defendant.⁷³

The plaintiff sought and obtained ex parte common law injunctions prohibiting Japan Electron from using Jeolco to distribute its products in Australia.⁷⁴ The plaintiff then sought a continuation of those ex parte injunctions before Macfarlan J.⁷⁵

RM Hope QC and RP Meagher, appearing for the plaintiff, argued against the applicability of *Atlas Steels (Australia) Pty Ltd v Atlas Steels Ltd* ('Atlas'),⁷⁶ a decision that was put forward by Japan Electron as an impediment to injunctive relief.⁷⁷

⁶⁹ Sir Frederick Jordan, *Chapters on Equity in New South Wales*, ed FC Stephen (Thomas Henry Tennant, 6th ed, 1945) 144. Prior to 1966, there are two reported cases in which a common law injunction was granted: *Walker v Peel Shire Council* (1908) 8 SR (NSW) 333 and *Stocker* (n 62).

⁷⁰ *Astor Electronics* (n 52) 419.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ (1948) 49 SR (NSW) 157.

⁷⁷ *Astor Electronics* (n 52) 424.

The substance of *Atlas* was that a court would not injunct future breaches of a negative contractual stipulation if it would thereby be ordering specific performance of a contract of personal service.⁷⁸ Mr Hope QC advanced the argument that *Atlas*, being a case decided on the equity side of the Supreme Court, was not determinative of the approach to be taken on the common law side of the Supreme Court in relation to the issuance of a common law injunction.⁷⁹

Importantly, in giving his *ex tempore* decision, Macfarlan J accepted, without reservation, the proposition that the common law injunction was wider in certain respects than its counterpart in the equitable auxiliary jurisdiction.⁸⁰ His Honour said that, in enacting s 79 of the *1854 Act*, the predecessor to s 179, the 'Imperial Parliament [had] added to the field of subject-matter in which Equity Courts regarded themselves as at liberty or under a duty to grant injunctions'.⁸¹

The critical question, however, in *Astor Electronics* was whether a common law injunction should be governed by different discretionary considerations than those applicable to equitable auxiliary injunctions. Justice Macfarlan expressed the view that at least in those fields common to law and equity, judges should apply the same discretionary principles.⁸² Accordingly, Macfarlan J declined to distinguish *Atlas* in the way agitated for by the plaintiff.⁸³

In a way, *Astor Electronics* marks the genesis of contemporary thinking about the common law injunction. *Astor Electronics* confirmed the view that the common law injunction covered 'fields of subject matter' which were additional to those in which equity operated (for example, defamation).⁸⁴ It also offered guidance with respect to the operation of the common law injunction in, what one might call, 'overlapping fields' (for example, breach of contract cases).⁸⁵ Despite reviving scholarly interest in the common law injunction, *Astor Electronics* has received little attention in the subsequent case law (which has primarily focused on the role of the common law injunction in defamation cases).⁸⁶ *Astor Electronics* is the only Australian case to date to consider the common law injunction in a breach of contract context, and as such the operation of common law injunctions in breach of contract cases remains largely untested. This, in the author's opinion, is regrettable, given the implications of the nature and scope of the common law injunction for day-to-day commercial

⁷⁸ See also: *Lumley v Wagner* (1852) 5 De Ge & Sm 485; 64 ER 1209; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209.

⁷⁹ *Astor Electronics* (n 52) 424.

⁸⁰ *Ibid* 425.

⁸¹ *Ibid*, citing *White* (n 13) 163.

⁸² *Astor Electronics* (n 52) 425–6.

⁸³ *Ibid*.

⁸⁴ *Ibid*.

⁸⁵ See *ibid*.

⁸⁶ See, eg: *Wagner* (n 14); *Chau* (n 14) 79–82 [173]–[183]; *Capilano Honey Ltd v Dowling [No 2]* [2018] NSWCA 217, [51] (Basten JA).

practice. For example, it is not uncommon for commercial contracts to contain acknowledgements of the inadequacy of damages in the event certain terms of the contract are breached, the purpose of such acknowledgments being to facilitate enforcement of the contract. However, if it is correct that a common law injunction may issue without inadequacy of damages being established, then the somewhat artificial acknowledgment of inadequacy clauses can be safely done away with.

To take another example, contracting parties (through their legal representatives) from time to time agonise over whether obligations expressed in a deed are enforceable by injunction in circumstances where there is no clear consideration passing between the parties. It is, on the one hand, reasonably clear that equity will not assist a volunteer,⁸⁷ and, on the other hand, less than clear whether a deed necessarily imports consideration. However, if it is correct that equitable maxims do not apply, or do not apply with equal force, to the granting of a common law injunction, then obligations in a deed may be enforceable regardless of whether they are voluntary or entered into for value, and the question of whether a deed imports consideration may recede into more theoretical territory.

The common law injunction has also, for the time being, not been subjected to in-depth analysis in the public law context, notwithstanding the prominent role injunctions play in that field. Again, this is regrettable, especially in light of the High Court's recent decision in *Smethurst v Commissioner of Police* ('*Smethurst*').⁸⁸ That decision confirmed that an injunction can only issue in aid of a recognised legal or equitable right and that injunctions issued in public law contexts (including under s 75(v) of the *Australian Constitution*) are no exception to that rule.⁸⁹ In other words, the shape of the court's power to grant injunctive relief is determined principally by historical and doctrinal considerations, including those historical and doctrinal considerations that relate to the granting of common law injunctions.⁹⁰ That being so, it is not difficult to see that the unsettled debates concerning the nature and scope of the common law injunction may in time assume practical significance in the public law sphere.

There is admittedly no discussion in *Smethurst* of the extent to which resort might be had to common law injunctions to circumvent the inadequacy of damages principle. This is unsurprising given that no party to the proceedings raised that as a possibility. Rather, to the extent that it turned its mind to the inadequacy of damages principle, the Court proceeded on the assumption that the inadequacy of damages principle would regulate the availability of any injunction in aid of legal

⁸⁷ *Milroy v Lord* (1862) 4 De G F & J 264; 45 ER 1185; *Corin v Patton* (1990) 169 CLR 540, 551, 556 (Mason CJ and McHugh J), 579–80 (Deane J).

⁸⁸ (2020) 272 CLR 177 ('*Smethurst*').

⁸⁹ *Ibid* 216–17 [85] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 241–2 [155], Edelman J agreeing at 268 [232], Gordon J dissenting at 250–1 [179]), citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 241 [91] (Gummow and Hayne JJ).

⁹⁰ *Smethurst* (n 88) 237–8 [145]–[146] (Nettle J).

rights issued in a public law context,⁹¹ either as a limit 'of the court's power to grant injunctions'⁹² or as a matter to be taken into consideration.⁹³ As argued below, that is with respect far from certain.

C *A Survey of Australian Scholarship Concerning the Common Law Injunction*

Interest in the common law injunction was somewhat revived in the 1970s and 1980s with the publication of ICF Spry's *The Principles of Equitable Remedies* in 1971 and Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* ('*Doctrines and Remedies*') in 1984.⁹⁴ Both texts grapple with the interaction between the common law injunction and the equitable auxiliary injunction and advance two propositions as being more or less settled and two other propositions on a more tentative basis.

1 *The Relative Width and Narrowness of the Common Law Jurisdiction*

The first proposition that appears to be more or less settled is that the common law injunction is wider in some respects than the equitable auxiliary injunction and narrower in other respects.⁹⁵ The common law injunction is wider than its equitable counterpart in that it may issue in aid of a legal right that is not a proprietary right.⁹⁶ The classic example here is the personal interest an individual has in their reputation, and the corresponding right to claim damages for unjustified or otherwise indefensible defamation. This greater width, however, may be less extensive than what appears at first blush. The point is made in *Doctrines and Remedies* that, in this specific context, the proprietary right concept is not as unforgiving as it once was and now arguably encompasses many rights that were historically viewed as merely personal rights.⁹⁷

The common law injunction is narrower than its equitable counterpart in that an equitable auxiliary injunction may issue on a quia timet basis, whereas a common

⁹¹ Ibid 229–30 [120]–[123] (Gageler J), 242 [156] (Nettle J), 280–2 [261]–[265] (Edelman J).

⁹² Ibid 241–2 [155] (Nettle J).

⁹³ Ibid 282 [265] (Edelman J).

⁹⁴ Since this period, other substantial works on equity and equitable remedies have been published, including: MJ Tilbury, *Civil Remedies: Principles of Civil Remedies* (Butterworths, 1990) vol 1 ('*Principles of Civil Remedies*'); MJ Tilbury, *Civil Remedies: Remedies in Particular Contexts* (Butterworths, 1993) vol 2; GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia and New Zealand* (LBC Information Services, 1st ed, 1996); Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009). These works, however, contain very limited consideration of the common law injunction.

⁹⁵ Heydon, Leeming and Turner (n 13) 709 [21-060].

⁹⁶ Ibid.

⁹⁷ Ibid 757–9. See also Spry (n 13) 351–2.

law injunction may not.⁹⁸ The reason for this result is that ss 79 and 82 require an applicant for a common law injunction to have commenced an action at law that they are entitled to maintain, and no action for common law damages can be brought for a merely threatened or apprehended legal wrong.⁹⁹

It is important to note that the inability to injunct on a quia timet basis is ultimately a feature of the terms in which ss 79 and 82 of the *1854 Act* are cast and, as such, this particular limitation may be cured by express statutory language to the contrary. In various Australian jurisdictions, express statutory language of that kind has been enacted.¹⁰⁰

In New South Wales, the relevant provision is s 66 of the *Supreme Court Act 1970* (NSW). As already mentioned, s 66 was initially a restatement of ss 79 and 82 of the *1854 Act* in more modern language. Section 66 was, however, recast in 1972 as follows: ‘The Court may, at any stage of proceedings, by interlocutory or other injunction, restrain any threatened or apprehended breach of contract or other injury.’¹⁰¹

The effect of the words ‘any threatened or apprehended breach of contract or other injury’ is to allow for the granting of common law injunctions on a quia timet basis in relation to all legal wrongs.¹⁰²

In Queensland, there is a similar provision that allows for the granting of common law injunctions in relation to ‘a threatened or apprehended breach of contract or other wrongful conduct’.¹⁰³

As such, in New South Wales and Queensland, the scope of the common law injunction is at least equal to that of the equitable auxiliary injunction.

⁹⁸ Heydon, Leeming and Turner (n 13) 709 [21-060]; Spry (n 13) 334. This result was criticised as absurd in Samuel Prentice, *Chitty’s Archbold’s Practice of the Court of Queen’s Bench, in Personal Actions and Ejectment, Including the Common Pleas and Exchequer* (H Sweet, 12th ed, 1866) vol 2, 1113 n (c).

⁹⁹ *Leeds* (n 12).

¹⁰⁰ Tilbury has argued that, even without express statutory language, common law injunctions can now be granted on a quia timet basis: Tilbury, *Principles of Civil Remedies* (n 94) 304. This view depends on the proposition that courts of equity were, at all times, courts of unlimited jurisdiction and that the so-called jurisdictional limits on intervention in support of legal rights were no more than entrenched rules of practice: see below n 111. According to Tilbury, in a judicature system, any limitation propounded by the *1854 Act* can be (and has in fact now been) overcome by a court’s inherent equitable jurisdiction: Tilbury, *Principles of Civil Remedies* (n 94) 304.

¹⁰¹ *Supreme Court Act 1970* (NSW) s 66.

¹⁰² Heydon, Leeming and Turner (n 13) 711 [21-070], 722 [21-135].

¹⁰³ *Civil Proceedings Act 2011* (Qld) s 9(1).

In South Australia, Tasmania and Western Australia, express statutory language has extended the circumstances in which a common law injunction can be sought on a *quia timet* basis.¹⁰⁴ The extension, however, is not to all legal wrongs but to waste and trespass only.¹⁰⁵

Victoria does not appear to have enacted statutory language extending the scope of the common law injunction.

2 *The 'No Circumvention' Principle Set Out in Astor Electronics*

A second point on which there appears to be a consensus (at least in Australia) is that the common law injunction cannot ordinarily be used to circumvent the discretionary principles that apply to equitable auxiliary injunctions.¹⁰⁶ This is the approach marked out by Macfarlan J in *Astor Electronics*¹⁰⁷ and it is an approach that allows, and even requires, judges to have regard to familiar considerations such as whether injunctive relief may cause a defendant undue hardship or require constant supervision or be futile in the circumstances.

One area in which the 'no circumvention' principle has been applied is in relation to the principle that equity will not grant injunctions to administer the criminal law. This principle has historically been expressed as a fact of jurisdiction (although it is no longer understood in this way), and the locus classicus in this area is the statement of Lord Eldon LC in *Gee v Pritchard* that his Lordship had 'no jurisdiction to prevent the commission of crimes'.¹⁰⁸ The *1854 Act* has been understood as putting beyond any doubt the jurisdiction of a court to injunct criminal conduct.¹⁰⁹ However, in exercising its power to injunct criminal conduct, a court is to give effect to equity's long-standing reluctance to administer the criminal law, and adhere to the narrow exceptions developed by equity in this area.¹¹⁰

3 *The Status of the Inadequacy of Damages Principle*

A third and somewhat less certain proposition relates to the inadequacy of damages principle. It is suggested by the authors of *Doctrines and Remedies* that the inadequacy of damages principle does not apply to the common law injunction, at least not as a

¹⁰⁴ *Supreme Court Act 1935* (SA) s 29(3); *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12); *Supreme Court Act 1935* (WA) s 25(9).

¹⁰⁵ *Supreme Court Act 1935* (SA) s 29(3); *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12); *Supreme Court Act 1935* (WA) s 25(9).

¹⁰⁶ Heydon, Leeming and Turner (n 13) 709; Spry (n 13) 336–7, 345, 460–1.

¹⁰⁷ *Astor Electronics* (n 52) 425–6.

¹⁰⁸ *Gee v Pritchard* (1818) 2 Swans 402; 36 ER 670, 674.

¹⁰⁹ *Australian Securities and Investment Commission v Burton-Clay* (2003) 21 ACLC 651, 652–3 [2] ('*Burton-Clay*'); *Australian Securities and Investment Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487, 493 [19] ('*HLP Financial Planning*').

¹¹⁰ *Burton-Clay* (n 109) 652–3 [2]; *HLP Financial Planning* (n 109) 493 [19].

jurisdictional prerequisite.¹¹¹ This conclusion is reached by recognising: (1) that the inadequacy of damages principle, like the proprietary right requirement, goes to the question of jurisdiction or, to put it differently, to the question of whether a litigant has the requisite equity to approach a court of equity for the relief sought;¹¹² and (2) that the decisions of *Quartz Hill* and *Bonnard* were concerned, not so much with the proprietary right requirement specifically, but more generally with the jurisdictional prerequisites that apply in equity's auxiliary jurisdiction.¹¹³ The authors of *Doctrines and Remedies*, however, concede that this conclusion is not supported by any direct authority.¹¹⁴

As mentioned before, the primary challenge that can be raised in respect of this argument is that it was never the intention of the drafters of the *1854 Act* to remove the inadequacy of damages principle. In fact, the draft provisions in the *1831 Report* and *1853 Report* expressly condition the availability of injunctive relief on proof of inadequacy of damages.

It has also been suggested that the inadequacy of damages principle, whatever it may have been in the past, has, over time, decayed into a discretionary consideration.¹¹⁵ If that characterisation is correct, *Astor Electronics* may require courts to have regard to the inadequacy of damages principle in the common law jurisdiction, albeit as a discretionary consideration. This argument will be explored more fully in Part V, against the backdrop of the fourth and final proposition noted in this Part.

4 *Exceptions to the 'No Circumvention' Principle*

The fourth proposition relates to the exact import of *Astor Electronics*, specifically whether that decision requires the discretion to issue common law injunctions to be exercised in strict accordance with the discretionary principles that apply to equitable auxiliary injunctions,¹¹⁶ or whether it is open for a court to modify or

¹¹¹ Heydon, Leeming and Turner (n 13) 719 [21-120]. See also Spry (n 13) 334–5. Spry does not accept that courts of equity lacked jurisdiction in the sense that it lacked power to injunct, for example, defamations, and prefers the view that, properly conceived, courts of equity enjoy unlimited jurisdiction: at 333, 341. He does, however, accept that a practice developed whereby courts of equity would not restrain certain wrongs, including defamations, and that s 79 does not, in its terms, import limitations that are tied to practices peculiar to courts of equity: at 335.

¹¹² Heydon, Leeming and Turner (n 13) 719 [21-120].

¹¹³ Ibid 709 [21-060].

¹¹⁴ Ibid 719 [21-120].

¹¹⁵ David Wright, 'Unity in Remedies: Finding the Best Remedy' (2014) 38(1) *University of Western Australia Law Review* 30, 33, 46. The inadequacy of damages principle was also regarded as a discretionary factor in *Curro* (n 16) 348.

¹¹⁶ See Michael Tilbury, 'Francis Gurry: Breach of Confidence' (1984) 7(2) *University of New South Wales Law Journal* 392, 392–3 for the view that common law injunctions should not issue on different principles to those applicable to equitable auxiliary injunctions.

disapply those discretionary principles or develop novel discretionary principles with a view to satisfying the mandate (if that is what it is), in ss 81 and 82 of the *1854 Act*, that the common law injunction issue or not issue 'as Justice may require' and on terms that are 'reasonable and just'. For convenience only, these words will be referred to as 'words of limitation'.

Spry's analysis of the common law injunction proceeds on the basis that the words 'as Justice may require' are operative and not merely ornamental. He states that while there will generally be 'no difference between what appears to be just according to established equitable doctrines and what appears to be just according to more general conceptions',¹¹⁷ there may also be exceptional circumstances in which a court issuing a common law injunction will 'decline to adopt special equitable rules of practice'.¹¹⁸ This is consistent with his view of the 'just and convenient' formulation in s 25(8) of the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 which is that those words do not, in and of themselves, extend the jurisdiction of a court to which it applies, or alter the principles to be applied by such a court, but instead provide a statutory basis for departing from rigid rules of practice (where they exist).¹¹⁹

This approach is also consistent with Jessel MR's construction of ss 79, 81 and 82 of the *1854 Act* in *Beddow v Beddow*.¹²⁰ In that case, Jessel MR observed that '[w]hat is reasonable and just is the only limit'¹²¹ and that 'what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles'.¹²² Master of the Rolls Jessel acknowledged that the Court of Chancery at its inception exercised a similar unlimited jurisdiction but that over time it became settled that 'there were certain well-known cases in which ... the Court ought not to grant an injunction'.¹²³ Additionally, Jessel MR acknowledged that 'in course of time various vexatious and inconvenient restrictions [had been] adopted'¹²⁴ by courts of equity in relation to injunctions.

¹¹⁷ Spry (n 13) 336.

¹¹⁸ Ibid 337. Spry singles out, as potentially inapplicable to a common law injunction, the rules of practice that give effect to the maxim that the one who seeks equity must do equity: at 337–8, 435, 460–1. Spry also notes that the common law may view requirements of accrued rights differently from equity and questions whether legal injunctions may apply the principle in equity that injunctions are to be granted or refused by reference to the circumstances and state of the law existing at the date of the hearing and not at the date of the writ's issue: at 345 n 18. This observation will have a ring of familiarity to those acquainted with the English and Australian authorities considering the different points at which equitable damages and common law damages are assessed: See McDermott (n 10) 103, 122.

¹¹⁹ Spry (n 13) 341–2.

¹²⁰ (1878) 9 Ch D 89.

¹²¹ Ibid 92.

¹²² Ibid 93.

¹²³ Ibid 92.

¹²⁴ Ibid.

The gap between justice ‘according to established equitable doctrines’ and justice ‘according to more general conceptions’ is likely to be narrow, perhaps even vanishingly so.¹²⁵ The class of cases in which inflexible application of equitable principles results in unjust outcomes is also difficult to contemplate in the abstract. Moreover, if one conceives of there being a core of cases in which the application of equitable discretionary considerations consistently achieves justice ‘according to more general conceptions’ (and that by virtue of those considerations being fine-tuned over time), the class of cases in which there is a gap is likely to exist on the periphery of that core, that is in cases that are so infrequently brought, or have not to date been brought, and to which discretionary considerations are yet to be adapted, or applied unadapted with unjust effect.

It may be that the common law injunction has a role to play in this peripheral region. It could act as a safeguard against the unjust or reflexive application of received equitable doctrine and practice, by focusing judicial attention not on equitable doctrine and practice but on the words of limitation set out in ss 81 and 82 of the *1854 Act*.

The authors of *Doctrines and Remedies* have argued for a reading of *Astor Electronics* that accords with this flexible approach, although they make no reference to the words of limitation in ss 81 and 82. They make the following comment in relation to the use of injunctions to restrain breaches of negative stipulations, but the comment is of general application:

it must be remembered that in 1854 the common law jurisdiction acquired a power to restrain breaches of contract, ... and the defamation cases show that the common law jurisdiction need not be whittled down by any equitable considerations. ... If one is invoking the old common law jurisdiction, it does not matter whether the breach was of an affirmative or of a negative stipulation; whether personal services are involved or not; whether the contract concerns chattels personal or not; whether supervision of the injunction would be required or not; and so on. The attitude to which a consideration of equitable principles would lead one would certainly be a relevant factor in determining what attitude one should adopt in exercising the common law jurisdiction, but it need not be a decisive consideration. If *Astor Electronics Pty Ltd v Japan Electron Optics Laboratory Co Ltd* tends to the contrary (which, it is suggested, it does not) it should be regarded as wrongly decided.¹²⁶

Much has been written, in the context of the fusion fallacy debates, about whether there is scope for equitable principles to be developed incrementally in new directions. The common law injunction may provide, at least in the sphere of injunctions, an avenue for exactly that kind of organic, incremental development (to the extent that it is needed). Ironically, the case for such flexibility is best made by reference to the methodology favoured by equity traditionalists, that is, by grounding the inherent powers of contemporary courts in powers available to courts of equity and courts of

¹²⁵ See above n 117.

¹²⁶ Heydon, Leeming and Turner (n 13) 745–6 [21-230].

common law immediately prior to the enactment of the *Judicature Acts*, including by reason of, or as augmented by, any statute that preceded the *Judicature Acts*.

IV INADEQUACY OF DAMAGES AS A JURISDICTIONAL REQUIREMENT

Is satisfying a court of the inadequacy or inappropriateness of damages as a remedy a prerequisite to the issuing of a common law injunction?¹²⁷

The clear intention of the framers of the *1854 Act* was that it would be and, if ss 79 and 82 were enacted as originally drafted, the answer to the above question would be yes.

But, as enacted, the only textual basis in ss 79 and 82 for an inadequacy of damages requirement is the word 'injunction' and the strength of that textual basis depends on whether one accepts the unstated assumption that the inadequacy of damages requirement runs with the remedy.

That assumption has a superficial attractiveness to it but appears to break down once subjected to analysis. What that analysis reveals is a paradox in the form of a jurisdictional Möbius strip.

This paradox comes into focus when one considers the nature and history of the inadequacy of damages requirement. The true principle that stands behind the inadequacy of damages requirement is that equity will only intervene in aid of legal rights where relief at law, including statutory relief, is inadequate.¹²⁸ The requirement is said to be jurisdictional because where inadequacy of relief at law cannot be demonstrated, a court of equity will 'refuse, according to established equitable principles, to consider at all whether or not they should exercise their discretion' to grant relief.¹²⁹

Any attempt to characterise the rule as incarnating some broader normative principle is misconceived. The rule and the remedial hierarchy which it supports are not premised on a preference for substitutionary relief over specific relief, notwithstanding the fact that debate surrounding the rule is occasionally cast in exactly these terms.¹³⁰ Such a characterisation of the rule hardly explains why equitable compensation in the exclusive jurisdiction is not subject to a similar adequacy test. It also does not account for the fact that relief at law includes various forms of specific relief (for example, recovery under detinue and replevin actions), which,

¹²⁷ A similar question has been raised and in fact litigated (albeit not at an appellate level) with respect to the issuing of statutory injunctions. See *Varley v Varley* [2006] NSWSC 1025, [19]–[26].

¹²⁸ PG Turner, 'Inadequacy in Equity of Common Law Relief: The Relevance of Contractual Terms' (2014) 73(3) *Cambridge Law Journal* 493, 495; Spry (n 13) 402.

¹²⁹ Spry (n 13) 651.

¹³⁰ See, eg: Wright (n 115) 38–9; Douglas Laycock, *The Death of the Irreparable Injury Rule* (Oxford University Press, 1991) 12–14.

if adequate, preclude a litigant from accessing specific relief in equity.¹³¹ It is also incorrect to say that, whatever the inadequacy requirement may have entailed in the past, the inadequacy requirement has now collapsed into a requirement concerned solely with the adequacy of damages. Peter Turner makes the point that decrees of specific performance in important cases dealing with part performance can only be explained if the inadequacy requirement is concerned with relief at law generally as opposed to damages only.¹³²

The rule, to use Geoffrey Gibson's phrase, is an 'accident of history'.¹³³ It is the product of an inter-fora struggle between the common law courts, on the one hand, and courts of equity, on the other, and not the embodiment of a grand jurisprudential vision.

The true principle on which the inadequacy of damages requirement is based gives rise to a circularity problem. The common law injunction is capable of being issued by a common law court and is therefore a legal remedy. The availability of a common law injunction would therefore be conditional on the inadequacy or inappropriateness of legal remedies, including the common law injunction itself.

This paradox is admittedly premised on a formalistic approach to categorising remedies. The only reason the common law injunction is categorised, for the purpose of this paradox, as a common law remedy is that it was a remedy that common law courts had power to grant prior to the passage of the *Judicature Acts*. But there are good reasons for insisting on this kind of formalism. The only alternative is to attempt to categorise remedies by reference to whether a given remedy has some innate legal quality or equitable quality, which is an impossible task. There is no innate quality in an injunction that qualifies that remedy as equitable any more than there is an innate quality in an award of damages that qualifies that award as legal. That is why FW Maitland insisted that

if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity.¹³⁴

¹³¹ Spry (n 13) 402.

¹³² Turner (n 128) 495–6, citing *Maddison v Alderson* (1883) 8 App Cas 467, 475–6 (Earl of Selborne LC).

¹³³ Geoffrey Gibson, *The Common Law: A History* (Australian Scholarly, 2012) 115, reproduced in Geoffrey Gibson, 'Actual Decline and Likely Fall' (2012) 15(1) *Legal History* 110, 115.

¹³⁴ FW Maitland, *Equity: A Course of Lectures*, ed AH Chaytor, WJ Whittaker and John Brunyate (Cambridge University Press, 2nd rev ed, 1936) 1. The correctness of Maitland's conception of equity is the subject of a protracted academic debate. A helpful and relatively recent summary of opposing views can be found in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020).

It could be said that a remedy should be seen as being equitable if it has some discretionary element to it and legal if it is a remedy that is rigidly and inflexibly available as of right. But this, in the author's view, really puts the cart before the proverbial horse. If anything, it is the categorisation of a remedy as legal or equitable that has historically determined whether that remedy should be discretionary or available as of right.

It is therefore tentatively suggested that the inadequacy of damages requirement does not apply to the common law injunction, at least not as a jurisdictional prerequisite. The true principle behind the inadequacy of damages requirement gives rise to a paradox. The paradox could, of course, be resolved by untangling the inadequacy of damages requirement from its historical underpinnings and antecedents. That, however, seems unlikely to occur organically and would probably require legislative intervention.

V INADEQUACY OF DAMAGES AS A DISCRETIONARY CONSIDERATION

Up to this point, we have assumed, without interrogation, that the inadequacy of damages principle operates only as a jurisdictional requirement. As alluded to above, this assumption is not without its detractors. It is increasingly suggested that, whatever it may have been in the past, the inadequacy of damages principle has now decayed into a kind of discretionary consideration.¹³⁵ In other words, the classification of the inadequacy of damages principle as a jurisdictional prerequisite is little more than a nominal veil that obscures the fact that, in practice, the principle is applied at the point of discretion and not jurisdiction.¹³⁶

It is therefore necessary to consider what, if anything, turns on the correctness of our assumption as to the jurisdictional nature of the inadequacy of damages principle.

On one view, if the inadequacy of damages principle operates as a discretionary consideration in equity's auxiliary jurisdiction, there is no reason why the same should not obtain with respect to the common law injunction. That is so because *Astor Electronics* promotes a policy of approximate uniformity between the discretionary considerations that apply in the equitable auxiliary jurisdiction and those that apply in the common law jurisdiction.¹³⁷ It would then no longer be to the point that the inadequacy of damages principle does not run with the remedy. *Astor*

¹³⁵ See above n 115.

¹³⁶ It has also been suggested that the inadequacy of damages principle rarely affects the outcome of cases, even as a discretionary consideration. See generally Laycock (n 130) but note its focus on cases decided in the United States. See also: Wright (n 115) 31; David Wright, 'Discretion with Common Law Remedies' (2002) 23(2) *Adelaide Law Review* 243, 246–7. But see Gene R Shreve, 'Book Review: The Premature Burial of the Irreparable Injury Rule' (1991–92) 70(4) *Texas Law Review* 1063.

¹³⁷ *Astor Electronics* (n 52) 425–6.

Electronics provides an entirely separate avenue for that principle (or at least a less absolute version of that principle) to ‘cross over’, as it were, the jurisdictional divide.

It is difficult, however, to be definitive on this point, given the flexibility introduced by the words of limitation in ss 81 and 82, which, as already noted, have been construed as being operative, and not merely ornamental. Unlike many other discretionary considerations that exist in equity’s auxiliary jurisdiction, there is a fundamental tension between the inadequacy of damages principle and the requirements of ss 81 and 82. The inadequacy of damages principle prompts a court to ask ‘is it just or unjust, in all the circumstances, that a plaintiff should be confined to his remedy in damages?’.¹³⁸ Such a question is different to the enquiry that ss 81 and 82 require a court to make, namely whether it would be just or unjust in all the circumstances for a plaintiff to be granted an injunction.

The first question assumes the appropriateness of both pecuniary relief and injunctive relief and asks whether it is just for the plaintiff to be confined to a single remedy (an award of damages) or be awarded a combination of otherwise appropriate remedies (an award of damages and an injunction). The second question is directed to the appropriateness of injunctive relief.

Damages can simultaneously be a just remedy and an insufficient remedy. This is the very premise for most specific performance cases involving real property¹³⁹ and personal property not readily available on an open market.¹⁴⁰ In these cases, an award of damages may be an insufficient remedy not because a different amount is warranted (in which case, it would be an unjust award) but because the relevant shortfall can only be made up by a different kind of remedy.

In the same way, an injunction can simultaneously be a just remedy and an insufficient remedy. The sufficiency and, for that matter, the effect of a combination of remedies is distinct from the justice achieved by the individual remedies comprising that combination.

As such, there is at least an argument to be made that the inadequacy of damages principle is screened out on account of the words of limitation in ss 81 and 82.

VI CONCLUSION

More than 150 years after its introduction, the nature and scope of the common law injunction are yet to be settled. This is due, in no small part, to the fact that it is difficult to disentangle remedies, and the principles that regulate their availability, from idiosyncrasies of jurisdiction. This difficulty is here amplified by the fact that

¹³⁸ *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, 379 (Sachs LJ).

¹³⁹ *Adderley v Dixon* (1824) 1 Sim & St 607; 57 ER 239, 240–1.

¹⁴⁰ *Dougan v Ley* (1946) 71 CLR 142, 150–1 (Dixon J, McTiernan J agreeing at 152), 153 (Williams J).

the framers of the *1854 Act* clearly did not distinguish between a remedy's irreducible or core content and its jurisdictional incidents.

Some headway has been made by Australian equity scholars in clarifying aspects of this turbid admixture but there remain areas of uncertainty. It is true that the common law injunction appears in certain Australian jurisdictions to be broader in all respects than the equitable auxiliary injunction. That said, how significant that greater breadth is remains to be seen. Much will depend on how courts decide to resolve the difficult question of whether the inadequacy of damages principle has a role to play in applications for common law injunctions.

Examining the history behind the enactment of the *1854 Act* is helpful, but only up to a certain point, and early commentary of the *1854 Act* is divided on what should be made of the breadth of the language used in ss 79 and 82. Similarly, while the English and Australian cases dealing with the injunction provisions in the *1854 Act* and its Australian equivalents provide a foundation for regarding the proprietary right requirement as not applicable to the common law injunction, it is unclear whether, by analogy, the inadequacy of damages principle has no role to play where common law injunctions are concerned. The analogy relies on the following proposition: the inadequacy of damages principle should be treated in the same manner as the proprietary right requirement because the former is and the latter either is or was a jurisdictional prerequisite to obtaining equitable auxiliary injunctions. Against that proposition, there is some doubt as to whether the inadequacy of damages principle should today be regarded as a jurisdictional prerequisite, as opposed to a mere discretionary consideration.

The author has also weighed into the balance of the nature and history of the inadequacy of damages principle, which appear to give rise to a paradox.

The author's tentative view is that the inadequacy of damages principle does not regulate the availability of common law injunctions. There are, admittedly, sound arguments pointing in both directions, but in the author's opinion the broad language used in the relevant statutory provisions and the nature and history of the inadequacy of damages principle tips the scale in favour of courts disregarding the inadequacy of damages principle in granting common law injunctions.

That said, the law in this area would benefit from legislative intervention. It is somewhat unsatisfactory that the nature and scope of the common law injunction is unclear and dependent on somewhat abstruse historical and even theoretical considerations. There is also the fact of non-uniformity across jurisdictions. As interesting as these matters may be from an academic standpoint, the resulting uncertainty is less than ideal for litigants and those advising them.

INCOME SPLITTING IN AUSTRALIA: TIME FOR A PRINCIPLED APPROACH?

ABSTRACT

Income splitting occurs where a taxpayer diverts some of the income that they might have derived personally to a taxpayer who is on a lower tax rate. This is permitted under current tax laws; however, the Australian Taxation Office ('ATO') has recently asserted limits to some known methods of income splitting. This article examines the current law in relation to income splitting in Australia, including the ATO's recent formal policies. Broadly speaking, the law allows the splitting of income from property and business income, unless that business income is generated from the taxpayer's personal services. This means that salary- or wage-earning taxpayers are at a relative disadvantage. One way of levelling the playing field could be to permit joint returns, allowing spouses to split their entire incomes — as is done in the United States of America. Alternatively, income splitting could be curtailed substantially beyond what the ATO currently permits, through legislative change. This article examines both approaches and concludes that either approach would be preferable to the current law.

I INTRODUCTION

An income tax system characterised by progressive tax rates will invariably tempt those on relatively high tax rates to split income with others on lower rates.¹ Income splitting is the process by which a portion of a person's assessable income is diverted to another party who is on a lower tax rate, resulting in a lower aggregate tax liability.² Recently, the Australian Taxation Office ('ATO') has targeted certain forms of income splitting. It has done so by releasing guidelines restricting the use of trusts to split property income³ and limiting professionals'

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¹ See, eg, Samuel D Brunson, 'Grown-Up Income Shifting: Yesterday's Kiddie Tax Is Not Enough' (2011) 59(3) *University of Kansas Law Review* 457, 468.

² Graeme S Cooper et al, *Income Taxation: Commentary and Materials* (Lawbook, 9th ed, 2020) 440 [7.10].

³ Australian Taxation Office, *Income Tax: Section 100A Reimbursement Agreements* (TR 2022/4, 8 December 2022) ('TR 2022/4'); Australian Taxation Office, *Section 100A Reimbursement Agreements — ATO Compliance Approach* (PCG 2022/2, 8 December 2022) ('PCG 2022/2').

ability to split their firm's profits.⁴ Given that the ATO is not a legislative body, its approach has been seeking to apply the existing law more strictly.⁵

To what extent and in which situations income splitting should be allowed are perplexing questions that affect the income tax liability of many taxpayers. It can be seen, from the multiplicity of policy approaches taken by different jurisdictions, that there is no one obvious or perfect answer. However, given the importance and impact of income-splitting laws, there is substantial utility in understanding the current law, its trade-offs, and potential policy alternatives.

Part II of this article discusses the current law on income splitting, including an explanation of the main methods used to achieve it under Australian law. Part III of the article turns to anti-avoidance provisions and how they curtail income splitting. The discussion here includes a description of recent ATO guidelines on the application of the law as it relates to income splitting in professional services firms, such as accounting and legal partnerships. Part IV then examines the broad question of whether couples should be able to make joint returns, as is the case in some jurisdictions such as the United States of America ('USA'). In essence, joint returns result in full income splitting between a spousal couple. Part V of the article approaches the issue on the assumption that the current system of individual returns is maintained. It examines the broad approach of the current law, and suggests that the ability to split income under the current law should be curtailed. Part VI then concludes that either of the approaches in Parts IV or V — despite entailing diametrically opposed policies — would be preferable to the status quo.

II INCOME SPLITTING IN AUSTRALIA

Australia treats individuals as taxpayers and assesses them on their income.⁶ This is in contrast to some other jurisdictions, such as the USA, that allow or mandate couples to lodge joint tax returns based on their aggregate income.⁷ However, Australia does take a 'joint income' approach when assessing the entitlement of individuals to certain government benefits, such as the age pension⁸ or when assessing other tax liabilities such as the Medicare levy surcharge.⁹

By way of background, the income-splitting techniques described below involve arranging the ownership of income-producing assets so as to modify the taxpayers assessable on the income of such assets. Such assets may include business interests

⁴ Australian Taxation Office, *Allocation of Professional Firm Profits — ATO Compliance Approach* (PCG 2021/4, 16 December 2021) ('PCG 2021/4').

⁵ Ibid; TR 2022/4 (n 3).

⁶ *Income Tax Assessment Act 1997* (Cth) s 4-1 ('ITAA 1997').

⁷ IRC § 6013 (2006).

⁸ *Social Security Act 1991* (Cth) s 1064.

⁹ *Medicare Levy Act 1986* (Cth) s 8D.

as well as more passive investments. Often ownership arrangements involve use of a trust that alters the ownership of beneficial interests in such assets.

In contrast, case law has established that personal exertion income cannot be shifted to another person in a tax-effective manner.¹⁰ This position arises from an important distinction between existing and future proprietary interests. An actual proprietary interest, including a right to income, is considered a chose in action, and is thus transferable (alienable),¹¹ unlike a ‘mere expectancy’ of future income, which cannot be effectively immediately alienated.¹² Although a purported transfer of a mere expectancy for consideration will give the assignee a right to the income, this will only come into effect once the assignor has derived the income.¹³ Consequently, in the case of personal exertion income that is not based on an underlying proprietary interest, an attempted alienation only takes effect after the income is earned and the tax liability has accrued — making income splitting in such a scenario ineffective.¹⁴ In contrast, anti-avoidance provisions aside, courts have allowed the effective alienation of business interests, notwithstanding that the business income was in substance predominantly due to the personal services of the owner.¹⁵

Techniques for income splitting have evolved over time and can be placed in one of the three categories discussed below.

A *Utilising an Entity for Businesses*

The carrying on of a business through various entities is a popular way of income splitting. At the simplest level, this can involve carrying on a small business in

¹⁰ *Liedig v Federal Commissioner of Taxation* (1994) 50 FCR 461, 472 (*‘Liedig’*). While the term ‘income from personal exertion’ is given a technical definition in s 6(1) of the *Income Tax Assessment Act 1936* (Cth) (*‘ITAA 1936’*), the definition does not provide a substantive definition of what types of income fall under it. Judicial decisions have also been reluctant to give a precise definition of the term. In contrast, the Personal Services Income (*‘PSI’*) provisions, which as discussed below in Part III(B) impose some legislative limits on income splitting, describe ‘personal services income’ as income that is ‘mainly a reward for your personal efforts or skills (or would mainly be such a reward if it was your income)’: *ITAA 1997* (n 6) s 84-5.

¹¹ *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385, 390–1 (Barwick CJ).

¹² *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 26 (Windeyer J).

¹³ *Tailby v Official Receiver* (1888) 13 App Cas 523, 546 (Lord Macnaghten); *Palette Shoes Pty Ltd (in liq) v Krohn* (1937) 58 CLR 1, 26–7 (Dixon J).

¹⁴ *Liedig* (n 10) 471–2.

¹⁵ *Ibid* 474, discussing *Tupicoff v Federal Commissioner of Taxation* (1984) 56 ALR 151. But see *Hollyock v Federal Commissioner of Taxation* (1971) 125 CLR 647, 653 (*‘Hollyock’*), where Gibbs J in obiter dictum did question whether business income that was in essence due to the personal exertion of the taxpayer could, anti-avoidance provisions aside, be legally assigned. In New Zealand, there is a stronger judicial basis for being unable to alienate such amounts: Ian Tregoning, ‘*Liedig and the Limits of Section 96*’ (1998) 8(1) *Revenue Law Journal* 122, 127–9.

the form of a company where the taxpayer and their spouse both own its shares and so receive dividend income. Similar arrangements involve utilising a unit or discretionary trust instead of a company. More sophisticated arrangements involve utilising multiple entities. For instance, a business partnership may have discretionary family trusts (in lieu of individuals) as partners,¹⁶ or the business might be in the form of a company with shareholders that are discretionary trusts.¹⁷

One arrangement that differs from the direct use of an entity to split income is the use of a ‘service trust’. Here, a professional practice (such as a law or accounting firm) pays a service trust for its administrative services.¹⁸ Specifically, the service trust pays for administrative services directly, including leasing of office and office furniture, purchasing stationery and equipment, and paying administrative staff.¹⁹ The service trust then marks up these costs and charges the professional practice for their supply.²⁰ The service trust, which is typically in the form of a unit trust, then distributes its profit to the unit holders, which are typically the relatives and related entities of the partners.²¹

B Partnership Income Assignments

A different form of income splitting available to partners is a partnership income assignment. This is sometimes referred to as an *Everett* assignment, after the High Court case that held such arrangements to be tax-effective.²² Here, in essence, the partner transfers part of their right to income in the partnership to a third party, which may be a person (often their spouse) or an entity such as a discretionary trust.²³ While such an assignment, legally speaking, involves the partner holding part of their interest on trust for the assignee,²⁴ the unique nature of such an arrangement means that it is in substance fundamentally different from utilising an entity to split income.

Since the introduction of Capital Gains Tax (‘CGT’), income assignments are less tax-effective, as they will typically lead to the transferor incurring a substantial CGT

¹⁶ PCG 2021/4 (n 4) [147].

¹⁷ Ibid [173].

¹⁸ Australian Taxation Office, *Your Service Entity Arrangements* (Guide No NAT 13086–04.2006, April 2006) 5.

¹⁹ Ibid.

²⁰ Ibid.

²¹ See, eg, the facts in the income-splitting case of *Phillips v Federal Commissioner of Taxation* (1977) 13 ALR 417, 420.

²² *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 (‘*Everett*’).

²³ ‘*Everett Assignments*’, *Australian Taxation Office* (Web Page, 4 July 2022) <<https://www.ato.gov.au/Business/Income-and-deductions-for-business/In-detail/Professional-firms/Everett-assignments/#MeaningofanEverettassignment>>.

²⁴ Ibid.

liability.²⁵ However, situations such as the transferor having substantial current or carried-forward capital losses can still potentially lead to the assignment markedly reducing their tax liability.²⁶

C Passive Income-Producing Property Ownership

Whereas the previous categories applied to income splitting by business owners, the simplest form of income splitting is shared ownership of passive income-producing property. Here, the lower-tax-rate spouse owns income-producing assets such as shares or a cashflow-positive investment property. A variant of this approach uses an entity, such as a trust or company, as a vehicle to own such assets for income-splitting purposes. As with income assignments, transfer of part or full ownership from one taxpayer to another can potentially trigger a CGT liability.²⁷

III LIMITS ON INCOME SPLITTING

The tax legislation includes various anti-avoidance measures, some of which are specifically aimed at preventing or strongly discouraging income splitting. Further, the general anti-avoidance provisions, located in pt IVA of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA 1936*'), can also prevent income splitting in certain situations. It is worthwhile to consider the most important anti-avoidance provisions.

A Division 6AA — Income of Minor

Division 6AA of pt III of the *ITAA 1936* was introduced in 1979 and is aimed at parents attempting to split income with their children who are under the age of 18.²⁸ These provisions apply to income earned directly by a minor²⁹ as well as to a minor's present entitlement to trust income.³⁰ Where div 6AA applies to the income of a minor, this income is in substance subject to the top tax rate for amounts above a modest tax-free threshold of \$416.³¹ Minors who are financially independent or under certain specified circumstances are deemed to be 'excepted persons', and are not subject to these provisions.³² Specifically, 'excepted persons'

²⁵ Section 104-10 of the *ITAA 1997* (n 6) makes a gain from transfers of assets potentially assessable and s 116-30 deems gifts and non-arm's-length transfers to have been sold at market value.

²⁶ Under *ITAA 1997* (n 6) s 102-5 any carried-forward and current capital losses are offset against capital gains.

²⁷ *Ibid* ss 104-10, 116-30.

²⁸ Explanatory Memorandum, Income Tax Assessment Amendment Bill (No 6) 1979 and Income Tax (Rates) Amendment Bill (No 2) 1979 (Cth) 2–3.

²⁹ *ITAA 1936* (n 10) ss 102AD, 102AE.

³⁰ *Ibid* s 102AG.

³¹ *Income Tax Rates Act 1986* (Cth) sch 11 ('*ITRA 1986*').

³² *ITAA 1936* (n 10) s 102AC.

are minors engaged in full-time work, certain minors considered disabled under the legislation, and minors with carer responsibilities.³³

Importantly, minors who are not ‘excepted persons’ (referred to as ‘prescribed persons’)³⁴ are only subject to the higher minor rates on certain types of income. Broadly speaking, higher tax rates apply to income that is ‘unearned’, such as shares or real estate whose purchase has been funded by their parents.³⁵ Conversely, income such as employment income, as well as income from investments acquired with funds originating from the services income of the minor, are not subject to minor tax rates.³⁶

B Personal Services Income Provisions

In the late 1990s, the federal government was concerned about the increasing number of taxpayers who were utilising an interposed entity to earn and split income from what was essentially employee-like personal services income.³⁷ In order to neutralise the tax effectiveness of these ‘employee on Friday, contractor on Monday’ arrangements, the government introduced the Personal Services Income (‘PSI’) provisions.³⁸

PSI is defined by these provisions as income mainly attributable to the taxpayer’s personal effort and skills — as opposed to income generated mostly by business capital, employees or trading stock.³⁹ The provisions apply to situations where the taxpayer has either directly,⁴⁰ or through an entity, arranged to be paid for their services.⁴¹ Where the PSI provisions apply, they limit the deductions available to what could be described as deductions only available to employees.⁴² They also prevent income splitting by deeming the income to have been earned by the taxpayer providing the services.⁴³

Importantly, the adverse consequences of these provisions do not apply to PSI earned by taxpayers carrying on a Personal Services Business (‘PSB’).⁴⁴ Broadly speaking,

³³ Ibid s 102AC(2).

³⁴ Ibid s 102AC(1).

³⁵ Ibid ss 102AE(1)–(2).

³⁶ Ibid s 102AE(2).

³⁷ John Ralph, *A Tax System Redesigned* (Final Report, 1999) 288–94.

³⁸ Explanatory Memorandum, New Business Tax System (Alienation of Personal Services Income) Bill 2000 (Cth) 5–6 [1.5]–[1.10] (‘PSI Explanatory Memorandum’).

³⁹ *ITAA 1997* (n 6) s 84-5.

⁴⁰ Ibid div 85.

⁴¹ Ibid div 86. Where an interposed entity is used, the legislation refers to this as a ‘personal services entity’: at s 86-15.

⁴² Ibid div 85 (where the individual has contracted directly with the employer), sub-div 86-B (where an entity has been interposed to be paid for the services).

⁴³ Ibid sub-div 86-A.

⁴⁴ Ibid ss 85-30, 86-15, 86-60.

this exception is aimed at distinguishing between PSI earned through a ‘genuine business’ and PSI earned from what is in substance an employment-like relationship.⁴⁵ For instance, a sole practitioner accountant or medical practitioner, who is mostly earning income from providing personal services to various clients, would be considered a PSB and will not be affected by the PSI provisions.⁴⁶ However, the Explanatory Memorandum to the PSI provisions, as well as other ATO documents,⁴⁷ make it clear that income splitting through a PSB is still potentially subject to the general anti-avoidance provision in pt IVA of the *ITAA 1936*.⁴⁸

C Section 100A — Trust Income

Section 100A of the *ITAA 1936* is an anti-avoidance provision aimed at trust income subject to a ‘reimbursement agreement’.⁴⁹ This provision, broadly speaking, applies to persons who are legally entitled to trust income, but in reality are unable to control a portion of such funds.⁵⁰ Section 100A was originally enacted to prevent tax minimisation arrangements involving distributions to a tax-advantaged beneficiary, where in reality most of the funds were channelled to another person.⁵¹ Where s 100A applies, the tax liability falls on the trustee at the top tax rate.⁵² The ATO has recently turned its interest to s 100A and has introduced Taxation Ruling 2022/4 (‘TR 2022/4’) detailing the application of that provision.

⁴⁵ Ibid div 87. Broadly speaking, to be a PSB under this division, the taxpayer must either have been paid to produce a result rather than paid for their time (s 87-18), or in the alternative, not have 80% or more of their PSI derived from one client (s 87-15) and pass at least one of three other tests, being: the *unrelated clients test* (s 87-20) (the PSI must have been sourced from at least two unrelated clients through work obtained by the taxpayer offering services to the public or sections of the public); the *employment test* (s 87-25) (employee or employees must have been engaged to undertake at least 20% of the principal work that generated the PSI); and the *business premises test* (s 87-30) (premises were used by the taxpayer to generate PSI, and those premises were separate from the taxpayer’s home or the business premises of clients).

⁴⁶ The requirements for a PSB would be fulfilled in such a situation as a result of no single client or patient generating 80% or more of the PSI, and both the unrelated clients test and business premises test being likely to have been fulfilled.

⁴⁷ See, eg, Australian Taxation Office, *Income Tax: Personal Services Income and Personal Services Businesses* (TR 2022/3, 23 November 2022) [160] (‘TR 2022/3’).

⁴⁸ PSI Explanatory Memorandum (n 38) 11.

⁴⁹ *ITAA 1936* (n 10) s 100A.

⁵⁰ Ibid ss 100A(1), (7).

⁵¹ Explanatory Memorandum, Income Tax Assessment Amendment Bill (No 5) 1978 (Cth) 31–2.

⁵² Section 100A deems such income to not be presently entitled in the hands of the relevant beneficiary, meaning that it will be subject to s 99A of the *ITAA 1936* (n 10), which assesses such income in the hands of the trustee at the top tax rate as specified by *ITRA 1986* (n 31) s 12(9). In contrast, under normal circumstances, under s 97 of the *ITAA 1936* (n 10), beneficiaries presently entitled to income are assessable on the income at their applicable tax rate.

Section 100A is limited in its application due to its requirement that the relevant agreement was entered into for the purpose of obtaining a tax benefit,⁵³ as well as an exemption for ordinary family or commercial dealings.⁵⁴ The ATO has recently issued TR 2022/4 which reads down the ordinary family dealings exemption by stating that arrangements are less likely to be covered by it if they involve a purpose of minimising tax.⁵⁵ However, some have disagreed with the ATO interpretation, and argued that as a matter of statutory interpretation, the ordinary family dealing exception can in many instances comfortably apply, notwithstanding the presence of a tax minimisation purpose.⁵⁶

According to the ATO, where parents presently entitled to trust income use such funds to make a one-off gift to an adult child, s 100A would typically not apply, as this arrangement would be covered by the ordinary family dealing exception.⁵⁷ In contrast, the ATO's view is that if such gifts were continuous, then potentially s 100A would apply to them (especially if some other features were present, such as the parents being on a lower tax rate than the child), due to the repeated splitting between the parties entitled to the trust income and the party who regularly receives its benefit.⁵⁸

D Section 26-35 — Excessive Payments to Related Entities

Section 26-35 of the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997') states that the deductibility of payments to related entities can be restricted to the amount that the Commissioner of Taxation considers reasonable.⁵⁹ 'Related entity' includes both a relative and a partnership in which a relative is a partner.⁶⁰ This prevents a rudimentary form of income splitting involving a taxpayer who is on a comparatively high tax rate employing and excessively remunerating their family member, such as their spouse, for which a deduction is claimed. To prevent double taxation, any amount denied a deduction is also not regarded as income in the hands of the recipient of the payment.⁶¹

Although s 26-35 does not apply to situations such as the sole shareholder of a corporate entity arranging for the company to excessively remunerate an employee

⁵³ *ITAA 1936* (n 10) ss 100A(8)–(9).

⁵⁴ *Ibid* s 100A(13) (definition of 'agreement').

⁵⁵ TR 2022/4 (n 3) [105], [195].

⁵⁶ Mark West, 'Section 100A and Tax Purpose' (2022) 56(11) *Taxation in Australia* 701, 712. See also Michael Butler, 'The Increasing Use and Threat of Section 100A' (2020) 24(2) *Tax Specialist* 45, 59, where the author argues that the 'ordinary family dealing' exception should be interpreted widely.

⁵⁷ TR 2022/4 (n 3) [143].

⁵⁸ *Ibid* [144].

⁵⁹ *ITAA 1997* (n 6) s 26-35(1).

⁶⁰ *Ibid* s 26-35(2).

⁶¹ *Ibid* s 26-35(4).

family member, case law disallows such deductions to the extent that such expenditures are not motivated primarily by a genuine income-producing purpose.⁶²

E *Other Specific Provisions*

Certain other provisions in the tax legislation are aimed at restricting income splitting in situations where the legal recipient of the income lacks control of the funds. For instance, s 94 of the *ITAA 1936* is aimed at ‘uncontrolled’ partnership income, which applies where a partner, in substance, lacks control over their share of partnership income. Similarly, s 102 of the *ITAA 1936* is aimed at situations where the settlor of a trust has the power to revoke the trust, resulting in their being able to access its income and capital.

At times, rather than relying on an anti-avoidance provision, the ATO has succeeded in denying income-splitting attempts by successfully claiming that the relevant expenses do not satisfy the tax legislation’s general deduction provision. For instance, this is the approach that the ATO has taken in relation to service trusts.⁶³ Specifically, whether the ATO regards the professional firm’s payment to a service trust as fully deductible depends on the degree to which the service trust is being used as an income-splitting device.⁶⁴

F *Part IVA — the General Anti-Avoidance Provision*

Part IVA of the *ITAA 1936* is the tax legislation’s general anti-avoidance provision. It potentially applies to a broad variety of situations, including some income-splitting scenarios. The Commissioner of Taxation can use pt IVA to ‘undo’ an income-splitting arrangement where its general requirements are fulfilled. Specifically, pt IVA applies where there is a scheme that grants a tax benefit to the taxpayer which has been entered into for the dominant purpose of obtaining a tax benefit.⁶⁵

⁶² See *Ure v Federal Commissioner of Taxation* (1981) 34 ALR 237, where the Full Court of the Federal Court held that an attempt by a taxpayer to split his income with his wife by lending money to her at a lower interest rate than he was paying on the borrowed funds was ineffective, as only part of the interest was deductible under the general deduction provision. The Court’s reason for this disallowance was due to the taxpayer’s borrowing of the money not being accompanied by a genuine income-producing purpose: at 241–2 (Brennan J), 250 (Deane and Sheppard JJ).

⁶³ Australian Taxation Office, *Income Tax: Deductibility of Service Fees Paid to Associated Service Entities: Phillips Arrangements* (TR 2006/2, 20 April 2006) [18]–[30].

⁶⁴ Australian Taxation Office, *Your Service Entity Arrangements* (n 18) 11–17. According to the ATO, service trust arrangements can also in some circumstances contribute to the application of pt IVA of the *ITAA 1936*, the general anti-avoidance provision: PCG 2021/4 (n 4) [130]–[134].

⁶⁵ *ITAA 1936* (n 10) ss 177A(5), 177D.

As discussed, the ATO has specifically singled out pt IVA as potentially applying to PSI that is generated through a PSB.⁶⁶

The ATO has had previous successes in using pt IVA's predecessor provision to prevent income-splitting arrangements. Specifically, the Full Court of the Federal Court in *Tupicoff v Federal Commissioner of Taxation* was successful in applying it to an insurance company employee who resigned and then, so as to facilitate income splitting with his family, provided services to his ex-employer through a trust.⁶⁷ In another landmark decision, the High Court in *Federal Commissioner of Taxation v Gulland* ('*Gulland*') decided that this predecessor provision applied to three unrelated medical specialists who used trust arrangements for income-splitting purposes.⁶⁸ Subsequent to pt IVA replacing its legislative predecessor, case law,⁶⁹ as well as the ATO itself,⁷⁰ indicated that pt IVA would have been successful in preventing income splitting for cases decided under its predecessor. However, pt IVA does not apply to all cases of income splitting. This is illustrated by the Full Court of the Federal Court deciding that pt IVA did not apply to a taxpayer who used an entity to carry on his share broking business, as it was held that the dominant purpose of structuring the business in such a manner included asset protection but did not include the purpose of obtaining a tax benefit.⁷¹

Recently, the ATO has published Practical Compliance Guideline PCG 2021/4 ('PCG 2021/4'), which discusses when the ATO will seriously consider using pt IVA to prevent income-splitting arrangements relating to professional firm profits.⁷² This document is broadly aimed at taxpayers who own an equity stake in businesses that involve the taxpayer selling their professional services, such as law, accounting or medical partnerships.⁷³ The document discusses techniques such as taxpayers utilising service trusts,⁷⁴ undertaking *Everett* income assignments,⁷⁵ partnerships where the partners are discretionary trusts rather than individuals,⁷⁶ running a

⁶⁶ TR 2022/3 (n 47) [267]–[269].

⁶⁷ (1984) 56 ALR 151, 152–4 (Fisher J, Jenkinson J agreeing at 154), 164–6 (Beaumont J, Jenkinson J agreeing at 154).

⁶⁸ (1985) 160 CLR 55, 71, 76 (Gibbs CJ, Wilson J agreeing at 77), 81–4 (Brennan J), 113, 117–18, 126–7 (Dawson J, Wilson J agreeing at 77) ('*Gulland*').

⁶⁹ See *Liedig* (n 10) 472, where Hill J indicated that *Gulland* (n 68) would have had the same result if decided under pt IVA.

⁷⁰ See Australian Taxation Office, *Income Tax: Income Splitting* (IT 2330, 30 June 1986) [41] ('IT 2330').

⁷¹ *Federal Commissioner of Taxation v Mochkin* (2003) 127 FCR 185, 205–9 [81]–[98] (Sackville J, Merkel J agreeing at 216 [136], Kenny J agreeing at 216 [137]).

⁷² PCG 2021/4 (n 4) [30]–[37].

⁷³ *Ibid.*

⁷⁴ *Ibid* [130]–[134].

⁷⁵ *Ibid* [135]–[139].

⁷⁶ *Ibid* [147]–[151].

business as a company with discretionary trust shareholders,⁷⁷ and carrying on a business as a unit trust with discretionary trusts as the unit holders.⁷⁸

According to PCG 2021/4, if the arrangement resulting in the income splitting of the professional services firm income has a sound commercial rationale,⁷⁹ and does not exhibit certain high-risk features,⁸⁰ the ATO uses a ‘traffic light’ system to evaluate the likelihood of giving serious consideration to applying pt IVA.⁸¹ This traffic light system in essence evaluates the degree of income splitting by examining how much of the professional services income of the business owners is assessable to them, as opposed to being split with others. It does this by calculating the degree to which the profit entitlement is returned to the owner,⁸² the average effective tax rate paid by the taxpayer owner and their associates due to the income-splitting arrangement,⁸³ and the remuneration returned to the taxpayer ‘as a percentage of the commercial benchmark for the services provided’.⁸⁴ In other words, the ATO’s view appears to be that as long as the taxpayer is a genuine business owner, and there is some commercial explanation for the income-splitting arrangement, then some income splitting — though not an excessive degree — is acceptable.

In contrast, the ATO has stated that when it comes to income splitting of property, or businesses in which the owner is not selling their personal services, income splitting is typically tolerated and will not be subject to the general anti-avoidance provision.⁸⁵ That policy can be historically linked to the case of *Deputy Federal Commissioner of Taxation v Purcell*,⁸⁶ where the general anti-avoidance provision in effect at the time was found to be inapplicable to an owner of primary producing property who had declared the relevant income-producing assets to be held on trust for himself and his relatives.⁸⁷ The ATO has stated, however, that the general anti-avoidance provision could apply to such non-personal exertion business income-splitting

⁷⁷ Ibid [167]–[172].

⁷⁸ Ibid [177]–[181].

⁷⁹ Ibid [10]. PCG 2021/4 indicates that justifying a business structure arrangement on the basis of asset protection is only valid if in substance the arrangement results in asset protection: at [41].

⁸⁰ Ibid [10]. An example of a high-risk feature is a salaried non-equity partner attempting to make an *Everett* income assignment: at [57].

⁸¹ Ibid [9]–[11], [65]–[81].

⁸² Ibid [82]–[83].

⁸³ Ibid [84]–[86].

⁸⁴ Ibid [100]–[105].

⁸⁵ IT 2330 (n 70) [15]–[17].

⁸⁶ (1921) 29 CLR 464.

⁸⁷ Ibid 473 (Gavan Duffy and Starke JJ), 476 (Rich J). See also Australian Taxation Office, *Income Tax: Family Companies and Trusts in Relation to Income from Personal Exertion* (IT 2121, 12 December 1984) [20], where the ATO expresses the view that the current general anti-avoidance provision, pt IVA, would also be inapplicable to such a factual scenario.

arrangements where the arrangements were ‘beyond the range of transactions ordinarily explicable as normal commercial or family dealing’.⁸⁸ As an example of this, the ATO pointed to two High Court decisions (each before a single judge), where income-splitting arrangements were struck down under the previous general anti-avoidance provision.⁸⁹ The first of these was *Millard v Federal Commissioner of Taxation*,⁹⁰ where a bookmaker who had previously operated as an individual commenced operation through a company for income-splitting purposes;⁹¹ the second was *Hollyock v Federal Commissioner of Taxation* (*‘Hollyock’*),⁹² where a pharmaceutical chemist declared his pharmaceutical business that he ran individually to be operated as a trust.⁹³ However, it could be argued that both of these cases did involve the owner of the business selling, in substance, their personal services, and thus fall within the scope of scenarios in which, traditionally, income splitting has been restricted.⁹⁴ This perspective leads to the conclusion that there is very wide scope for income splitting through ownership of property, or business assets that do not involve the owner making money from their personal services, without invoking the general anti-avoidance provision.

IV SHOULD INCOME SPLITTING BE WIDELY AVAILABLE THROUGH JOINT RETURNS?

As discussed above, in Australia income splitting is only available to any meaningful extent to some taxpayers, being those who derive income from property and, to varying degrees, to those deriving business income.⁹⁵ In contrast, in some

⁸⁸ IT 2330 (n 70) [15].

⁸⁹ Ibid [21]–[25]. See also at [41], where the ATO expresses its view that where the income-splitting arrangement was found to have been disallowed due to pt IVA’s immediate predecessor, it would also be disallowed under the current pt IVA.

⁹⁰ (1962) 108 CLR 336.

⁹¹ See IT 2330 (n 70) [22], where the reason was explained as being
that the bookmaking business was conducted precisely as it had been conducted before the agreement was entered into, that no advice of the agency agreement had been given to relevant authorities, eg racing clubs, that the bookmaking business had not been assigned and was never intended to be assigned to the company and that it was not possible for the company to obtain registration as a bookmaker. All of these factors led to the conclusion that the whole purpose and effect of the agreement was to split the taxpayer’s income into a number of parts in order to minimise the amount of tax which would become payable.

⁹² *Hollyock* (n 15).

⁹³ See IT 2330 (n 70) [25], where the ATO states that the Court in *Hollyock* was influenced by the fact that the wife did not in substance receive her entitlement of her share of the profit.

⁹⁴ See Tregoning (n 15) 129–30, where the author describes *Hollyock* as a case involving a business owner selling their personal services.

⁹⁵ See above Parts II, III(B), III(F).

jurisdictions,⁹⁶ such as the USA, married couples can file joint returns and are assessed on their aggregate income.⁹⁷ This differs from the Australian position, where the unit for tax purposes is primarily the individual, and joint returns are unavailable.⁹⁸

Widespread spousal income splitting could be implemented in two ways. The first would be to allow or mandate joint returns for couples, which would aggregate their incomes, but apply more generous income tax brackets.⁹⁹ An alternative is to continue with individual returns, but impute the average income of a couple into each of their individual tax returns.¹⁰⁰ For the sake of clarity, this article will refer to income splitting between couples as a system of *joint returns*, given that this is the mechanism widely adopted by jurisdictions that allow that form of income splitting.¹⁰¹

Some limited jurisdictions include children in the process of automatically allowing income splitting.¹⁰² However, given that families are given various government benefits for the upkeep of children, including direct payments and indirect transfers such as government contribution to their schooling,¹⁰³ the argument for a joint return to be affected by children (by allowing more generous tax brackets) is not particularly strong.

The joint return approach, where available, in essence means that such couples automatically split all their income. It could be argued that making income splitting

⁹⁶ David G Duff et al, *Canadian Income Tax Law* (LexisNexis, 4th ed, 2015) 22.

⁹⁷ IRC (n 7) § 6013. Under the USA law, domestic unmarried partners, even if registered, cannot utilise the federal joint tax return system: ‘Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions’, *Internal Revenue Service* (Web Page) <<https://www.irs.gov/newsroom/answers-to-frequently-asked-questions-for-registered-domestic-partners-and-individuals-in-civil-unions>>.

⁹⁸ *ITAA 1997* (n 6) ss 4-5, 4-10; *ITRA 1986* (n 31) s 12(1), sch 7.

⁹⁹ Jonathan R Kesselman, ‘Income Splitting and Joint Taxation of Couples: What’s Fair?’ (2008) 14(1) *Institute for Research on Public Policy Choices* 1, 10 <<https://irpp.org/wp-content/uploads/assets/research/new-research-category/income-splitting-and-joint-taxation-of-couples/vol14no1.pdf>>.

¹⁰⁰ *Ibid* 9.

¹⁰¹ M Christl, S De Poli and V Ivaškaitė-Tamošiūnė, ‘Does It Pay To Say “I Do”? Marriage Bonuses and Penalties across the EU’ (JRC Working Papers on Taxation and Structural Reforms No 07/2021, Joint Research Centre, European Commission, 2021) 5.

¹⁰² See, eg, ‘France: Individual: Taxes on Personal Income’, *PWC Worldwide Tax Summaries* (Web Page, 14 February 2022) <<https://taxsummaries.pwc.com/france/individual/taxes-on-personal-income>>.

¹⁰³ See, eg, Patricia Apps and Ray Rees, ‘Household Saving and Full Consumption over the Life Cycle’ (Discussion Paper No 280, IZA Institute of Labor Economics, April 2001) 6–7.

universally available to couples would level the playing field as compared with the current law. It would also save significant resources currently devoted to tax planning with the aim of legal income splitting.¹⁰⁴ Such reasons were among the justifications for introducing income splitting in the USA through joint tax returns.¹⁰⁵

It has long been said that policy decisions on the introduction of joint income tax returns for couples involve an unresolvable trilemma in which it is possible to attain at most two out of three desired goals.¹⁰⁶ Those goals are progressive taxation, marriage neutrality, and couples neutrality.¹⁰⁷

Specifically, ‘marriage neutrality’ refers to the individual’s tax burden being the same irrespective of whether they are single or part of a couple. As far as marriage neutrality is concerned, joint taxation can potentially result in marriage bonuses and penalties.¹⁰⁸ If the joint return regime has tax brackets double the size of those applicable to individuals, it can result in marriage bonuses but not penalties.¹⁰⁹ If, on the other extreme, it has tax brackets equal to those applicable to single returns, it will cause only marriage penalties, not bonuses.¹¹⁰ Tax brackets falling somewhere between these extremes will generate both.¹¹¹ Specifically, in such a scenario, couples with greater differentials in incomes are more likely to be subject to a marriage bonus, whereas those with similar incomes are more likely to face a marriage penalty.¹¹² Where joint returns have a rate schedule that at times imposes marriage penalties, policymakers need to be careful to ensure that such penalties do not harshly apply to lower income earners.¹¹³

¹⁰⁴ Julie Smith, ‘Income Splitting’ (Research Paper No 10 1994, Parliamentary Research Service, Department of the Parliamentary Library, Parliament of the Commonwealth of Australia, 20 July 1994) 17.

¹⁰⁵ See Boris I Bittker, ‘Federal Income Taxation and the Family’ (1975) 27(6) *Stanford Law Review* 1389, 1441. See also Terry Dwyer, ‘The Taxation of Shared Family Incomes’ (Policy Monograph No 61, The Centre for Independent Studies, 2004) 10, where this argument is made in the context of the Australian tax system.

¹⁰⁶ Yair Listokin, ‘Taxation and Marriage: A Reappraisal’ (2014) 67(2) *Tax Law Review* 185, 185.

¹⁰⁷ *Ibid.*

¹⁰⁸ Lawrence Zelenak, ‘Marriage and the Income Tax’ (1994) 67(2) *Southern California Law Review* 339, 339.

¹⁰⁹ *Ibid* 340.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid* 340–1. See also Michael J McIntyre and Oliver Oldman, ‘Taxation of the Family in a Comprehensive and Simplified Income Tax’ (1977) 90(8) *Harvard Law Review* 1573, 1587–8, where the authors note that as women’s income becomes over time gradually more equal to men’s, under such a system, there is an increased incidence of marriage penalties.

¹¹³ James M Puckett, ‘Facing the Sunset: An Egalitarian Approach against Taxing Couples as a Unit’ (2022) 55(2) *Loyola of Los Angeles Law Review* 477, 498–9.

The term ‘couples neutrality’ is a reference to equal taxation treatment between couples who have the same aggregate incomes, regardless of the way such incomes are split between them.¹¹⁴ In isolation, universal income splitting results in couples neutrality.

A joint return regime invariably generates numerous advantages and disadvantages. It is noteworthy that elements of income splitting are potentially also available, to a limited degree, in single-return tax systems through the use of earned income tax offsets, dependent spouse deductions and government benefits.¹¹⁵

The following discussion examines the main issues regarding the feasibility of a joint tax return system.

A Attribution of Income

One of the main arguments for income splitting through joint returns is that the benefit of the aggregate income of couples, irrespective of how it is earned between them, is predominantly shared by both spouses.¹¹⁶ Specifically, whether there is one main income earner, or two equal ones, most of the resources consumed and utilised, such as housing, food, holidays and transport, benefit both of the spouses.¹¹⁷ This is due to the pragmatic and legal reality that in general, a primary-earning spouse is going to support the secondary- or non-earning one.¹¹⁸ As such, and as discussed later in this article,¹¹⁹ it can be argued that couples inequality through an individual return regime breaches concepts of horizontal equity, being the principle that those in a similar economic position should pay the same amount of tax.¹²⁰ An extension to this argument is that given that the central basis of a progressive tax system is

¹¹⁴ Daniel Hemel, ‘Beyond the Marriage Tax Trilemma’ (2019) 54(3) *Wake Forest Law Review* 661, 663.

¹¹⁵ Smith (n 104) 3–4.

¹¹⁶ McIntyre and Oldman (n 112) 1592–7.

¹¹⁷ Ibid.

¹¹⁸ Bittker (n 105) 1420.

¹¹⁹ See below Part IV(E).

¹²⁰ James Alm, Leslie A Whittington and Jason Fletcher, ‘Is There a “Singles Tax”? The Relative Income Tax Treatment of Single Households’ (2002) 22(2) *Public Budgeting and Finance* 69, 85. But see Note, ‘The Case for Mandatory Separate Filing by Married Persons’ (1981) 91(2) *Yale Law Journal* 363, 363, where Lynn A Stout asserts that the claim for increased horizontal equity under a joint return system is premised on the assumption that couples ‘pool their incomes and share them equally’. However, as discussed in this section of the article, perfect income sharing is not required to justify income splitting on the basis of horizontal equity.

that the tax burden follows the ability to pay,¹²¹ the full household income¹²² should be the focus of applicable tax rates.¹²³

Some have argued against this justification by asserting that supporting a secondary-earning or non-earning spouse should be viewed as a form of consumption.¹²⁴ In response, this argument has been said to be of limited importance, as deciding whether to categorise supporting a spouse as a consumption good is ultimately a value judgement based on societal norms.¹²⁵ Although there is no moral obligation on people to be part of a spousal couple, such relationships and the rights and obligations that flow from them are strongly recognised by our society.¹²⁶

It has also been argued that this ‘shared benefit’ justification for joint returns, while substantially accurate for low- and middle-income couples, is not necessarily true for couples with higher incomes.¹²⁷ Specifically, such couples are more likely than others to have substantial savings and investment assets which are not co-owned.¹²⁸ However, amounts saved and invested rather than consumed typically also benefit both parties. This is true for continuing marriages, given that both parties are likely to benefit from the future consumption of returns of invested funds. Further, even if the relationship breaks down, investments made during the marriage are likely, to a significant extent, to benefit both parties, given that divorce laws in Australia, particularly in longer-term marriages, divide assets in a manner that also takes

¹²¹ See Stephen Utz, ‘Ability To Pay’ (2002) 23(4) *Whittier Law Review* 867, 867–9 nn 1–9 for an excellent reference to literature on the justification of the ‘ability to pay’ as a vital benchmark for ascertaining the relevant tax burden. But see Walter J Blum and Harry Kalven Jr, ‘The Uneasy Case for Progressive Taxation’ (1952) 19(3) *University of Chicago Law Review* 417, 430–44, where the authors discuss the disadvantages of a progressive tax regime.

¹²² See Hemel (n 114) 661, 691–2, where the author states that marriage is strongly, though not perfectly, correlated with cohabitation.

¹²³ Stephanie Hunter McMahon, ‘To Have and To Hold: What Does Love (of Money) Have To Do with Joint Tax Filing?’ (2011) 11(3) *Nevada Law Journal* 718, 746–8 (‘To Have and To Hold’). But see Lily Kahng, ‘One Is the Loneliest Number: The Single Taxpayer in a Joint Return World’ (2009) 61(3) *Hastings Law Journal* 651, 680, where the author claims that singles earn less for similar work and face higher living costs, and thus should not be regarded as having a stronger ability to pay despite only supporting themselves. However, the author’s evidence supporting these claims appears to fall far short of being conclusive proof.

¹²⁴ Kahng (n 123) 679.

¹²⁵ See Anne L Alstott, ‘Comments on Samansky, “Tax Policy and the Obligation To Support Children”’ (1996) 57(2) *Ohio State Law Journal* 381, 386–7.

¹²⁶ Jeannette Anderson Winn and Marshall Winn, ‘Till Death Do We Split: Married Couples and Single Persons under the Individual Income Tax’ (1983) 34(4) *South Carolina Law Review* 829, 842.

¹²⁷ See *ibid* 845.

¹²⁸ *Ibid*.

into account the non-financial contributions of the parties.¹²⁹ However, one could envision a situation where a single income earner couple invests most of the funds in the income earner's name, and upon the relationship breakdown, the investments remain predominantly in the name of the income earner. In such a scenario, seeing the income earner's funds as applied in an approximately 50:50 manner is arguably misguided. In response, first, it could be argued that the shared benefits justification for joint returns is not based on some notionally perfect 50:50 sharing of benefits, but rather on approximations that are close enough to reality to warrant being translated into law. Further, if there is sufficient evidence that the benefit of aggregate incomes in higher-income couples deviates sufficiently regularly from an effective 50:50 split, the tax brackets could reflect this so as to reduce the effect of income splitting for such couples.¹³⁰ Such an outcome is preferable to the current approach, which allows income splitting through the manipulation of income-producing business and passive property assets, which is an approach more readily used by wealthier individuals.¹³¹

Others have argued from a different, control perspective, pointing to research indicating that for a substantial percentage of couples, the party with the primary income source is the one who has substantial control of financial decision making.¹³² This appears to be the case sometimes even where joint accounts are used to pool income.¹³³ One commentator has argued that logically, those with control of the money should be the ones assessed to pay tax, and so an individual taxation regime is justified.¹³⁴ As an extension of this argument, the 'ability to pay tax' criterion has at times been used by such commentators to propose that as those who earn the income have control of it, it is their individual ability to pay the tax that should determine the liability.¹³⁵ It has been speculated that the previously discussed 'benefits' approach is popular among economists, whereas the 'control' approach is more popular among legal scholars.¹³⁶

While both of the above perspectives might have some merit, the benefits approach, as a practical matter, better reflects reality. First, even within relationships where there is a primary income earner, a substantial percentage of couples do not restrict

¹²⁹ Eithne Mills and Marlene Rita Ebejer, *Family Law* (LexisNexis Butterworths, 8th ed, 2021) 500–2.

¹³⁰ Specifically, the higher tax brackets could apply to the aggregate couples' income at amounts which are substantially less than double the income that they apply to for singles: Kesselman (n 99) 19.

¹³¹ See *ibid*.

¹³² Marjorie E Kornhauser, 'Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return' (1993) 45(1) *Hastings Law Journal* 63, 80–91.

¹³³ Jan Pahl, 'Household Spending, Personal Spending and the Control of Money in Marriage' (1990) 24(1) *Sociology* 119, 124.

¹³⁴ Kornhauser (n 132) 109.

¹³⁵ *Ibid* 110.

¹³⁶ Duff et al (n 96) 22–3.

financial decision-making control to one person.¹³⁷ Further, joint finances have been found to be more common the longer a couple has been together, or where one has given up working for reasons such as looking after children or education.¹³⁸ Most importantly, the reality is that one person having control of the money cannot be conflated with whether the funds are spent on that earner or on the family.¹³⁹ Ultimately, a large proportion of household spending is on items which, by their nature, are used by the family, such as accommodation, food, and other household-related expenditure.¹⁴⁰ Given the importance of ‘ability to pay’ in our tax system,¹⁴¹ the amount of resources the household has is vital in determining the appropriate tax burden. Interestingly, some who have argued against joint returns have conceded that the benefits approach and the control approach merely reflect different perspectives, each having value.¹⁴²

None of this is to deny that couples’ financial decision-making equality is an important consideration that should be strongly encouraged. A feeling of control,

¹³⁷ Martin Klesment and Jan Van Bavel, ‘Women’s Relative Resources and Couples’ Gender Balance in Financial Decision-Making’ (2022) 38(5) *European Sociological Review* 739, 746.

¹³⁸ Kornhauser (n 132) 87–8.

¹³⁹ See Michael J McIntyre, ‘What Should Be Redistributed in a Redistributive Income Tax?: Retrospective Comments on the Carter Commission Report’ in W Neil Brooks (ed), *The Quest for Tax Reform: The Royal Commission on Taxation Twenty Years Later* (Carswell, 1988) 189, 194, where the author makes the interesting argument that if we are to tax the entity that had control and ‘could have’ benefitted from the funds, it follows that we are taxing potential, which according to the author leads to the unappealing conclusion that we should tax an early retiree, or someone who has consciously chosen a lesser-earning career, on their potentially higher income.

¹⁴⁰ Michael J McIntyre, ‘Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion’ (1979) 58(3) *North Carolina Law Review* 469, 469–70. See also: Zelenak (n 108) 353, where the author states that realistically, most couples have no choice but to share their income; Australian Bureau of Statistics, *Household Expenditure Survey, Australia: Summary of Results* (Catalogue No 6530.0, 13 September 2017) Graph 2 — Proportion of Weekly Household Spending on Goods and Services 1984, 2009–10, 2015–16, which indicates what percentage of Australian household expenditure is spent on different categories; Roger Wilkins et al, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 20* (Report, Melbourne Institute: Applied Economic & Social Research, University of Melbourne, 2022) 62, which also confirms that a substantial dollar amount of household expenditure is spent on items such as accommodation (and associated maintenance and repairs), education, utilities and insurance. Cf Pamela B Gann, ‘Abandoning Marital Status as a Factor in Allocating Income Tax Burdens’ (1980) 59(1) *Texas Law Review* 1, 67, where it is argued that the amount of income sharing between couples being unknown supports a system of individual returns. However, in response to this, the argument for joint returns is based on resources being broadly spent on both; it does not require a perfect 50:50 income sharing between the individuals in a couple.

¹⁴¹ Utz (n 121) 867–9.

¹⁴² See, eg: Zelenak (n 108) 358; Kesselman (n 99) 8.

including financial control, is an important aspect of wellbeing.¹⁴³ However, there is no evidence that imposing a higher tax burden on couples who have a primary income earner than on couples who earn similar amounts would encourage more equitable financial decision making.

B *Economies of Scale*

It has been argued that if income splitting is to be implemented through joint returns, some recognition of the economies of scale that couples enjoy is required.¹⁴⁴ This is because it takes less than double the funds to support a couple than it takes to support a single.¹⁴⁵ Specifically, items such as accommodation, utilities, and many discretionary expenses such as holidays cost less than double for a couple as compared to a single.¹⁴⁶

Here, an appropriate policy response is to subject joint returns to a rate schedule that establishes income brackets which, while more generous than those applying to singles, are less than twice the rate for singles.¹⁴⁷ For instance, it has been suggested that increasing the income tax bracket thresholds applicable to singles by 50 per cent would give policy acknowledgment to the economies of scale that couples enjoy.¹⁴⁸ The USA acknowledges these economies of scale through the tax bracket thresholds that apply to joint returns.¹⁴⁹

Disregarding economies of scale in joint returns by way of tax bracket thresholds of twice the size of single ones would mean, as discussed above, no marriage penalties, whereas most couples with dissimilar incomes would be subject to marriage bonuses.¹⁵⁰ This would result in singles who earn the equivalent income as a couple, comparatively speaking, suffering from a disproportional singles penalty.¹⁵¹

Conversely, recognising economies of scale by setting those tax scales at somewhere between one and two times that of the single rate would lead to both marriage

¹⁴³ See Reed Larson, 'Is Feeling "in Control" Related to Happiness in Daily Life?' (1989) 64(3) *Psychological Reports* 775, 782, where the author finds that for many individuals, a chronic lack of control compromises wellbeing. See also Linda Skogrand et al, 'Financial Management Practices of Couples with Great Marriages' (2011) 32(1) *Journal of Family and Economic Issues* 27, 31, where the authors find that even if one partner primarily manages finances, this can be consistent with a high level of wellbeing if there is mutual trust and understanding about financial decision making.

¹⁴⁴ Duff et al (n 96) 23.

¹⁴⁵ Kesselman (n 99) 6.

¹⁴⁶ See *ibid*.

¹⁴⁷ *Ibid* 5–6.

¹⁴⁸ See *ibid* 6.

¹⁴⁹ IRC (n 7) § 1.

¹⁵⁰ Kesselman (n 99) 8–10.

¹⁵¹ See also Kahng (n 123) 660.

penalties and bonuses, depending on the size of the disparity between the incomes of each spouse.¹⁵² This will also lessen the tendency of singles who comparatively speaking earn the equivalent income as a couple suffering from a singles penalty.¹⁵³

A contrary argument — one that opposes recognition of potential economies of scale — poses a rhetorical question framed in terms of relationship categories: if one is to take into account the economies of scale of spousal relationships, why not also take them into account in respect of other cohabitation arrangements, such as housemates or young adults still living with parents?¹⁵⁴ However, such arrangements are inherently different from spousal relationships, given that they are typically entered into to save costs, with the trade-off being less comfort and freedom than would be experienced by a person living independently. In other words, such non-spousal arrangements could be seen in many cases as a choice to reduce consumption on accommodation and related expenses.¹⁵⁵ In contrast, the cost savings from spousal cohabitation arrangements could, notwithstanding their disadvantages,¹⁵⁶ be argued to constitute a ‘windfall gain’, as people voluntarily enter into such arrangements primarily motivated by love and affection rather than a desire to save funds.¹⁵⁷

A further argument made against recognising economies of scale in joint returns is that while it is relatively easy to quantify such economies from data at lower income levels, where most funds are spent on non-discretionary items, such estimates become much more difficult as incomes rise.¹⁵⁸ Such an argument does not deny that there are economies of scale, but claims that given the wide variability in taxpayers’ choices and preferences, implementing a ‘one size fits all’ formula

¹⁵² See above nn 109–111 and accompanying text. See Alan J Auerbach and Kevin A Hassett, ‘A New Measure of Horizontal Equity’ (2002) 92(4) *American Economic Review* 1116, 1124–5, where the authors describe the difficulty of finding an equivalence scale that is fair across the income spectrum.

¹⁵³ See Nancy J Knauer, ‘Heteronormativity and Federal Tax Policy’ (1998) 101(1) *West Virginia Law Review* 129, 151–2, discussing an instance in the USA where the size of the singles penalty was reduced after Second World War widows lobbied for such a reduction due to the involuntariness of their single status.

¹⁵⁴ Bittker (n 105) 1423. See also Puckett (n 113) 485, 510, where the author points out that the tax system ignores many instances of taxpayers with the same taxable income having different purchasing power (an example being the different costs of living in different cities).

¹⁵⁵ William A Klein, ‘Familial Relationships and Economic Well-Being: Family Unit Rules for a Negative Income Tax’ (1971) 8(3) *Harvard Journal on Legislation* 361, 386.

¹⁵⁶ See McIntyre (n 139) 198, where the author cites loss of privacy and independence as examples of disadvantages of spousal cohabitation.

¹⁵⁷ D’Vera Cohn, ‘Love and Marriage’, *Pew Research Centre* (Web Page, 13 February 2013) <<https://www.pewresearch.org/social-trends/2013/02/13/love-and-marriage/>>. See Penelope M Huang et al, ‘He Says, She Says: Gender and Cohabitation’ (2011) 32(7) *Journal of Family Issues* 876, 886.

¹⁵⁸ Bittker (n 105) 1424.

would be likely to cause injustice by over-recognising such economies. In response, it can be argued that it is not possible to perfectly align the taxpayer's ability to pay with their tax burden; rather, policy should attempt to make any such evaluation as accurate as possible while taking into account other policy considerations.¹⁵⁹ The reality is that in spousal cohabitation, nearly all couples do in fact benefit from economies of scale.

In summary, given that the aim of joint returns is to accurately reflect the 'ability to pay' for couples, there are convincing arguments for recognising some level of economies of scale in joint returns. Notwithstanding the difficulties of doing so, such recognition should, to the extent possible, be based on evidence of the cost savings that benefit couples at different income levels. Importantly, at lower income levels, care should be taken to ensure that rates do not affect lower income earners in a way that may increase the risk of such couples living in poverty.¹⁶⁰

C *Imputed Income and Cost Saving*

Some have argued against a joint return regime by arguing that couples with a single income earner have a greater ability to pay tax than a dual-income-earning couple with the same aggregate income.¹⁶¹ Thus, it has been argued that in couples where one person works no, or few, hours in paid employment, there is a substantial amount of imputed income in the form of housework, cooking, and other activities.¹⁶² Further, it has also been argued that non-deductible working costs, such as transport to and from work and work clothes, are substantially reduced in the case of a couple with only one primary worker.¹⁶³ Thus, it is argued, a joint return regime is not justified, given that it should be recognised that a single-earner couple should pay more tax because of their superior ability to pay.¹⁶⁴

To the extent such arguments are accepted as the main reason against a joint return regime, the logical corollary is that they are inapplicable to couples with two full-time workers.¹⁶⁵ Some of those opposing a joint return system have conceded

¹⁵⁹ See below Part IV(E).

¹⁶⁰ See also Puckett (n 113) 498–9.

¹⁶¹ Kesselman (n 99) 26–7.

¹⁶² See, eg: Tony Cooper, 'Taxing the Family Unit: Income Splitting for All?' (1995) 5(1–2) *Revenue Law Journal* 82, 88; *ibid*; Listokin (n 106) 188–9.

¹⁶³ See: Cooper (n 162) 88; Kesselman (n 99) 26–7.

¹⁶⁴ Kesselman (n 99) 27. See also Patricia Apps, 'Family Taxation: An Unfair and Inefficient System' (Discussion Paper No 524, Centre for Economic Policy Research, The Australian National University, May 2006) 8–9, where the author argues that another aspect of the unfairness in allowing joint returns for couples lies in the fact that when comparing one-earner as against two-earner couples with the same aggregate incomes, the hours worked to pay tax for a joint-income couple far exceeds the hours worked to pay the tax for an equivalent single-income couple. However, given that our income tax system is based on incomes rather than incomes per hour, such an argument appears to have limited merit.

¹⁶⁵ Kesselman (n 99) 27.

that while this reasoning is theoretically valid, in reality, it would be hard to verify whether both members of the couple are in full-time work.¹⁶⁶

The following discussion examines in more detail the extent to which these arguments militate against a joint return regime.

1 *Reasons Joint Returns Can Be Justified Despite Issues of Imputed Income and Work Expense*

It would be an unlikely coincidence if, when comparing the tax burden of a single-primary-earner couple in an individual return regime and a joint return regime, the extra tax burden from the former accurately reflected the economic benefits of a non-working spouse's imputed labour and expenditure savings. In other words, if we are to impose extra tax on the basis of the economic benefits from there being a non-full-time working spouse, then this should be accurately reflected in direct adjustments to the tax burden of such couples, rather than through the arbitrary result of a tax system focused on individual incomes.¹⁶⁷

Further, there are persuasive arguments for not taking the impact of imputed income into account when determining the tax liability of couples. At its core, our tax system does not in general take into account imputed income. There are respectable reasons for this, including that, first, many of the tasks that we perform every day, regardless of marriage status, can be considered a form of imputed income. This includes tasks such as shaving (which saves barber fees) and pruning roses (saving gardening fees).¹⁶⁸ It is difficult to argue that there is even an approximate point at which such activities are to be taken into account by the tax system.¹⁶⁹ This is especially so given that often, self-performed services such as cooking are qualitatively different from their commercial equivalents, such as eating restaurant food or even take-away.¹⁷⁰ Further, although the data does support the supposition that more domestic services are provided where a couple includes a non-working spouse,¹⁷¹ there is substantial variance as to the extent to which this is the case for

¹⁶⁶ Kesselman (n 99) 28 argues that one of the problems with restricting joint returns to such a system would be gathering accurate information on hours worked. See also Gann (n 140) 39, where it is argued that a system of individual rather than joint returns eliminates the problem of differentiating between single- and dual-income-earning couples.

¹⁶⁷ See Matt Krzepkowski and Jack Mintz, 'No More Second-Class Taxpayers: How Income Splitting Can Bring Fairness to Canada's Single-Income Families' (Research Paper No 6(15), The School of Public Policy, University of Calgary, April 2013) 4, 8–9, where it is demonstrated that the contrast in tax burden between single- and dual-earner couples in an individual progressive system is markedly different from the contrast between such couples in a joint return system that takes into account imputed income for single-earner couples.

¹⁶⁸ McIntyre and Oldman (n 112) 1611–12.

¹⁶⁹ Ibid.

¹⁷⁰ See Bittker (n 105) 1434.

¹⁷¹ Patricia Apps and Ray Rees, 'The Household, Time Use and Tax Policy' (2004) 50(3) *CESifo Economic Studies* 479, 487–8.

such couples, as well as for other household types.¹⁷² This is partly because different households have different circumstances and needs — for instance, living in an older house on a larger block of land as compared to a smaller apartment without a garden would result in substantially different domestic requirements.¹⁷³ Ultimately, while a tax system should strive to tax people in accordance with their ability to pay, this has to be balanced with how accurately this can be accomplished, pragmatism, and minimising complexity.¹⁷⁴

A further important reason as to why imputed income not being expressly recognised does not negate the implementation of a joint return regime is that the issue of potential recognition of imputed income is factually applicable to other scenarios, and not restricted to couples with one main income earner. For instance, it could be argued that the imputed income from singles who do not work because they earn their income primarily from investments, as compared with full-time working singles, should also be taken into account by the tax system, if it is going to take account of the imputed income of couples with only one main worker.¹⁷⁵

Some might argue, however, that the current non-recognition of imputed income from self-provided services in most contexts is an argument to recognise it in a greater number of scenarios, including, though not necessarily restricted to, the situation of single-income couples. In reality, for pragmatic purposes, it would not be realistically possible to ask people to record their self-performed services and subsequently to tax them on them.¹⁷⁶ Consequently, as taxing the actual amount of self-performed services is near impossible, a surrogate measure of self-performed services is necessary so as to tax such imputed income in a *de facto* manner. Individual taxation in such a context can be seen as utilising a surrogate for the purposes of taxing some types of self-performed services.¹⁷⁷ However, while the use of a surrogate can never be 100% accurate, in this instance it is suggested that the inaccuracy is too pronounced to justify its use. Specifically, for the reasons

¹⁷² Ibid 480.

¹⁷³ McIntyre and Oldman (n 112) 1615–16.

¹⁷⁴ Louis Kaplow, ‘Accuracy, Complexity, and the Income Tax’ (1998) 14(1) *Journal of Law, Economics, and Organization* 61, 62, 77–8. See also below Part IV(E) for a discussion regarding the criteria for evaluating joint returns.

¹⁷⁵ See also Bittker (n 105) 1435–7. See also McIntyre and Oldman (n 112) 1622, where the authors point out that a single-earner couple has less leisure time than couples or singles who purely live off property income.

¹⁷⁶ Tsilly Dagan, ‘Taxing the Non-Market Economy’ (Bar-Ilan University Public Law and Legal Theory Working Paper No 09-09, Bar-Ilan University Law School, July 2008) 26.

¹⁷⁷ See Thomas Chancellor, ‘Imputed Income and the Ideal Income Tax’ (1988) 67(3) *Oregon Law Review* 561, 563. See also Victor Thuronyi, ‘The Concept of Income’ (1990) 46(1) *Tax Law Review* 45, 82, where the author, while arguing for the taxation of imputed income for self-performed services, states that for the sake of fairness, this should be confined to the taxpayer self-providing their market activities, such as a farmer providing their family with their farm’s products.

mentioned above, including the fact that many couples adversely impacted by individual taxation have dual incomes, as well as the heterogeneity of the extent of self-performed services even amongst single-earner couples, such a surrogate will all too frequently be a very inaccurate proxy for the actual amount of self-performed services.¹⁷⁸

Further, realistically, even if it were possible to directly measure and tax self-provided services at a broad level, many would at an instinctual level oppose it.¹⁷⁹ Consequently, use of an individual taxation regime of a surrogate for imputed income from self-performed services should raise the same concerns.¹⁸⁰ Specifically, it has been argued that the whole principle behind taxing self-provided services is misguided, due, at the base level, to being motivated by a principle to tax ‘satisfaction’,¹⁸¹ which is too wide a criterion to have a tax base on.¹⁸²

It should also be noted that notwithstanding that some commentators desire to tax imputed income on the basis that it should be included in what some regard as an ideal tax base,¹⁸³ realistically, for practical and pragmatic reasons, there are many instances of tax laws deviating from such a theoretical base. These include the non-taxation of most unrealised capital gains,¹⁸⁴ main residences,¹⁸⁵ and personal gifts.¹⁸⁶ The related claim that dual-income couples should pay less tax than single-income couples on similar total incomes, due to the former having

¹⁷⁸ Use of a surrogate for self-performed services in other contexts would also have severe limitations in its accuracy. For instance, taxing unearned income at a higher tax rate than personal exertion income, for those of working age who depend on their unearned income as a form of subsistence, would be based on broad, often incorrect individual assumptions regarding the extent of self-performed services that such taxpayers undertake.

¹⁷⁹ Chancellor (n 177) 566–7.

¹⁸⁰ Ibid 565.

¹⁸¹ See, eg, Mark A Haskell and Joel Kauffman, ‘Taxation of Imputed Income: The Bargain–Purchase Problem’ (1964) 17(3) *National Tax Journal* 232, 233, where the authors justify taxing imputed income on the basis that non-market activities grant satisfaction.

¹⁸² See Chancellor (n 177) 578–83, where the author discusses the disconnect between satisfaction and market outcomes, the latter being what the tax system’s base is primarily based on. For instance, the author argues, those paying a market price for an item might pay substantially less than they are prepared to, showing a disconnect between market forces and satisfaction. Further, the author argues, even for those paying as much as they are prepared to for an item, the satisfaction attained usually only very vaguely resembles the amount paid.

¹⁸³ See SL Hurley, ‘The Unit of Taxation under an Ideal Progressive Income Tax’ (1984) 4(2) *Oxford Journal of Legal Studies* 157, 165.

¹⁸⁴ See James Alm, ‘Is the Haig–Simons Standard Dead? The Uneasy Case for a Comprehensive Income Tax’ (2018) 71(2) *National Tax Journal* 379, 389.

¹⁸⁵ *ITAA 1997* (n 6) sub-div 118-B.

¹⁸⁶ *Scott v Federal Commissioner of Taxation* (1966) 117 CLR 514, 526.

higher non-deductible work-related expenses such as travel and clothing, is also, upon examination, of limited force. Given that the tax system has labelled such expenses (which are often necessary to undertake work, but not incurred directly in the process of working) as non-deductible,¹⁸⁷ it appears arbitrary to take them into account for dual-working couples as compared to single-income couples.¹⁸⁸ Further, as is the case with imputed income, if such expenses are to be taken into account, then this should affect the tax burden of nearly all income earners who have to work for their money, not just dual-income couples.¹⁸⁹

Notwithstanding these issues, if the tax system were to take into account the loss of imputed income (to the extent the worker undertakes full-time hours), as well as work-related expenses that are currently regarded as personal, there are direct ways of doing so. This appears preferable to relying on the individual return regime, which as discussed, does not attempt to accurately reflect these concepts in its calculation of the taxpayer's burden.¹⁹⁰ Such methods include allowing additional deductions above what is currently the case, or through an earned income offset.¹⁹¹

However, as discussed, the issues of imputed income and work-related expenses apply to most taxpayers with substantial employee obligations. Subsequently, realistically, if the tax system took account, for all such workers, of lost imputed income from working, as well as work expenses currently considered non-deductible, this would cause a substantial loss of revenue.¹⁹² This would be likely to cause those benefits to be clawed back through compensatory current or future higher taxes. Consequently, unless those higher taxes fell predominantly on unearned income — which

¹⁸⁷ See, eg: *Lunney v Federal Commissioner of Taxation* (1958) 100 CLR 478, 486 (Dixon CJ), 501 (Williams, Kitto and Taylor JJ) (where the High Court disallowed the deductibility of travel expenses between home and work); *Mansfield v Federal Commissioner of Taxation* (1995) 31 ATR 367, 375 (where Hill J of the Federal Court said that generally, expenditure on ordinary clothing is not deductible).

¹⁸⁸ But see Tsilly Dagan, 'Commuting' (2006) 26(1) *Virginia Tax Review* 185, 201–7, where the author discusses the problem with courts categorising certain work-related expenses, such as commuting, as non-deductible.

¹⁸⁹ Bittker (n 105) 1443–4.

¹⁹⁰ Krzepkowski and Mintz (n 167) 4, 8–9.

¹⁹¹ McIntyre and Oldman (n 112) 1622–3 make the point that since the amount of leisure given up by workers corresponds to the number of hours worked, this raises administrative complexities in ascertaining the number of hours worked by a taxpayer. See also Nancy C Staudt, 'Taxing Housework' (1996) 84(5) *Georgetown Law Journal* 1571, 1620–7, 1636–8, where the author argues that the importance of housework be recognised through making it assessable, though the author also suggests that this be accompanied by a tax offset so as to minimise the taxation burden that such policy might have on lower-income taxpayers. See also Lisa M Colone, 'Taxing Housework... with a Deeper Purpose' (2002) 21(3) *Virginia Tax Review* 417, 425, where it is argued that the taxation of housework recommendation in Nancy C Staudt's 'Taxing Housework' is not an attempt either to incentivise or disincentivise the decision of women to undertake paid work.

¹⁹² Bittker (n 105) 1435.

is unlikely, given their limited tax base — the compensating increase in taxes would to a large extent fall on those who received the breaks (workers), meaning that the exercise would largely be a zero-sum game.¹⁹³ While applying such concessions only to couples that have both persons working would not have the same fiscal consequences, it would be inherently inequitable to other taxpayers suffering from loss of imputed income and work-related expenses.

Overall, the preceding discussion indicates that the issues of imputed income and work-related expenses should in general not prevent the introduction of a joint return regime.

2 *Is There a Stronger Case for Opposing Income Splitting for Couples with Young Children?*

It has been argued that the non-recognition of imputed income in the context of couples with younger children presents a stronger case for disallowing automatic income splitting and instead having a genuine individual return regime.¹⁹⁴ Specifically, it is argued that in such cases, having one person working relatively little or no paid hours results in substantial childcare expenditure savings, and so presents a stronger argument against a joint return regime.¹⁹⁵

By way of background, it has been argued that for those with children, Australia's current income tax and benefit system already in some cases results in a de facto income splitting regime.¹⁹⁶ This is because although the equivalent amount earned by one person is taxed more highly than if it were split between two, the net effect, after taking into account Family Tax Benefit, in many cases, broadly equalises this.¹⁹⁷ The reason being that, as Family Tax Benefit is partially means tested against both combined incomes and the secondary income earner, couples with a single earner are entitled to greater benefits.¹⁹⁸ However, under the means testing laws, this applies only under a certain aggregate income level.¹⁹⁹

It has been argued that this de facto income splitting regime is especially unfair for those couples with younger children, given that, unlike the imputed income earned by a stay-at-home child carer, the market income earned by the secondary earner and used to pay child care is taxed.²⁰⁰ Consequently, it has been claimed that it is

¹⁹³ Ibid 1435–7.

¹⁹⁴ Apps (n 164) 7–9.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid 8.

¹⁹⁷ Ibid 7–8.

¹⁹⁸ *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 pt 4.

¹⁹⁹ Ibid sch 1 cls 28B, 29, 30, 32–3.

²⁰⁰ Apps (n 164) 10. See also Patricia Apps et al, 'Labor Supply Heterogeneity and Demand for Child Care of Mothers with Young Children' (2016) 51(4) *Empirical Economics* 1641, 1653, 1671, for a more recent discussion concerning how government benefits

inequitable that a couple with a single primary earner should only pay the same net tax (after taking into account government benefits) as a dual-earning couple with the same aggregate income, given that the need to pay child care out of after-tax income in the latter case makes them economically worse off.²⁰¹ In essence, this is a specific application of the ‘imputed income argument’ against joint returns. Although that argument is generally aimed at the current law, if its logic is accepted in such a context, it holds equally against an explicit joint return regime.

Is child care for parents of young children an area where there are stronger arguments for recognising distortions caused by the differing tax treatment of imputed and market income? This could be argued, given the relative importance and positive long-term externalities as well as the labour-intensity of raising children. However, it does not follow that it is a good argument against universal joint returns. Rather, there are other ways to address the specific situation relating to couples with young children, such as properly formulated childcare subsidies. Specifically, the Australian Labor Party’s proposed changes to the childcare subsidy system feature substantially less tapering for larger household incomes than under the current system.²⁰² Though the policy gives a markedly larger subsidy to higher-income families,²⁰³ it does to some extent further reduce the difference in net cost between purchased and stay-at-home child care.²⁰⁴ Some have also argued that rather than providing childcare subsidies,²⁰⁵ the government should dramatically increase the provision of public child care.²⁰⁶

continue to make the Australian tax system to some degree emulate a joint return system, leading to potentially unfavourable outcomes for mothers with pre-school children.

²⁰¹ Apps and Rees, ‘The Household, Time Use and Tax Policy’ (n 171) 481, 494, 498.

²⁰² ‘Labor’s Plan for Cheaper Child Care’, *Australian Labor Party* (Web Page) <<https://www.alp.org.au/policies/cheaper-child-care>>.

²⁰³ Ben Phillips, ‘Research Note: Modelling of the 2022 Coalition and Labor Child Care Policies’ (Research Note, Centre for Social Research & Methods, The Australian National University, May 2022) 5–7.

²⁰⁴ Owain Emslie, ‘Explainer: Everything You Need To Know about the Major Parties’ New Childcare Policies’, *Grattan Institute* (Web Page, 10 May 2022) <<https://grattan.edu.au/news/explainer-everything-you-need-to-know-about-the-major-parties-new-childcare-policies/>>.

²⁰⁵ See OECD, ‘Is Childcare Affordable?’ (Policy Brief on Employment, Labour and Social Affairs, June 2020) <<https://www.oecd.org/els/family/OECD-Is-Childcare-Affordable.pdf>> 2–3, where it is discussed how such subsidies have contributed to Australia having among the most expensive (predominantly private-sector) childcare in the world.

²⁰⁶ Matt Grudnoff, *The Economic Benefits of High-Quality Universal Early Child Education* (Report, Centre for Future Work, The Australia Institute, March 2022) 39–40 <https://australiainstitute.org.au/wp-content/uploads/2022/04/Economic_Aspects_of_ECEC_in_Australia-WEB.pdf>.

While there are relatively stronger arguments for recognising the role of imputed income as between dual-income and single-income couples with younger children, such recognition can be directly dealt with by adequate policy responses, such that these arguments do not negate the net benefits of introducing a joint return regime.

3 *Conclusion on the Imputed Income Argument against Joint Returns*

The imputed income and lack of work-related expenses that benefit couples with only one main earner do not, from an equity perspective, negate the benefits of a system of joint returns — irrespective of whether the couple has children. That aside, as discussed below, some have argued against joint returns on the basis of economic efficiency, in that joint returns can lead to the secondary earner facing higher marginal tax rates, which leads to reduced labour supply. These arguments are discussed in Part IV(D) below.

D *Labour Market Efficiency*

It has been argued that joint returns reduce labour market efficiency through reduced workforce participation by secondary earners (predominantly women) because they face higher marginal tax rates than would be the case under a single return system.²⁰⁷ The direct benefits of increased female labour supply include contributing to increased societal wealth,²⁰⁸ and there are also indirect benefits, such as improved workplace leadership through greater diversity.²⁰⁹

However, it is important to put this in context. The main disincentive effect against secondary income earner workforce participation is due to the lack of taxation of imputed work income and the non-deductibility of many work expenses.²¹⁰ Higher marginal tax rates on secondary earners due to joint returns do however exacerbate the effect of these by creating a further secondary earner disincentive.²¹¹

This issue has become less important than previously, given the long-term decline in the sensitivity (elasticity) of married women's labour market participation to tax rates.²¹² While opinions vary on the extent to which joint returns create a disincentive

²⁰⁷ Listokin (n 106) 188–9.

²⁰⁸ See Edward J McCaffery, 'Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code' (1993) 40(4) *UCLA Law Review* 983, 1036–43, where the author explains that minimising 'deadweight losses' involves the tax system not dissuading married women from entering the workplace.

²⁰⁹ Hemel (n 114) 689.

²¹⁰ Zelenak (n 108) 372–3.

²¹¹ McCaffery (n 208) 988, 993–4.

²¹² Bradley T Heim, 'The Incredible Shrinking Elasticities: Married Female Labor Supply, 1978–2002' (2007) 42(4) *Journal of Human Resources* 881, 915; Anil Kumar and Che-Yuan Liang, 'Declining Female Labor Supply Elasticities in the United States and Implications for Tax Policy: Evidence from Panel Data' (2016) 69(3) *National Tax Journal* 481, 511–12.

to secondary earner labour supply, with some arguing it is relatively weak,²¹³ there is evidence that to a material degree such a disincentive exists.²¹⁴

Importantly, there is a high degree of variability amongst countries that utilise joint returns regarding the degree of such a disincentive effect, which is partially due to the different features of each one's tax system.²¹⁵ The degree of the disincentive effect on participation is also highly variable between individual couples, and is relatively weaker for those couples that have a primary earner on a relatively good income.²¹⁶

However, while joint returns can have some, albeit highly variable, negative effect on economic efficiency, this needs to be put in context. Ultimately in many cases the most efficient tax policies can be highly inequitable. For instance, a head tax (which is a tax that requires each taxpayer to pay an identical dollar amount)²¹⁷ is more economically efficient than income taxes,²¹⁸ but few would condone making a head tax the primary source of government revenue. Another similar example is that from an efficiency perspective, sales taxes on luxury goods should be set at a comparatively low rate, and conversely, sales tax rates on inelastic staples should be comparatively high,²¹⁹ and yet this would not be regarded as fair policy. In other words, any negative impact on economic efficiency needs to be balanced against the

²¹³ See, eg: Stephanie Hunter McMahon, 'Gendering the Marriage Penalty' in Anthony C Infanti (ed), *Controversies in Tax Law: A Matter of Perspective* (Ashgate, 2015) 27, 42–3; Staudt (n 191) 1613.

²¹⁴ See, eg: Apps (n 164) 8, 18; Kesselman (n 99) 30–2; Margherita Borella, Mariacristina De Nardi and Fang Yang, 'Are Marriage-Related Taxes and Social Security Benefits Holding Back Female Labour Supply?' (2023) 90(1) *Review of Economic Studies* 102, 124.

²¹⁵ Alexander Bick and Nicola Fuchs-Schündeln, 'Quantifying the Disincentive Effects of Joint Taxation on Married Women's Labor Supply' (2017) 107(5) *American Economic Review* 100, 103–4. See also Alexander Bick et al, 'Long-Term Changes in Married Couples' Labor Supply and Taxes: Evidence from the US and Europe since the 1980s' (2019) 118(1) *Journal of International Economics* 44, 50, where the authors explain how the United Kingdom's now-superseded joint return regime had tax brackets that in many cases did not disincentivise women from participating in the labour market.

²¹⁶ Henrik Jacobsen Kleven, Claus Thustrup Kreiner and Emmanuel Saez, 'The Optimal Income Taxation of Couples' (2009) 77(2) *Econometrica* 537, 544–5.

²¹⁷ Peter Varela, 'What Are Progressive and Regressive Taxes?' (Policy Brief No 3/2016, Tax and Transfer Policy Institute, The Australian National University, February 2016) 1.

²¹⁸ Joshua Cutler, 'The Parallel Head Taxes of Margaret Thatcher and Barack Obama: Economics as Morality and Its Populist Rejection' (2020) 29(2) *Southern California Interdisciplinary Law Journal* 251, 258, 278.

²¹⁹ Harvey S Rosen, 'Is It Time To Abandon Joint Filing?' (1977) 30(4) *National Tax Journal* 423, 427. The author explains that efficiency demands that goods that have the most elastic demand (such as luxuries) have comparatively lower sales tax rates than goods with comparatively inelastic demand (such as many necessities).

advantages of a joint return regime, which include increased horizontal equity, and improvements to other aspects of efficiency, as well as simplicity.²²⁰

If, however, this potential labour supply issue is a concern, alternative effective policies can be implemented in the context of a joint return regime. One method is to make income splitting by couples optional.²²¹ However, in many cases couples would be unlikely to take up this option to lower the second earner's marginal tax rate given that it would defeat the whole point of income splitting (lowering the average aggregate tax rate of the couple). A more preferable alternative would be to allow a secondary earner an offset that would in effect lower their marginal tax rate.²²² Such a targeted offset, while not, as discussed earlier, necessarily justifiable on equity grounds,²²³ could arguably be justified on the basis of increasing labour supply. Some would correctly point out that this would in effect reduce couples neutrality, and so would in substance emulate some of the features of a single return system (in that dual-income couples were taxed more lightly than single-income ones with the same aggregate incomes).²²⁴ However, such an offset could potentially be targeted so as to control its impact on couples neutrality. Further, there are other potential policy responses that governments can use to increase labour participation rates, such as those affecting the affordability of child care.²²⁵

²²⁰ See below Part IV(E).

²²¹ Jason J Fichtner and Jacob Feldman, 'Taxing Marriage: Microeconomic Behavioral Responses to the Marriage Penalty and Reforms for the 21st Century' (Working Paper No 12-24, Mercatus Center, George Mason University, September 2012) 16.

²²² McCaffery (n 208) 1058; Grace Blumberg, 'Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers' (1971) 21(1) *Buffalo Law Review* 49, 62. See also Commonwealth of Australia, *Personal Income Tax: The Tax Unit* (Treasury Taxation Paper No 6, October 1974) 8, discussing the presence at the time of 'wife's earned income allowances'. Clearly, modern equivalents would be gender neutral.

²²³ See above Part IV(C)(1). See also below Part IV(E) for a discussion on evaluating tax policy.

²²⁴ Hemel (n 114) 688.

²²⁵ Florence Jaumotte, 'Female Labour Force Participation: Past Trends and Main Determinants in OECD Countries' (Economics Department Working Paper No 376, OECD, 12 December 2003) 6; Nisar Ahmad, Amjad Naveed and Rayhaneh Esmaeilzadeh, 'Female Labor Force Participation in the United States: Impact of Income Taxes During 1990–2000' (2016) 10(3) *South East Asia Journal of Contemporary Business, Economics and Law* 32, 42.

E Policy Evaluation of Joint Returns

It is worthwhile to evaluate a joint return regime against the benchmark criteria generally applied to tax laws: equity, efficiency and simplicity.²²⁶ *Equity* consists of both horizontal and vertical equity; whereas horizontal equity is the principle of those of equal financial position paying the same amount of tax,²²⁷ vertical equity concerns those of greater means paying relatively more tax.²²⁸ Unlike horizontal equity, which at the base theoretical level is relatively uncontroversial, vertical equity raises the issue of how much extra tax the better off should pay, which is ultimately based on various assumptions and underlying justice theory.²²⁹ Ultimately, both horizontal and vertical equity are interlinked with the concept of ‘ability to pay’ of taxpayers.²³⁰

The criterion of *efficiency* calls for the tax laws to minimise the degree to which they distort market-based decision making.²³¹ The criterion of *simplicity* is directed at ensuring that tax laws can be easily understood and applied.²³²

These criteria will be applied to two broad scenarios. The first of these involves a couple whose only income is in the form of personal exertion income, which as discussed, cannot be split under current laws. The second scenario involves situations where a couple has income from business or property that can be subject to income splitting under current laws.

²²⁶ Taxation Review Committee, *Full Report: 31 January 1975* (Report, Australian Government Publishing Service, 31 January 1975) 11–17 [3.1]–[3.28] (*Asprey Report*); Commonwealth of Australia, ‘Reform of the Australian Tax System’ (Draft White Paper, June 1985) 14–15 [1.1]–[1.10]; ‘A Strong Foundation: Establishing Objectives, Principles and Processes’ (Discussion Paper, Review of Business Taxation, November 1998) 62–4 [6.7]–[6.19]; Commonwealth of Australia, ‘Re:Think’ (Tax Discussion Paper, March 2015) 14.

²²⁷ Richard A Musgrave, ‘ET, OT and SBT’ (1976) 6(1–2) *Journal of Public Economics* 3, 4.

²²⁸ Richard A Musgrave and Peggy B Musgrave, *Public Finance in Theory and Practice* (McGraw-Hill, 5th ed, 1989) 223.

²²⁹ Paul R McDaniel and James R Repetti, ‘Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange’ (1993) 1(10) *Florida Tax Review* 607, 610.

²³⁰ See James R Repetti, ‘The Appropriate Roles for Equity and Efficiency in a Progressive Individual Income Tax’ (2020) 23(2) *Florida Tax Review* 522, 567–8, 570–1, where the author argues that the ‘ability to pay’ is one of the major forms of distributive justice and approaches taken to designing a tax base, and that utilising the ‘ability to pay’ concept impacts on how horizontal and vertical equity are applied.

²³¹ James Alm, ‘What Is an “Optimal” Tax System?’ (1996) 49(1) *National Tax Journal* 117, 117.

²³² Binh Tran-Nam, ‘Tax Reform and Tax Simplicity: A New and “Simpler” Tax System?’ (2000) 23(2) *University of New South Wales Law Journal* 241, 242.

1 *Couple Earning Only Personal Exertion Income*

As discussed earlier, the ‘impossible trilemma’ means that a tax system cannot achieve all three goals of progressive taxation, couples neutrality and marriage neutrality. This article argues that a joint return regime accompanied by a rates schedule that realistically reflects the economies of scale enjoyed by many couples would link the tax burden on the personal exertion income of such couples more strongly to their joint ability to pay tax. Specifically, given that a couple’s ability to pay tax on their personal exertion income is reflected in their joint income, such a regime, by implementing couples neutrality, will support horizontal equity.

While a joint return regime is incompatible with marriage neutrality, it can still support principles of equity by recognising that the ability to pay is different for a given amount of personal exertion income when it is earned by a single taxpayer as opposed to being earned in aggregate by a couple. To what extent a joint regime is compatible with principles of equity ultimately depends on whether the rate schedule accurately assesses the economies of scale enjoyed by couples.

Some have, however, argued that a joint return regime resulting in a lack of marriage neutrality would reduce vertical equity.²³³ Specifically, it has been argued that couples with one high income earner would get a tax break from such arrangements.²³⁴

However, as discussed, for a number of reasons, imputed income from self-performed services is generally not taken into account in our tax system. Such reasons include the substantial difficulty in valuing the imputed income and the substantial heterogeneity regarding the degree to which people utilise imputed income, as well as wider arguments against such income being included at the tax base in the first place.²³⁵

Even accepting that there is a case for the recognition of imputed income, arguments based on the vertical inequity of joint returns are inapplicable where there are two full-time earners in a marriage (who often benefit from a joint return system where they have dissimilar incomes).²³⁶ Also, it is important to recognise that no tax system is perfect, and there are inevitable trade-offs in the vast majority of tax policy decisions.²³⁷ In other words, even if it is accepted that due to the imputed income of self-performed services, a joint return system can subsequently in some instances increase vertical inequity, such a system can still have sufficient net advantages.

²³³ Kesselman (n 99) 38.

²³⁴ Martha T McCluskey, ‘Taxing the Family Work: Aid for Affluent Husband Care’ (2011) 21(1) *Columbia Journal of Gender and the Law* 109, 123–4.

²³⁵ See above Part IV(C)(1).

²³⁶ See Joseph E Stiglitz and Jay K Rosengard, *Economics of the Public Sector* (WW Norton, 4th ed, 2015) 682–3, where the authors point out that one wage-earner families have greater imputed income than two wage-earner ones.

²³⁷ William G Gale, ‘What Can America Learn from the British Tax System?’ (1997) 50(4) *National Tax Journal* 753, 754.

The evidence has indicated that the degree of inequity in a properly formulated joint return regime is potentially limited,²³⁸ and can result in net advantages over an individual return system.²³⁹

Importantly, while a joint return system might not recognise the relatively higher imputed income of a single-earner couple, the counter to this is that single-earner couples will have a strong tendency to have, in the aggregate, a decreased opportunity to increase their tax-free human capital.²⁴⁰ In other words, since they collectively work fewer hours, they have less collective opportunity to increase their human capital through work experience.

Overall, while it is all too easy to describe the introduction of a regime that in some instances lowers the tax burden for higher income earners as breaching vertical equity, ultimately such policies need to be evaluated in a balanced, fair manner. The fairness of a joint return system can be illustrated by a further examination of the above example of a single high income earner who marries a stay-at-home partner and is consequently subject to a lower tax burden. It is unrealistic to imagine that in most instances the extra costs of the living expenses of financially supporting the spouse would be recouped by the value of the domestic housework undertaken by them. The reality is that a system of joint returns, as discussed earlier, recognises the differences in ability to pay due to the different living expenses of a couple as compared to a single person.

A further issue that a joint return system resolves is the inequity under current laws, where income splitting is disallowed for personal exertion income and instead confined to those who earn money from property and certain types of business income — often taxpayers of higher wealth.²⁴¹ However, as discussed later in this article, another approach to dealing with this particular equity issue is through the introduction of laws restricting income splitting.²⁴²

As far as efficiency is concerned, as discussed, while there are some concerns about this criterion for joint returns, they can be moderated by appropriate policy.²⁴³ Further, as far as simplicity is concerned for couples earning income from personal

²³⁸ Jeffrey Liebman and Daniel Ramsey, 'Independent Taxation, Horizontal Equity, and Return-Free Filing' (2019) 33(1) *Tax Policy and the Economy* 109, 126.

²³⁹ See Nuria Badenes Plá et al, 'Joint Taxation in Spain and Its Effects on Social Welfare: A Microsimulation Analysis' (EUROMOD Working Paper No EM 23/20, Institute for Social and Economic Research, University of Essex, December 2020) 12, where the authors discuss the welfare enhancement of joint taxation in Spain.

²⁴⁰ McIntyre and Oldman (n 112) 1618. For a discussion of the difficulties in taxing human capital, see generally Louis Kaplow, 'Human Capital under an Ideal Income Tax' (1994) 80(7) *Virginia Law Review* 1477.

²⁴¹ See Kesselman (n 99) 19.

²⁴² See below Part V.

²⁴³ See above Part IV(D).

exertion, it is likely to be slightly improved, given that only one tax return per couple would need to be lodged.

2 *Couple Earning Income from Property or Business That Currently Can Be Subject to Income Splitting*

It is also worthwhile evaluating the impact of joint returns on property and types of business income that under current laws can be split within couples.

It is noteworthy that with an individual return system, to the degree such income is legally able to be split, it can be shifted onto the lower-earning spouse to take advantage of their lower tax rates. This is fundamentally different from the result from a joint return system, where such income, rather than being predominantly shifted to the lower-earning spouse, is in substance compulsorily split in an even manner.²⁴⁴ For instance, in the USA, joint returns aggregate all the income of the couple, including investment income.²⁴⁵ This, as discussed, increases horizontal equity, because it results in such income being subject to the same treatment as personal services income under such a regime.

Further, a joint return system also improves equity in the sense that under current arrangements, those who choose to utilise tax planning arrangements to split such income end up arbitrarily paying less tax than those who for various reasons have not done so.

Efficiency would also be much improved for such income under such a joint return system, given that it would minimise resources put into entering into income-splitting arrangements.²⁴⁶ Similarly, simplicity would also be much improved given that a joint return system reduces the need to understand and apply laws relating to income splitting.

F *Summary of Evaluation of Joint Returns Approach*

It has been suggested that, given the complexity of the issues and the trade-offs that would be necessitated by joint returns, the default — individual taxation — is the appropriate policy.²⁴⁷ Another commentator has stated that since there are arguments for both joint and individual returns, a ‘compromise’ approach would work best: one with less-progressive tax rates accompanied by a system where

²⁴⁴ Rosen (n 219) 424. This is assuming that either joint returns are mandatory for spouses, or in the alternative, joint returns give sufficient advantages that very few taxpaying couples, when presented with a choice, would opt to file individual tax returns.

²⁴⁵ IRC (n 7) §§ 1, 61.

²⁴⁶ See McMahon, ‘To Have and To Hold’ (n 123) 736–7, where the author discusses how the introduction of joint returns in the USA was motivated by the desire to eliminate income-shifting devices.

²⁴⁷ Joel S Newman, ‘Taxation of Households: A Comparative Study’ (2010) 55(1) *Saint Louis University Law Journal* 129, 152.

the rates for joint returns and for couples filing separately are set at a level that minimises the degree of marriage bonuses and penalties.²⁴⁸ Notwithstanding the reality of the conundrums involved, there is a solid case for the introduction of a joint return regime.

A policy of a joint return system has many advantages, most notably levelling the playing field as far as income splitting is concerned. In other words, appropriately formulating the rate thresholds so as to maximise the accuracy of the relative ability of couples to pay tax would aid equity and simplicity. Further, despite the arguments that economic efficiency might to some extent be compromised, compensatory policies are available.²⁴⁹

However, to be politically viable, the introduction of such a regime would need generally to avoid increasing the tax burden of existing couples. Consequently, the introduction of a joint return approach might need to be accompanied by a rate schedule that leads to substantially more marriage bonuses than marriage penalties. This presents two potential problems. First, such a policy could be overly generous to couples as compared with singles. In other words, by not adequately recognising the economies of scale from which couples benefit, the policy could breach notions of equity by assessing couples as having a lower ability to pay than is actually the case.

Second, such an approach might lead to a substantial loss of government revenue.²⁵⁰ Such a loss might then be clawed back in the future through higher taxes, which could lead to an increase in the net real tax burden on singles, as compared with its level prior to the introduction of the regime.²⁵¹ However, notwithstanding such genuine concerns, a properly timed and implemented joint return regime could be politically and fiscally viable²⁵² and bring net advantages to the tax system.

²⁴⁸ Listokin (n 106) 199–201, 202–5.

²⁴⁹ See above Part IV(D) regarding how the use of tools such as a targeted offset can help abate the loss of economic efficiency in such a scenario.

²⁵⁰ See *Asprey Report* (n 226) 140–3, where such implementation issues were used by the Chairman as a major justification for recommending that an individual tax regime be maintained.

²⁵¹ Cooper (n 162) 92. Smith (n 104) 8, using older figures, discusses estimates which indicated that the revenue loss was approximately 5–6% of income tax revenue, though this was based on full income splitting with no allowance for economies of scale enjoyed by couples.

²⁵² If the implementation of such a regime widened tax brackets for singles, and took into account economies of scale in a fair manner by having joint return tax brackets less than double the single ones, the result could be that hardly anyone suffered from an increase in taxes. Although this would be at a fiscal cost, if implemented at the right time, this could be fiscally viable.

V WHAT TYPES OF INCOME SPLITTING SHOULD BE ALLOWED?

As discussed in this article, the underlying current principle is that the greater the degree that the income is generated from property, the more income splitting is permitted. In the case of business income, this principle manifests itself through the allowance of income splitting generally to the extent that what is split is in substance property rather than personal exertion income. Assuming that Australia continues with an individual returns regime, it is worth examining the broader question of whether the current law on income splitting should be subject to policy reform.

Importantly, the current state of property income-splitting laws should not be seen as an optional, limited version of a joint return regime that is restricted to property income. Rather, it broadly allows property income to be shifted to a substantial degree to the lower-income spouse. This is in the context of property income already being subject to concessional tax treatment in some situations.²⁵³ Further, as discussed earlier in this article, there are economies of scale that couples enjoy,²⁵⁴ yet voluntary income splitting of property income can be undertaken without any matching penalty that takes into account such economies.

The main legal impediment to splitting property income is the cost of transferring pre-existing property, which can typically result in a substantial CGT bill.²⁵⁵ However, careful tax planning, such as acquiring an asset before it has appreciated in value through a trust, or in the lower-income-earning spouse's name, can avoid this.²⁵⁶

The current law, which in effect allows such splitting, is based on attributing the income to the taxpayer who owns the property. One main argument for allowing income splitting in such situations is based on respecting property ownership.²⁵⁷ Further, pragmatically speaking, as income from property is a relatively minor

²⁵³ For example, CGT is subject to a 50% discount in many situations: *ITAA 1997* (n 6) div 115.

²⁵⁴ See above Part IV(B).

²⁵⁵ *ITAA 1997* (n 6) ss 104-10 (which would apply when property is transferred), 104-55 (which applies when a trust is created), 104-60 (which applies to assets transferred to a trust).

²⁵⁶ This would generally not trigger a CGT event under the CGT provisions in *ITAA 1997* (n 6).

²⁵⁷ See Lisa Philipps, 'Income Splitting and Gender Equality: The Case for Incentivizing Intra-Household Wealth Transfers' (Research Paper No 04/2010, Comparative Research in Law and Political Economy, Osgoode Hall Law School of York University, 2010) 8–9, where the author discusses this principle in the context of women's agency of their property ownership, including situations where such ownership results from inter-spouse transfers.

proportion of the tax base,²⁵⁸ the amount of revenue at stake, while material, is limited.

That the law should allow, in effect, discretionary income splitting of property income is not incontestably desirable — indeed, some jurisdictions have laws that limit or largely prevent this.²⁵⁹ Some of the various policies of other jurisdictions include attributing unearned income to the top income earner, taxing it at an unearned income rate, or automatically attributing the unearned income on a 50:50 basis within the couple.²⁶⁰

In support of the status quo, it has been argued that a law that allows income attribution for tax purposes to follow asset ownership helps aid gender financial equality.²⁶¹ This is because it will in some cases encourage asset transfers to married women who are on lower tax rates, which will result in increasing their economic power.²⁶² Proponents of such reasoning emphasise that such discretionary income splitting from property transfers should only be allowed where there has been a truly valid transfer of ownership.²⁶³

It may be argued that such a justification is superfluous, given that upon marriage breakup, especially for longer marriages, courts do not necessarily give undue attention to legal and equitable title in property division matters.²⁶⁴ However, it has also been pointed out that such an approach gives women more control of the property and its income during marriage, and if there is a relationship breakdown, it gives those without access to adequate legal representation greater access to assets.²⁶⁵ Notwithstanding the validity of this point, and that generally encouraging women to have a more equal portion of marital property is a highly worthwhile aim, it does not follow that the quest for greater sharing of marital property should be the overriding principle regarding how property income is taxed.²⁶⁶

Importantly, to the extent that splitting of property income is justified on the basis of respecting ownership, there is a sound argument for distinguishing between property income splitting through the outright ownership of property and splitting

²⁵⁸ Australian Bureau of Statistics, *Survey of Income and Housing, User Guide, Australia, 2019–20* (Catalogue No 6553.0, 28 April 2022) Table 1.

²⁵⁹ Kesselman (n 99) 23.

²⁶⁰ Ibid.

²⁶¹ Philipps (n 257) 7.

²⁶² See *ibid.*

²⁶³ See also ‘The Case for Mandatory Separate Filing by Married Persons’ (n 120) 379–80, where the author argues that although joint returns are objectionable partially due to the lack of control of funds by the non-primary earner, no such objection applies to income splitting resulting from property transfers.

²⁶⁴ Mills and Ebejer (n 129) 425.

²⁶⁵ Philipps (n 257) 10.

²⁶⁶ See Zelenak (n 108) 385.

by the use of an entity such as a trust.²⁶⁷ This is especially the case where the income-splitting instrument in question is a discretionary trust, which does not typically give the beneficiaries any solid proprietary interest in the underlying property.²⁶⁸ While there are provisions, as discussed earlier in this article, that seek to allow the taxation of the individual only where they have the control of the income,²⁶⁹ in general, the law does not require that they have ownership or control of the underlying income-generating property. In accordance with such an argument, ahead of the 2019 federal election, the Australian Labor Party proposed a policy to tax discretionary trust income more aggressively than is currently the case,²⁷⁰ but the policy was abandoned after the party's electoral defeat.²⁷¹

Another commentator has argued for a more extreme approach, saying that Australia should take a much broader, harder line on income splitting than is currently the case.²⁷² Suggestions for accomplishing this include a tightening of the general anti-avoidance provision.²⁷³ Specifically, it has been suggested that as an example, pt IVA be modified by limiting the current requirement that it is to apply only to arrangements entered into with the dominant purpose of obtaining a tax benefit.²⁷⁴ Although it is beyond the scope of this article to discuss the details regarding the specifics of such hypothetically modified provisions, careful drafting could dramatically reduce the amount of legal income-splitting arrangements. Such a broad approach has the advantage of improving equity, given that it would curtail the amount of income splitting available to only a subset of taxpayers. Further, it could improve efficiency, given that it would, in some cases, lead to the non-primary earner having less property income; consequently, they would be subject to lower marginal tax rates on their labour income — though, as discussed earlier, the importance of this in improving labour market participation is debatable.²⁷⁵ Also, depending on how such modified legislative provisions are defined, simplicity could be improved

²⁶⁷ Ibid 387.

²⁶⁸ Harold Ford et al, Thompson Reuters, *Ford and Lee: The Law of Trusts* (at Release 174) [5.9930].

²⁶⁹ See above Part III(C).

²⁷⁰ Australian Labor Party, 'A Fairer Tax System: Discretionary Trusts Reform' (Document No 5445589, Parliamentary Library, Parliament of Australia, 30 July 2017) <https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/5445589/upload_binary/5445589.pdf;fileType=application%2Fpdf#search=%22library/partypol/5445589%22>.

²⁷¹ Rachel Clun, 'Labor Abandons Trust Fund Tax Reform, Shadow Treasurer Confirms', *The Age* (online, 3 April 2022) <<https://www.theage.com.au/politics/federal/labor-abandons-trust-fund-tax-reform-shadow-treasurer-confirms-20220403-p5aaf3.html>>.

²⁷² Cooper (n 162) 98.

²⁷³ Ibid 93.

²⁷⁴ Ibid.

²⁷⁵ See above Part IV(D).

to the extent that the law left less scope for ambiguity as to where income splitting is disallowed.²⁷⁶

An even more extreme suggestion is to establish a system, as in some other jurisdictions, where property and other unearned income are subject to the tax rate of the higher income earner in the couple.²⁷⁷ This approach has the advantage of lowering the marginal tax rate faced by the secondary income earner, and thus might in some instances encourage their labour market participation, potentially improving efficiency.²⁷⁸ It would also aid simplicity by making attempts at income splitting redundant. But it could also be argued that this might be harsh and lead to such income being overtaxed. Specifically, it would be in some instances inequitable as it would subject unearned income from property genuinely acquired by the secondary-earning spouse to a potentially higher tax rate than money they earn from personal services. Although an attempt could be made to draft laws exempting from such provisions any property genuinely acquired by the lower-earning spouse, such as assets brought into the marriage, or bought with funds that they earned, overseas experience has indicated that such laws are relatively easy to exploit.²⁷⁹ Other approaches, such as subjecting unearned income to a standard unearned income tax rate,²⁸⁰ would improve simplicity, though ultimately would negatively affect equity by not taxing such income at a progressive rate that takes into account the taxpayer's other income.

In summary, if Australia is to continue with a system of individual returns, there are strong arguments for modifying the current law so as to more strongly restrict income splitting. Of the methods discussed above, the suggestion regarding tightening the general anti-avoidance provision would be most consistent with the current income tax system, and would present the best trade-offs concerning the criteria of equity, efficiency and simplicity.

VI CONCLUSION

The current approach to income splitting, where it is only available in any meaningful degree to certain taxpayers, who are often higher income earners, results in inequitable outcomes. Many are instinctively averse to a regime that allows property owners and some business owners to split income but denies it for income derived from one's exertion. Although an all-or-nothing approach to income splitting might

²⁷⁶ But see Cooper (n 162) 94, where the author's reservation about such a policy is based on the unpredictability of how such a provision would be interpreted by courts. However, careful drafting of the relevant provisions could minimise, though not eliminate, such unpredictability.

²⁷⁷ Smith (n 104) 18.

²⁷⁸ Zelenak (n 108) 388.

²⁷⁹ Cooper (n 162) 95–6.

²⁸⁰ See generally Kesselman (n 99) 23.

seem simplistic, this article suggests that, broadly speaking, this should indeed be the policy aspiration.

The current law, which to a large degree allows income splitting of certain types of business income and passive property income, but not of personal exertion income, is arbitrary and inequitable. The recent ATO professional services guidelines addressed in this article continue to cement such an approach.

The issue of introducing a law allowing couples to file joint returns, and so endorsing income splitting for such couples, is a highly complex one with many trade-offs. Notwithstanding some downsides and problems in its initial implementation, there are clear positives to such a policy. Arguments against joint returns give undue focus to the asymmetric legal control of incomes in couples with a dominant income earner. This article argues that such a perspective gives a disproportional emphasis to form over substance, while not giving sufficient emphasis to the economic realities of couples, such as the ability to pay tax. However, given the current state of play of Australian politics, where there is a general absence of politically radical decisions,²⁸¹ and with a budget forecast to be in deficit for several years following a surplus in the 2022–3 financial year,²⁸² it is extremely unlikely that such a policy would be advanced for public consultation and discussion.

Assuming that the status quo of individual returns for spouses continues, if the law is to continue to treat property income, whether from passive investments or through certain businesses, as radically different from personal exertion income, there should at the very least be stricter limits on splitting such income. The ATO's curtailing of income splitting in situations where the legal recipient of income does not in substance receive the funds is a welcome development. However, strong consideration should be given to expanding the principle that income splitting of property income should only be available to those who in substance own the property. As discussed in this article, such an approach would in many instances prevent the use of a discretionary trust to split income. An arguably superior approach would be for the government to introduce laws which, as suggested in this article, strongly limit income splitting of property income, whether this be passive or earned through a business.

It is hoped that the need for substantial tax reform on income splitting — as opposed to the burden of change falling entirely on the ATO's tightening of its application of the current law — will be subject to greater public debate, with the aim of improving the equity of the Australian tax system.

²⁸¹ Editorial, 'Neither Side Is Showing the Courage Needed To Tackle Our Big Economic Challenges', *The Age* (online, 16 May 2022) <<https://www.theage.com.au/politics/federal/neither-side-is-showing-the-courage-needed-to-tackle-our-big-economic-challenges-20220516-p5alog.html>>.

²⁸² Commonwealth of Australia, 'Budget Strategy and Outlook' (Budget Paper No 1, Budget 2023–24, 9 May 2023) 7 <https://budget.gov.au/content/bp1/download/bp1_2023-24_230727.pdf>.

NEITHER SUPERIOR NOR SUBORDINATE: AN EXPLORATION OF THE MILITARY JURISDICTION IN DOMESTIC OPERATIONS

THE SCENARIO

At the 2040 Olympic Games in Canberra, the Australian Defence Force ('ADF') has been called out to counter threats of domestic violence to a Commonwealth interest.

Being satisfied that there is a threat of domestic violence, but wishing to continue the Olympic Games, the authorising Ministers approve a div 4 call out under the *Defence Act 1903* (Cth), declaring select sporting arenas around the city to be specified areas for the purposes of the *Act*. ADF members, armed with rifles, are called out to assist civilian police establish vehicle checkpoints, and control the flow of people into the stadiums.

Thirteen days into Operation Green and Gold Assist, an ADF Corporal is conducting searches of bags for items linked to the domestic violence threat. One member of the public in another queue is beginning to cause a disturbance in refusing to allow for his bag to be opened. Addressing the sports-goer, the Corporal again demands the bag to be opened. The man does so, and in closing the bag nearly catches the Corporal's hand within the zip.

Enraged, the Corporal grabs the man by the back of the neck and throws him to the ground. Before anything further can occur, other members of the public and the ADF intervene.

With the consent of the victim, the Corporal is charged with the service offence of assault.¹

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¹ *Defence Force Discipline Act 1982* (Cth) s 33(a) ('DFDA').

I INTRODUCTION

There is no situation more liable for a potential abuse of power than the domestic deployment of military personnel. The inherent reservations that Australian citizens hold about domestic deployments, although poorly articulated, reflect this.² While the topic of domestic deployments and the necessary checks and balances has recently inspired a reinvigorated discussion — including, but not limited to, the amenability of a decision to call out the troops to judicial review³ — this article focuses on another limb of accountability: the decision to prosecute any abuses of power by military personnel during a ‘call out’.⁴ Specifically, the article looks to explore the viability of the military jurisdiction under the *Defence Force Discipline Act 1982* (Cth) (*DFDA*) to respond to offences committed by Australian Defence Force (ADF) members during domestic operations. This article therefore seeks to explore the tension between jurisdictional choices of a court or court martial, as well as provide wider education to readers on the military jurisdiction — which is neither superior, nor subordinate, to the civil system. However, the article is not concerned with situations of armed conflict that could fall under the statutory framework of div 268 of the *Criminal Code Act 1995* (Cth) sch 1 (*Commonwealth Criminal Code*).

Although multiple domestic deployments have occurred in Australia,⁵ these have primarily occurred under non-statutory executive power with little consideration of what jurisdiction would apply for any criminal prosecutions.⁶ Indeed, the legislation that provides the statutory footing for the domestic deployment of the ADF where the use of force is contemplated — namely, pt IIIAAA of the *Defence Act 1903* (Cth) (*Defence Act*) — envisaged states and territories having jurisdiction to commence criminal proceedings against ADF members until its 2006 revision.⁷ The legislation

² Margaret White, ‘The Executive and The Military’ (2005) 28(2) *University of New South Wales Law Journal* 438, 438.

³ See Samuel C Duckett White and Andrew Butler, ‘Reviewing a Decision to Call Out the Troops’ [2020] (99) *Australian Institute of Administrative Law Forum* 58.

⁴ The expression ‘call out’ traditionally refers to the use of ‘reserves, militia and other auxiliary forces’ for certain contingencies. In 18th century England, where regular troops were to be used they were said to be ‘called in’. However, in time, the practice was to ‘call out’ troops in readiness to be ‘called in’: Victor Windeyer, ‘Opinion on Certain Questions Concerning the Position of Members of the Defence Force When Called Out to Aid the Civil Power’ in Bruce DeBelle (ed), *Victor Windeyer’s Legacy: Legal and Military Papers* (Federation Press, 2019) 211, 217 [15].

⁵ Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) 64. To this can be added the call out of the ADF to suppress a migrant riot at Bonegilla, Victoria in 1952: see ‘Riot Alert at Bonegilla’, *The Argus* (Melbourne, 19 July 1952) 1.

⁶ White, *Keeping the Peace of the Realm* (n 5) 64; BD Beddie and S Moss, ‘Some Aspects of Aid to the Civil Power in Australia’ (Occasional Monograph No 2, Department of Government, University of New South Wales, 1982) 59.

⁷ Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) 24 [162] (‘EM, DLA (Aid to Civilian Authorities) Bill 2005’). This is in juxtaposition to the *Maritime Powers Act 2013* (Cth) which provides a statutory footing for civil maritime security in the Australian offshore area.

now provides that ADF members are liable to civilian criminal punishment,⁸ and vests control of the civilian prosecutorial process in the Commonwealth Director of Public Prosecutions ('CDPP') to the exclusion of state or territory prosecutors.⁹ This provides consistency in the exercise of prosecutorial discretion for criminal acts when it is the Commonwealth that has stepped into the fray of an incident of domestic violence (a constitutional concept which is covered in more depth below).¹⁰ Importantly, it does not exclude military jurisdictions.

The decision to prosecute must necessarily grapple with the fundamental decision of whether a civilian court or a court martial is the more appropriate forum to hold ADF members accountable. On the one hand, a civilian court offers public confidence in the transparency and unbiased nature of the judiciary. However, on the other hand, a court martial allows a greater variety of punishments¹¹ and exists purely to discipline and punish military personnel for misconduct (both military and criminal offences). It is, therefore, the *curia specialis* this article addresses, through the fictional scenario of Operation Green and Gold Assist outlined above, how an abuse of power by an ADF member can and should be dealt with. The article deliberately uses an example of 'common' assault¹² — a service offence within the *DFDA* (that is not a prescribed offence)¹³ and thus could fall under the jurisdiction of a summary authority, a court martial, or a civilian court of the Commonwealth.

This article builds upon a recent decision by the High Court of Australia, which has finally and conclusively addressed the question of the applicability of the military jurisdiction to ADF members. *Private R v Cowen* ('*Private R*')¹⁴ settled three important issues. First, the decision laid to rest two converging, and confusing, lines of judicial and academic thinking about whether military law applies as a matter of: (1) an accused simply serving as an ADF member (the 'service status' test); or

⁸ Through the application of the criminal law of the Jervis Bay Territory: *Defence Act 1903* (Cth) s 51Y(1) ('*Defence Act*').

⁹ *Ibid* s 51Y(3).

¹⁰ EM, DLA (Aid to Civilian Authorities) Bill 2005 (n 7) 24 [163].

¹¹ In addition to imprisonment and fines, the *DFDA* allows for the punishments of dismissal, detention, reduction in rank, forfeiture of seniority, restriction of privileges, stoppage of leave and extra drill: *DFDA* (n 1) s 68(1).

¹² The offence of 'assaulting another person' in a public place under the *DFDA* (n 1) s 33(a) is not called 'common assault' notwithstanding that it has no aggravating features such as: the victim being superior in rank to the accused: at s 25; the victim being subordinate in rank to the accused: at s 34; or the assault resulting in actual bodily harm: at 33A. By contrast, the equivalent offence under the *Crimes Act 1900* (ACT) s 26, is entitled 'common assault'.

¹³ Relevantly for summary authorities, a prescribed offence, with some specified exceptions, is a service offence punishable by more than two years civil imprisonment: *DFDA* (n 1) s 104; *Defence Force Discipline Regulations 2018* (Cth) reg 51. Summary authorities do not have jurisdiction to try a prescribed offence: see *DFDA* (n 1) ss 106, 107.

¹⁴ (2020) 271 CLR 316 ('*Private R*').

(2) because the subject matter of the accused's conduct relates to their ADF service (the 'service connection' test). The High Court dismissed the use of both the service status test and the service connection test.¹⁵ Second, a law that 'tend[s] or might reasonably be considered to conduce to or to promote or to advance the defence of the Commonwealth'¹⁶ was held 'valid in all its applications';¹⁷ therefore, the territory offence provision in s 61(3) of the *DFDA* was found 'valid in all its applications'.¹⁸ Finally, the High Court stated that the jurisdiction of service tribunals may operate concurrently with the ordinary criminal law of the states and territories¹⁹ — in this regard, the jurisdiction is complementary, and not subordinate, to the ordinary criminal law.²⁰ Yet, *Private R* does not answer the question of when it is appropriate to pursue charges in a military jurisdiction; it merely again confirms that such a jurisdiction is constitutionally valid.

In order to address this, this article in Part II canvasses the legal framework for calling out the ADF. It does not focus on the spectrum of powers and defences available under the *Defence Act*, but looks to focus solely on the high constitutional threshold (being 'domestic violence') that must often be met in order to call out the troops.²¹ This high threshold is critical for framing the exceptional situations that must arise for pt IIIAAA to apply. Part II utilises never-before published archival evidence to demonstrate the multiple requests that have occurred for a call out to occur since Federation. The scenario that this article addresses would therefore be the first call out to occur under the current statutory framework — a necessary factor in any jurisdictional assessment.

Part III then turns to address the viability of proffering charges within the military jurisdiction through a legislative framework designed by Parliament. It demonstrates the strengths and weaknesses of the military jurisdiction, utilising the scenario-response model so as to best articulate any possible prosecution decisions, defence and sensitivities. It does so for multiple legal and policy reasons. Confusion as to prosecutorial jurisdiction degrades morale and the subordination of the military to civil authorities; it is in the interests of both ADF members and citizens to know how and in what forum a member of the armed forces will be prosecuted for specific offences. Although these questions have been asked in relation to different jurisdictions,²² there has been no discussion in Australia. Further, it is beneficial for

¹⁵ Ibid 331 [42], 345–7 [81]–[88] (Kiefel CJ, Bell and Keane JJ).

¹⁶ Ibid 332 [42], quoting *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 216 (Dixon CJ).

¹⁷ *Private R* (n 14) 332 [42].

¹⁸ Ibid 348 [89].

¹⁹ Ibid 335–6 [51].

²⁰ Ibid 337 [54], 338 [61].

²¹ See, eg, *Defence Act* (n 8) s 33.

²² For an example of these discussions in the United States of America, see David E Engdahl, 'Foundations for Military Intervention in the United States' (1983) 7(1) *University of Puget Sound Law Review* 1.

Australians in general to understand how prosecutions occur when the victim is a member of Australian society. Finally, it is important with respect to domestic security operations — which have long been hypothesised but never eventuated — to understand what might happen in the aftermath.

II LEGAL FRAMEWORK

Discussion of the legal framework is integral to an understanding of the potential for domestic operations to abuse power, as well as the historical checks and balances that have developed to address and mitigate the risk. This is particularly so due to the changed threshold requirement for calling out the ADF since 2019. After the Lindt Café siege in 2014, the State Coroner of New South Wales' report canvassed, inter alia, the use of the ADF in terrorist incidents and concluded that the 'challenge global terrorism poses for state police forces calls into question the adequacy of existing arrangements for the transfer of responsibility for terrorist incidents to the ADF'.²³ Consequentially, on 10 December 2018, the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) ('2018 Defence Amendment') was passed with bipartisan support. The amendments to pt IIIAAA aimed to 'streamline the legal procedures for call out of the ADF and to enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism'.²⁴

The thresholds were ostensibly lowered with the enactment of the *2018 Defence Amendment*. This has not, however, altered the requirement that the authorising Ministers must be satisfied that threat or violence merits calling out the ADF. Thus, although pt IIIAAA has not been used to date, it is foreseeable that the new statutory regime — which has now been in effect since 10 June 2019 — will increasingly become an option for Commonwealth, state or territory governments. The scope for calling out the ADF is wide and is increasingly considered a viable solution as a part of a Commonwealth response to a domestic emergency. This is unsurprising. The ADF demonstrates an ability to conduct operations without the need for external logistical support; it has a large pool of personnel and unique capabilities to counter non-routine threats and crises. This makes the ADF the Commonwealth government's go to agency to assist states and territories in resolving large scale

²³ State Coroner of New South Wales, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations* (Report, Coroners Court of New South Wales, May 2017) 385 [32] ('*Lindt Café Inquest*').

²⁴ Explanatory Memorandum, *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018* (Cth) 2 [3] ('*Explanatory Memorandum 2018*'). These aims were corroborated by the Attorney-General in the second reading speech for the Bill: see Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6746 (Christian Porter, Attorney-General).

domestic disasters.²⁵ Yet, the consequences of the use of the ADF in such circumstances, particularly for potential criminal prosecution of ADF members, remains under discussed.

This article will accordingly first canvas the constitutional parameters for the use of the ADF domestically, before addressing the statutory operationalisation of these restrictions. It will then pivot and address the disciplinary checks and balances codified under the *DFDA*.

A *The Australian Constitution*

Critical to domestic deployments is s 119 of the *Australian Constitution*. It has important consequences for the scope of the role of the armed forces, and of the Commonwealth generally, in exercising a power to keep the peace of the realm.²⁶ Although described as the ‘wallflower of the *Constitution*’,²⁷ s 119 (combined with s 114) is anything but. On one reading, it can be constructed as the sole authority for federal intervention; from another lens, it confirms the reserve powers of states; and yet another analysis shows it to be just a specific scenario in which domestic operations can occur.²⁸

This federal division of responsibility is reflected in Department of Defence policy when it comes to domestic operations. Importantly, this policy reflects what the law is believed to be. Whilst the accuracy of this divided policy has been critiqued, it usefully reflects the exceptional nature of military intervention.²⁹ Accordingly, as a matter of policy, the use of the military within Australia domestically falls into two broad categories: (1) Defence Assistance to the Civil Community (‘DACC’); and (2) Defence Force Aid to the Civil Authority (‘DFACA’). DACC relates to ‘assisting the civil community in both emergency and non-emergency situations ... [and does not] involve the use, or potential use, of force (including intrusive or coercive acts) by Defence members’.³⁰

²⁵ Ian McPhee, Auditor-General, *Emergency Defence Assistance to the Civil Community* (Audit Report No 24, Australian National Audit Office, 16 April 2014) 11–12; Department of Defence (Cth), *Defence Assistance to the Civil Community Policy* (Policy, 31 August 2021) [1.5] (‘DACC Policy’); Department of Defence (Cth), *Defence Assistance to the Civil Community Manual* (Policy, 2 December 2022) [4.2] (‘DACC Manual’).

²⁶ White, *Keeping the Peace of the Realm* (n 5).

²⁷ Peta Stephenson, ‘Fertile Ground for Federalism? Internal Security, the States and Section 119 of the *Constitution*’ (2015) 43(1) *Federal Law Review* 289, 290.

²⁸ White, *Keeping the Peace of the Realm* (n 5) 57.

²⁹ Victor Windeyer questioned whether such a threshold ‘should be the determinant of the need for and the lawfulness of an order by the Governor-General’: see Windeyer (n 4) 227 [40].

³⁰ *DACC Policy* (n 25) [1.5].

‘Force’, in turn, is defined within the *DACC Manual* to include ‘the restriction of freedom of movement of the civil community whether there is physical contact or not’.³¹ Examples of DACC, historically, include military aid in bushfires, floods and storms or use of specialist military personnel and equipment for explosive ordnance disposal.³² It has also included flying displays involving helicopters or fighter jets appearing at motorsport events, helicopters or skydivers appearing at football matches, or bands appearing at ceremonial functions.³³

If the ADF was called out to respond to a situation anticipated to require the use of force, this would be considered DFACA. When force is used by the ADF domestically,³⁴ outside of the security of defence premises and maritime law enforcement,³⁵ there is only one relevant statutory provision that may empower their conduct: pt IIIAAA of the *Defence Act*. These provisions, and their historical predecessor, have remained the only statutory provisions by which the ADF could deploy force domestically.

B *Part IIIAAA of the Defence Act 1903 (Cth)*

Since 1903, and the original *Defence Act*, there has been a statutory ability to call out the ADF to respond to instances of domestic violence.³⁶ In 2000, in preparation for the Sydney Olympic Games and the threat of possible terrorist activities, pt IIIAAA was introduced to the *Defence Act*, replacing the previous s 51 with 27 new sections.³⁷ The focus of pt IIIAAA related to land-based counterterrorism and hostage recovery situations and provided a statutory footing for ‘the mechanics

³¹ *DACC Manual* (n 25) annex 10F [14a]. It is implicit in this pattern of activity that the mere presence of ADF members, unarmed, does not constitute force and would seem to occur under the prerogative relating to the command, control and disposition of the ADF as found within s 68 of the *Australian Constitution*. For a more in-depth discussion of what the test of ‘use of force’ might be, see White, *Keeping the Peace of the Realm* (n 5) 12–15.

³² *DACC Manual* (n 25) ch 5, annex 10F. There are grey zones, however, such as what has happened on at least one occasion when the ADF assisted Victorian police in breaching motorcycle gang safe houses: see ‘Army, Police Raid Melbourne Property in Ongoing Operation Targeting Outlaw Motorcycle Gangs’, *ABC News* (online, 12 October 2013) <<https://www.abc.net.au/news/2013-10-12/police-and-adf-raid-bikie-property-in-melbourne/5018414>>.

³³ See White, *Keeping the Peace of the Realm* (n 5) 8.

³⁴ This article does not cover the situation of the ADF using force within Australia in the course of an armed conflict or pursuant to the *DFDA*.

³⁵ Certain authorised ADF members are permitted to use force to protect defence premises: see *Defence Act* (n 8) pt VIA.

³⁶ *Ibid* s 51, as enacted.

³⁷ David Letts and Rob McLaughlin, ‘Military Aid to the Civil Power’ in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 115, 118. See *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth) (*DLA (Aid to Civilian Authorities) Act 2000*).

for the deployment of the ADF in aid of the civil authorities’.³⁸ The provisions were amended again in 2006 to expand the basis for a call out to include threats to Commonwealth interests in the offshore area and to allow for the protection of critical infrastructure.³⁹ The *2018 Defence Amendment* streamlined the process for how a call out was to occur.

It is important to have a thorough understanding of the call out process, and threshold requirements, by the relevant decision-makers in order to demonstrate the exceptional nature of a call out order.

1 *Process to Call Out the ADF*

There are four potential call outs that may occur under the amended pt IIIAAA, as outlined in Table 1 below. The first two relate to Commonwealth interest call outs, the latter two to state and territory call outs.

Table 1: Type of Call Out Orders

Section	Call Out Type
33	Commonwealth interest
34	Commonwealth interest — contingent call out
35	Protection of states and territories
36	Protection of states and territories — contingent call out

A call out order is, for the most part, made by the Governor-General on the satisfaction of the authorising Ministers (being, the Prime Minister, the Attorney-General and the Minister for Defence)⁴⁰ that the relevant mandatory considerations are met — namely, that the ADF should be called out.⁴¹

However, situations arise that require speed and flexibility. Under div 7 of the *Defence Act*, the involvement of the Governor-General in a call out can be dispensed with in ‘sudden and extraordinary emergenc[ies]’.⁴² Such an order may simply be made verbally,⁴³ but a written record of the order must be made and signed by the

³⁸ HP Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 226.

³⁹ *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth) (*DLA (Aid to Civilian Authorities) Act 2006*).

⁴⁰ *Defence Act* (n 8) s 31. Part IIIAAA refers to ‘the Minister’, which, by virtue of the *Acts Interpretation Act 1901* (Cth) s 19, means that all Ministers in the Defence portfolio are ‘the Minister’ for the purposes of pt IIIAAA. For convenience, this article will refer to the senior Minister in the portfolio, the Minister for Defence.

⁴¹ *Defence Act* (n 8) s 33(1).

⁴² *Ibid* s 51U(1).

⁴³ *Ibid* s 51U(3).

decision-maker(s) and the Chief of the Defence Force ('CDF') for the order to take effect.⁴⁴

There are three different levels of authority by which an expedited call out may occur, and the call out may only progress in authority levels if the preceding option cannot be satisfied.⁴⁵ Primary responsibility is given to the Prime Minister unilaterally.⁴⁶ Where this is not practicable, the two remaining authorising Ministers may take responsibility for an expedited call out.⁴⁷ In the event that one of these two Ministers is unable, the remaining authorising Minister may work in concert with an alternative authorising Minister.⁴⁸ Although s 51V(1) of the *Defence Act* appears to give an expedited call out the same legal effect as a call out by the Governor-General, it seems inconsistent with the intent of div 7 — which imbues the legal authority for an expedited call out order with authorising or alternative authorising Ministers — that any action under div 7 would be anything other than a decision by an officer of the Commonwealth.

2 *Threshold Requirements*

For a majority of call out orders (except in the Australian offshore area) the threshold of 'domestic violence' must be met. The term 'domestic violence' has never been authoritatively defined in the *Australian Constitution*, parliamentary debates or the *Defence Act*. Whilst the constitutional provision has been cited in case law,⁴⁹ it has never been the subject of any jurisprudential commentary. It has only been the subject of narrow, sporadic academic commentary.⁵⁰

Most recently, Anthony Gray has attempted to advocate for 'narrow' and 'broad' interpretations of the constitutional term.⁵¹ Gray, in a somewhat disconnected manner, appears to try to link jurisprudential developments in the concept of domestic violence between individuals in relationships to the constitutional concept

⁴⁴ Ibid ss 51U(3)(a)–(b). This could allow, theoretically, for an expedited call out in under five minutes.

⁴⁵ Ibid s 51U(2).

⁴⁶ Ibid s 51U(2)(a).

⁴⁷ Ibid s 51U(2)(b).

⁴⁸ Ibid s 51U(2)(c). The alternative authorising Ministers are the Deputy Prime Minister, the Minister for Foreign Affairs, the Treasurer and the Minister for Home Affairs (who is defined by s 31 as the Minister who administers the *Australian Federal Police Act 1979* (Cth)): *Defence Act* (n 8) s 51U(2)(c).

⁴⁹ Most recently in *Thomas v Mowbray* (2007) 233 CLR 307, 394–5 [247]–[249] (Kirby J).

⁵⁰ See, eg, RM Hope, *Protective Security Review* (Report, 15 May 1979) 33.

⁵¹ Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the *Constitution*' (2021) 44(1) *University of New South Wales Law Journal* 357, 362–3.

of domestic violence.⁵² The link is not clear, except for an assertion that expansive definitions of domestic violence (in the family law context) have evolved with the times as should constitutional terms. Gray then posits that a liberal, non-literal interpretation of domestic violence could be applied,⁵³ recognising that the meaning of words in the *Australian Constitution* can change over time.⁵⁴ There is some benefit to this, despite an erroneous link between the alternate meanings of domestic violence and the incorrect and dangerous conclusions drawn from them with respect to the use of the military in Operation COVID-19 Assist.⁵⁵ Taking an expansive, flexible approach to the constitutional terms reflects it is a living document, capable of changing with the times. It also prevents fossilisation of particular concepts (such as ‘domestic violence’) unnecessarily constraining operations.

In making this assessment of how the constitutional term should be interpreted, it is useful to utilise Jonathan Crowe’s tryptic contextual analysis methodology — this involves interpreting words using their ordinary meaning, their holistic meaning, and their dynamic meaning.⁵⁶ It has benefits because it takes into account the meaning of the term domestic violence both as it was intended, and as it currently stands.

(a) *Ordinary Meaning of Domestic Violence*

The first step is to assess the lexical meaning of the term ‘domestic violence’, at the time of enactment. The term comes from the *United States Constitution* art IV § 4. Relevantly, the term was intended to allow the federal government to counter domestic dangers, which one Founding Father of the United States of America (‘US’) thought ‘more alarming’ than the ‘arms and arts of foreign nations’.⁵⁷ Particularly relevant for the US experience were fears of slave revolts; the term ‘domestic violence’ as opposed to ‘insurrection’ allowed for military force to be used against those who did not have the legal right to commit insurrection.⁵⁸ Within the US, the term has included ‘local uprisings, insurrections or internal unrest within a state’.⁵⁹

⁵² Ibid.

⁵³ Ibid 363.

⁵⁴ See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 495 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁵⁵ Gray (n 51) 373. Gray concludes that the nature and scale of the global health emergency in Operation COVID-19 Assist, and the scale of harm that could arise from the bushfires of Operation Bushfire Assist, would meet the threshold of domestic violence.

⁵⁶ For a detailed argument in support of this approach, see Jonathan Crowe, ‘The Role of Contextual Meaning in Judicial Interpretation’ (2013) 41(1) *Federal Law Review* 417.

⁵⁷ Alexander Hamilton, ‘No 6: Concerning Dangers from Dissensions Between the States’ in Mary Carolyn Waldrep and Jim Miller (eds), *The Federalist Papers* (Open Road Integrated Media, 2022) 30.

⁵⁸ See Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press, 1911) vol 2, 467. See also Jay S Bybee, ‘Insuring Domestic Tranquility: *Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause’ (1997) 66(1) *George Washington Law Review* 1, 33.

⁵⁹ Stephenson (n 27) 298.

Domestic violence has further been argued to include industrial disputes, protests, demonstrations, riots and ‘many traditional forms of political opposition’.⁶⁰ Such a position is reflected in the Addendum to the Explanatory Memorandum to the 2018 *Defence Amendment* which notes that domestic violence

*refers to conduct that is marked by great physical force and would include a terrorist attack, hostage situation, and widespread or significant violence. Part IIIAAA uses the term ‘domestic violence’ as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence. Peaceful protests, industrial action or civil disobedience would not fall within the definition of ‘domestic violence’.*⁶¹

The ordinary meaning of the term is thus concerned with conduct which would rupture the social fabric.⁶² Could the threshold be so low that it would include a riot? The answer must clearly be ‘no’. William Finlason, writing in 1868 on the use of martial law to suppress rebellion, described the difference between riot and rebellion in terms of the legal framework that could be employed to deal with each:

And these words, riot and rebellion, indicate the scope of the powers of common law and of martial law respectively. *Riot is, in its nature, casual, actual, and simple*; and simple measures of resistance may suffice, and the simple powers of the common law may be sufficient. But rebellion, as it is more dangerous and deep-seated, so it is necessarily more difficult to deal with, and may require not only full liberty of attack, but, as it may be passive as well as active, and may follow a policy of exhaustion and devastation rather than one of aggression or attack, even full liberty of attack may be insufficient to subdue it, and deterrent measures may be necessary, and the power of speedy punishment. ... *Rebellion is war: that is the cardinal principle.* War requires measures of war ...⁶³

The *Australian Constitution* makes clear that domestic violence is not an actual and simple matter that can be dealt with under simple common law powers held by citizens; it requires the use of the military. This article argues that the term domestic violence is *sui generis* — a classification of belligerency that arguably falls above the concept of riot (being casual, actual and simple) and below that of rebellion (being war, or non-international armed conflict).

⁶⁰ Michael Head, *Calling Out the Troops: The Australian Military and Civil Unrest* (Federation Press, 2009) 16. See also Michael Head, *Domestic Military Powers, Law and Human Rights: Calling Out the Armed Forces* (Routledge, 2020).

⁶¹ Addendum to the Explanatory Memorandum, *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth)* 2 (emphasis added).

⁶² See James Mortensen, ‘A History of “Domestic Violence” in Australian Politics’ (2023) 20(2) *History Australia* 254.

⁶³ WF Finlason, *A Review of the Authorities as to the Repression of Riot or Rebellion: With Special Reference to Criminal or Civil Liability* (Stevens and Richardson, 1868) 47–8 (emphasis altered).

(b) Contextual Meaning of Domestic Violence

The next step, according to Jonathan Crowe and Peta Stephenson, is to identify the broader contextual factors that underpin the meaning.⁶⁴ Noting the term comes from the *United States Constitution*, it is therefore relevant to explore both the US and Australian contextual meanings of the term.

Within the US, the history of the provision starts in 1786 when a group of British traders refused credit to Bostonian merchants; these merchants in turn demanded cash payments from subsistence farmers.⁶⁵ These farmers, under Revolutionary War veteran, Daniel Shays, led armed mobs through Massachusetts closing down public services.⁶⁶ Governor James Bowdoin dispatched privately funded militia, with federal troops being requested concurrently.⁶⁷ This call, importantly, largely went ignored.⁶⁸

By February 1787, Shays' Rebellion was over but with Great Britain looking to reinstate the monarchy, concerns lingered over whether or not the new US confederation could survive internal discord.⁶⁹ This could be either from internal dissidents conducting a rebellion against the respective state, or one state invading another — a fear at the forefront of the Constitutional Convention debates that opened three months later.⁷⁰ It resulted in two additions to the *United States Constitution* — a Preamble which promised to 'insure domestic Tranquillity' and a guarantee to do so against domestic violence.⁷¹

The Australian experience was somewhat similar. Section 119 of the *Australian Constitution* was first introduced into the constitutional debates by Samuel Griffith, on or around March 1891,⁷² in light of the Shearers' Strike. Here, unlike the US experience, the Queensland Government was successful in crushing the industrial action. But the provision must necessarily be read in the context of other Australian constitutional provisions, and the wider contextual history of the *Australian Constitution* itself.

⁶⁴ Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36(2) *Sydney Law Review* 205, 229.

⁶⁵ Bybee (n 58) 19.

⁶⁶ See David Szatmary, 'Shays' Rebellion in Springfield' in Martin Kaufman (ed), *Shays' Rebellion: Selected Essays* (Westfield State College, 1987) 1.

⁶⁷ Ibid 15–19.

⁶⁸ Ibid.

⁶⁹ See generally Robert A Feer, 'Shays's Rebellion and the Constitution: A Study in Causation' (1969) 42(3) *New England Quarterly* 388.

⁷⁰ Ibid 404 n 32 (listing six state conventions who referenced the rebellion).

⁷¹ *United States Constitution* art IV § 4.

⁷² JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 61–2.

In preparation for Federation, which would result in the withdrawal of Imperial troops from the colonies and place the onus of defence on the new Commonwealth of Australia,⁷³ the barracks and fortifications of Imperial troops were handed to the local colonial governments, and Imperial military advisers were sent to ensure the requisite state of efficiency could be reached. Accordingly, Major-General Edwards was sent to Australia in 1889 to inspect and report on the defence of the colonies. His recommendations were made for a uniform system of military organisation, the establishment of '[a] federal military college for the education of the officers' and '[a] uniform gauge for the railways'.⁷⁴ These recommendations heavily influenced the drafting of the *Australian Constitution*, and indeed were one of the major drives for Federation generally.⁷⁵

Accordingly, unlike the US experience, Australian states did not have their own militia per se to rely upon after Federation.⁷⁶ This may explain why Griffith was so 'concerned to seek a guarantee from the Commonwealth that military assistance would be provided to a state in cases of *uncontrollable* domestic violence'.⁷⁷ It may further explain why the Australian provision does not require the request to be from the legislature, but rather from the state executive.

Contextually, then, domestic violence is a term that carries with it the implications of, and against the backdrop of, federalism. Similar to the federal construct of the US, a mere passive policing role of the Commonwealth is not intended by s 119, but to create a framework to respond to a 'state ... in which life and property were absolutely unsafe'.⁷⁸ However, unlike state guards within the federalist United States system, Australian states do not have an inherent military capacity. They are reliant upon the Commonwealth. The provision should therefore be read widely.

⁷³ Alpheus Todd, *Parliamentary Government in the British Colonies* (Little, Brown, and Co, 1st ed, 1880) 295.

⁷⁴ Alpheus Todd, *Parliamentary Government in the British Colonies* (Lawbook Exchange, 2nd ed, 2006) 400.

⁷⁵ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books Sydney, 1976) 562–3.

⁷⁶ The *Australian Constitution* s 114 forbids states from raising naval or military forces without the consent of the Commonwealth. In theory, the states could develop forces for their own protection. No Commonwealth consent is required for paramilitary forces. In 1912, Prime Minister, Andrew Fisher, refused the request of the Queensland State Government under s 119 of the *Australian Constitution* for federal assistance to address the Brisbane General Strike on grounds it was a matter to be addressed by the state. This led to an interesting discussion of the role of the Commonwealth: see Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 1912, 84–5 (Alfred Deakin).

⁷⁷ Stephenson (n 27) 294 (emphasis added).

⁷⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1912, 153 (William Hughes, Attorney-General).

(c) Dynamic Meaning of Domestic Violence

The final step to understanding the constitutional term is to ask for its dynamic meaning, reflecting that constitutional terms are not locked in a ‘display cabinet in a constitutional museum’.⁷⁹ This involves looking at the social facts underpinning a term, and trying to minimise the cognitive bias within a single author’s interpretative horizon.⁸⁰

The notion of domestic violence clearly envisaged, at the time, non-peaceful and destructive actions by individuals, in person, against the government or organs thereof. Its dynamic meaning, however, can and should be extended to situations closer to the tearing of the social fabric. It may be open that a dynamic interpretation of domestic violence could include failure to comply with public health directions in a global pandemic, which threatened to tear a state apart and overwhelm public health services. But as the Explanatory Memorandum to the *2018 Defence Amendment* makes clear, physical force is key to current interpretations.

What is important, however, is that in making a determination to call out the ADF, the authorising Ministers must consider not just that domestic violence is occurring, but the nature of the domestic violence. This is a relevant mandatory consideration. This ensures that it is not just every instance of domestic violence that the ADF is called out to respond to. In making the determination, authorising Ministers may look to

matters such as *the type of violence, the types of weapons used, the number of perpetrators involved, as well as the scale of domestic violence* (or anticipated domestic violence) where such information is available. For example, the ADF could be called out in response to unique types of violence, such as chemical, biological, radiological or nuclear attack ... The ADF could also be called out where the type of violence is not unique — for example an active shooter — but *where the violence is so widespread, or there are so many shooters involved*, that law enforcement resources are in danger of being exhausted.⁸¹

The ADF may also be called out without a state or territory request.⁸² While on its face, this seems to run contrary to the constitutional provision of s 119, it has nevertheless been argued to fall within s 61 of the *Australian Constitution*.⁸³

⁷⁹ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ).

⁸⁰ Martin Heidegger, *Being and Time*, tr John Macquarrie and Edward Robinson (Blackwell, 1962) 194–5.

⁸¹ White and Butler (n 3) 67, quoting Explanatory Memorandum 2018 (n 24) 6 (emphasis altered).

⁸² *Defence Act* (n 8) s 38(1).

⁸³ Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (Australian National University Press, 2017) 189. See also White, *Keeping the Peace of the Realm* (n 5) 53–80.

Again, pt IIIAAA requires that the authorising Ministers must be satisfied that the ADF should be called out.

3 Overall Importance With Respect to Jurisdiction

This is all to say that the decision to call out the ADF, as per the fictional Operation Green and Gold Assist, is not one made lightly and reflects a paramount need for military assistance to the states, or for the Commonwealth to protect itself.⁸⁴

Operation Green and Gold Assist would clearly be a military operation and the alleged criminal conduct would not be done by the Corporal in a personal capacity but done in the course of duty as a defence member. Per *Private R*, there would appear no constitutional bar, then, to allowing prosecution under a military jurisdiction. Indeed, pt IIIAAA seems to imply Parliament intended to allow for this.⁸⁵

Deploying domestically, under established statutory processes, also has implications for prosecutions which are raised in more depth below. Primarily, the statute offers the ability for ADF members to train both in processes and in rules of engagement ('ROE'). ADF members are obliged to abide by the ROE that they are issued. ROE are best summarised as

directions to operational and tactical level commanders that delineate the circumstances and limitations within which armed force may be applied by the ADF to achieve military objectives. ROE are issued both in peace and armed conflict. ROE will be issued by the Chief of Defence Force ... The factors that influence the formulation of ROE are diplomatic, political, operational, and international and domestic law. Any ROE issued will include legal consideration of these factors.⁸⁶

The phrase ROE came to the fore due to its use by the US during the Korean War.⁸⁷ ROE have expanded to cover all forms of armed conflict.⁸⁸ For the purposes of pt IIIAAA, ROE constitute a lawful general order and must be adhered to.⁸⁹ Any non-compliance with such orders is thus 'not just an individual breach of discipline, but jeopardises the implementation of national policy as reflected in the rules of

⁸⁴ See generally White, *Keeping the Peace of the Realm* (n 5).

⁸⁵ The difficulty of parliamentary intention is noted: see White, *Keeping the Peace of the Realm* (n 5) 83–5.

⁸⁶ Royal Australian Air Force, *Operations Law for RAAF Commanders* (Australian Air Publication 1003, May 2004) 45 [5.16].

⁸⁷ Jeffrey F Addicott, 'The Strange Case of Lieutenant Waddell: How Overly Restrictive Rules of Engagement Adversely Impact the American War Fighter and Undermine Military Victory' (2013) 45(1) *St Mary's Law Journal* 1, 14–15.

⁸⁸ Jon Moran, 'Time to Move Out of the Shadows? Special Operations Forces and Accountability in Counter-Terrorism and Counter-Insurgency Operations' (2016) 39(3) *University of New South Wales Law Journal* 1239, 1251.

⁸⁹ See *DFDA* (n 1) ss 15F, 27, 29.

engagement'.⁹⁰ This policy consequence, as well as wider constitutional context, are all relevant factors in deciding the jurisdiction that should apply to incidents such as that in the hypothetical scenario.

4 *Criminal Jurisdiction*

When it was enacted, pt IIIAAA had no provision addressing the criminal jurisdiction applicable to ADF members involved in a call out.⁹¹ As the legislation was silent on the issue, this meant that ADF members were subject to the ordinary criminal law of the jurisdiction that they were operating in.⁹² If an incident crossed over multiple jurisdictions, then these members would have been subject to multiple criminal jurisdictions. This risked creating different types of criminal liability for ADF members engaged in the same conduct when operating at the behest of the Commonwealth,⁹³ with no guarantee that the operational context of the situation would be considered in any decision to prosecute an ADF member.

The situation was remedied in 2006. This was achieved by an amendment to pt IIIAAA: the 'applicable criminal law' provision.⁹⁴ The applicable criminal law provision alters the jurisdictional position that would otherwise ordinarily apply to ADF members operating under a call out. It achieves this by doing two things. First, the provision applies the substantive criminal law applicable in the Jervis Bay Territory to the conduct of ADF members involved in a call out.⁹⁵ This includes offences, concepts of criminal responsibility and defences.⁹⁶ Secondly, the criminal law of the other states and territories is excluded from application.⁹⁷ In practical terms, this means the criminal law that applies to ADF members involved in a call out, regardless of where the alleged offending occurs, is: (1) the *Commonwealth Criminal Code*; (2) the *Crimes Act 1900* (ACT); and (3) the *Criminal Code 2002* (ACT). Finally, it gives responsibility for the prosecution of criminal offences to the CDDP.⁹⁸

Before considering the operation of the applicable criminal law provision, it is appropriate to briefly mention the validity of the provision. By excluding the criminal

⁹⁰ Justice Paul Brereton, 'The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law' (2011) 85(2) *Australian Law Journal* 91, 95.

⁹¹ *DLA (Aid to Civilian Authorities) Act 2000* (n 37).

⁹² EM, *DLA (Aid to Civilian Authorities) Bill 2005* (n 7) 24 [162].

⁹³ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (Report, February 2006) 21 ('*Senate DLA 2005 Report*').

⁹⁴ *Defence Act* (n 8) s 51Y. When it was initially enacted, this provision was s 51WA: *DLA (Aid to Civilian Authorities) Act 2006* (n 39) sch 6 item 13.

⁹⁵ *Defence Act* (n 8) s 51Y(1)(a).

⁹⁶ *Ibid* s 31 (definition of 'substantive criminal law').

⁹⁷ *Ibid* s 51Y(1)(b).

⁹⁸ *Defence Act* (n 8) s 51Y(3).

law of the states and territories, there is, perhaps, a risk that a court would find the provision beyond the legislative power of the Commonwealth to enact. The position is different to what arose when the constitutionality of the *DFDA* was first challenged.⁹⁹ When it was enacted, the *DFDA* contained double jeopardy provisions that prevented a civil court from trying a person for a civil offence when that person had been convicted or acquitted of a service offence that was substantially the same.¹⁰⁰ The provision was held to be invalid as it determined to be beyond the Commonwealth's legislative power to oust the jurisdiction of state courts.¹⁰¹ As Brennan and Toohey JJ found:

A defence member is and must remain liable to the ordinary criminal law; he does not acquire immunity merely because he has been dealt with by a tribunal other than the ordinary courts.¹⁰²

The applicable criminal law provision does not completely oust the ordinary criminal law. As is analysed below, it merely restricts the exercise of criminal jurisdiction to the Commonwealth at the expense of the states and territories. It is beyond the scope of this article to provide a definitive answer to this issue, and the authors have proceeded on the basis that the applicable criminal law provision in pt IIIAAA is valid. Furthermore, the question is unlikely to be answered unless a state or territory, or indeed the Commonwealth, challenges the exercise of criminal jurisdiction over the conduct of a defence member arising out of a pt IIIAAA operation.

Tracing the history of the applicable criminal law provision offers insight into its purpose and how it is to operate in practice. When enacted, pt IIIAAA required an independent statutory review be conducted into its operation after three years.¹⁰³ Even after only three years, pt IIIAAA was considered too limited in application.¹⁰⁴ This was particularly evident when considered in the context of terrorist attacks that had occurred around the world since its enactment in 2000.¹⁰⁵ The *Statutory Review of Part IIIAAA* was completed in January 2004 and identified a number of major

⁹⁹ See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 ('*Re Tracey*').

¹⁰⁰ *DFDA* (n 1) ss 190(3), (5), (6).

¹⁰¹ *Re Tracey* (n 99) 547 (Mason CJ, Wilson and Dawson JJ), 574–8 (Brennan and Toohey JJ).

¹⁰² *Ibid* 576.

¹⁰³ *Defence Act* (n 8) s 51XA(3), as at 12 September 2000. There were, however, some events that would have altered the timeframe for an independent review. The independent review would have been required sooner than three years had a call out order been made: at s 51XA(1). Additionally, no review was required if a parliamentary committee had already presented a report on pt IIIAAA: at s 51XA(2).

¹⁰⁴ Anthony Blunn, John Baker and John Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)* (Report, Department of Defence (Cth), 12 January 2004) 8 ('*Statutory Review of Part IIIAAA*').

¹⁰⁵ *DLA (Aid to Civilian Authorities) Act 2000* (n 37) was enacted on 12 September 2000.

flaws in the legislation, particularly in relation to its too narrow scope, complexity, and likely inability to deal with a complex and evolving terrorist incident.¹⁰⁶

A significant concern highlighted by the reviewers was the uncertainty of the legal regime that would be applicable to the prosecution of an ADF member involved in a call out. The review identified that for any prosecution of a called out ADF member, pt IIIAAA lacked ‘a recognition of the military context in which the ADF operates in assessing the reasonableness of actions’.¹⁰⁷ The review acknowledged that it was possible a court or prosecuting authority would consider the provisions of pt IIIAAA as a whole, observing that

[w]hilst these provisions do not provide much, if any, advance on the relevant Commonwealth and State law which would be applied to the use of force, they do recognise that the circumstances faced by members may require the use of force, including lethal force. In so doing they perhaps create a climate in which a court would have regard to the position in which the member exercising force is placed, given that in calling out the defence force, civil authority had clearly decided military force was necessary and anticipated the use of force, including, in assault situations, lethal force.¹⁰⁸

However, the review ultimately determined that there was an inappropriate amount of legal uncertainty in pt IIIAAA for ADF members. The report recommended that ‘action be initiated to provide appropriate and effective recognition to the military context in which members of the ADF engaged in aid to civil authority must act’.¹⁰⁹ The solution was to be legislative amendment.

In 2005, the Government introduced new legislation to address some of the flaws identified in pt IIIAAA by the independent review.¹¹⁰ One of the amendments was the ‘applicable criminal law provision’. The intent of the applicable criminal law provision was to provide a consistent approach to determining the criminal responsibility of ADF members operating under a call out. This was to be achieved by modifying the criminal law jurisdiction that would apply to ADF members subject to a call out,¹¹¹ as well as specifying the responsible prosecuting authority.¹¹² The jurisdiction chosen to achieve consistency was the substantive criminal law of the Jervis Bay Territory and the prosecuting authority (for criminal matters) of the

¹⁰⁶ Blunn, Baker and Johnson, *Statutory Review of Part IIIAAA* (n 104) 8–11.

¹⁰⁷ *Ibid* 12.

¹⁰⁸ *Ibid* 11.

¹⁰⁹ *Ibid* 13.

¹¹⁰ Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) (‘2005 Bill’).

¹¹¹ *Ibid* sch 6 item 13.

¹¹² Revised Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth) 25 (‘REM, DLA (Aid to Civilian Authorities) Bill 2006’).

CDPP. The applicable criminal law provision, apart from being renumbered as part of the *2018 Defence Amendment*,¹¹³ has remained unchanged since 2006.

The Revised Explanatory Memorandum for the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 explained that the primary purpose of the applicable criminal law provision was as follows:

A nationally consistent approach to considering the prosecution of ADF members is more appropriate in circumstances where the ADF will be employed domestically by order of the Commonwealth Government. It is also possible that domestic security operations will be cross-jurisdictional. This would emphasise the importance of a consistent approach to any consideration to prosecute ADF personnel following such an operation.¹¹⁴

The means selected to achieve this was to have the CDPP provided with exclusive authority to prosecute criminal offences committed by ADF members during a call out. The CDPP was chosen because

[i]n accordance with normal prosecutorial discretion, the CDPP can be expected to consider the context of a domestic security operation and the military chain of command in deciding whether to prosecute.¹¹⁵

The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) ('2005 Bill') was examined by the Senate's Legal and Constitutional Legislation Committee ('Senate Committee'). In its submission to the Senate Committee, the Department of Defence explained in relation to the applicable criminal law provision that

[a]s the ADF is a Commonwealth entity operating under Commonwealth law (in this case the Defence Act) it is appropriate that any prosecutions arising from a domestic security operation should also be considered by the Commonwealth Director of Public Prosecutions (CDPP). The Bill ensures that the CDPP will assume responsibility for any prosecution of ADF personnel following allegations of unlawful activity when operating under Part IIIAAA. The Bill will also ensure that a uniform set of criminal laws can be applied and the ADF is able to prepare and train for potential domestic security operations under a consistent legal framework. The laws of the Jervis Bay Territory will apply to ADF personnel in the event of a prosecution resulting from a domestic security operation.¹¹⁶

¹¹³ *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) sch 1 item 2.

¹¹⁴ REM, DLA (Aid to Civilian Authorities) Bill 2006 (n 112) 25 [165].

¹¹⁵ Ibid 25 [166].

¹¹⁶ Department of Defence, Submission No 6 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (23 January 2006) 9 ('Defence Submission on 2005 Bill').

The Senate Committee's consideration of the applicable criminal law provision was brief, but concluded that

it is important to provide a consistent framework for dealing with offences committed by the military during a call-out. This cannot be achieved if the behaviour of troops is subject to the variable laws of the states and territories. It is also notable that should the state or territory wish to do so, there is nothing in the legislation which prevents state or territory police investigating an offence purported to be done by defence force members when operating under Part IIIAAA. The Committee also considers that as a federal entity, ADF prosecutions rightly should be conducted by the Commonwealth DPP, an independent statutory appointee.¹¹⁷

An important aspect of the military context of a pt IIIAAA operation is compliance with orders. In the context of a pt IIIAAA operation, there may be situations whereby a defence member is ordered to use force in circumstances where the defence member may not be aware of the reasons why such force is authorised in the circumstances. In such cases, and when such orders are not manifestly and obviously unlawful, the defence member is placing trust in their superiors that the order is lawful. It is for this reason that both pt IIIAAA and the *DFDA* provide limited defences for superior orders.¹¹⁸ However, the scope of defences available to a called out defence member is different depending upon which jurisdiction the member is tried under.

For the specific pt IIIAAA superior orders defence to apply, the act must have been in the following circumstances:¹¹⁹

- done under an order of a superior, which the defence member has a legal obligation to obey;
- pursuant to an order that was not manifestly unlawful, where the member had no reason to believe that there had been a material change in the circumstances since the order was issued;
- the member had no reason to believe the order was issued under a mistake of a material fact; and
- the action that the member took to comply with the order was reasonable and necessary.

Under the *DFDA*, an additional limited defence of superior orders exists.¹²⁰ Section 14(b) of the *DFDA* provides that a person cannot be convicted of a service offence that was, relevantly, in obedience to 'an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful'.

¹¹⁷ *Senate DLA 2005 Report* (n 93) 21.

¹¹⁸ *Defence Act* (n 8) s 51Z.

¹¹⁹ *Ibid* s 51Z(2).

¹²⁰ *DFDA* (n 1) s 14(b).

The flip side of the situation is the potential consequences for an ADF member not complying with a lawful direction from a superior. ADF members are required to comply with lawful orders issued to them. They risk prosecution if they fail to follow such orders,¹²¹ but also risk exposing themselves to prosecution if they do comply with a clearly unlawful order. This is not a new conundrum for members of the military in performing their duties and has been a longstanding concern in cases involving military aid to the civil power.¹²²

Prosecutorial understanding of the military context of operating under pt IIIAAA may cut both ways for defence members. On the one hand, defence members who have used powers under pt IIIAAA for what they thought were lawful reasons should have their conduct assessed by a prosecutorial authority that understands the context surrounding the alleged offending. Likewise, such understanding will allow a prosecutorial authority to identify when purported reliance on powers under pt IIIAAA was inappropriate and not to be countenanced, notwithstanding a claim to the contrary.

It is clear from the independent statutory review, the 2005 Bill and its various Explanatory Memoranda that there was concern about how state and territory prosecutorial authorities might exercise their discretion following a pt IIIAAA operation. Of particular concern was that these authorities might not consider the wider military context of the pt IIIAAA operation; because they are either unable or unwilling to do so. The CDPP was seen, in terms of criminal jurisdiction, as the panacea to this problem.

The CDPP prosecutes offences against the laws of the Commonwealth.¹²³ Under the *Director of Public Prosecutions Act 1983* (Cth) ('CDPP Act'), the CDPP has functions¹²⁴ and powers.¹²⁵ Part IIIAAA of the *Defence Act* specifically refers to the 'functions' of the CDPP.¹²⁶ The functions of the CDPP include, relevantly: (1) instituting and carrying on prosecution of indictable offences against the laws of the Commonwealth;¹²⁷ (2) instituting and carrying on prosecution of summary offences against the laws of the Commonwealth,¹²⁸ and (3) other functions as conferred on the CDPP by another law of the Commonwealth and such functions as are

¹²¹ Ibid ss 27–9.

¹²² Charles J Napier, *Remarks on Military Law and the Punishment of Flogging* (T and W Boone, 1837) 23.

¹²³ *Director of Public Prosecutions Act 1983* (Cth) ('CDPP Act'); 'About Us', *Commonwealth Director of Public Prosecutions* (Web Page) <<https://www.cdpp.gov.au/about-us>>.

¹²⁴ *CDPP Act* (n 123) s 6.

¹²⁵ Ibid s 9.

¹²⁶ *Defence Act* (n 8) s 51Y(3).

¹²⁷ *CDPP Act* (n 123) ss 6(1)(a)–(c).

¹²⁸ Ibid ss 6(1)(d)–(e).

prescribed.¹²⁹ In order to carry out their functions, the CDPP has the power to prosecute offences against the laws of the Commonwealth on indictment.¹³⁰

The role of the CDPP is not mentioned in the *Defence Act*'s simplified outline for div 8, containing the applicable criminal law provision.¹³¹ However, the Revised Explanatory Memorandum to the 2005 Bill explains that

the functions of the Director of Public Prosecutions under section 6 of the *Director of Public Prosecutions Act 1983* in relation to the law of the Jervis Bay Territory apply in relation to any prosecution of a Defence Force member arising as a result of a criminal act committed while operating under Part IIIAAA.¹³²

To understand how div 8 is to operate, it is necessary to consider its wording in its entirety. Section 51Y of the *Defence Act* provides as follows:

51Y Applicable criminal law

Application of criminal law of the Jervis Bay Territory

- (1) In relation to a criminal act of a member of the Defence Force that is done, or purported to be done, under this Part:
 - (a) the substantive criminal law of the Jervis Bay Territory, as in force from time to time, applies; and
 - (b) the substantive criminal law of the States and the other Territories, as in force from time to time, does not apply.
- (2) To avoid doubt, Chapter 2 of the Criminal Code does not apply to an act done, or purported to be done, under this Part that is a criminal act (except to the extent that it constitutes an offence against the law of the Commonwealth).

Functions of the Director of Public Prosecutions

- (3) To avoid doubt, the functions of the Director of Public Prosecutions under section 6 of the *Director of Public Prosecutions Act 1983* (Cth) in relation to the law of the Jervis Bay Territory as applied by subsection (1) of this section are exclusive of the corresponding functions of any officer of a State or Territory, in relation to the law of the Jervis Bay Territory as so applied, under a law corresponding to that Act.

Note: It is not intended that this section or Act restrict or limit the power of State or Territory police force to investigate any criminal acts done, or purported to be done, by Defence Force members when operating under this Part.

¹²⁹ Ibid s 6(2).

¹³⁰ Ibid s 9(1).

¹³¹ *Defence Act* (n 8) s 51X.

¹³² REM, DLA (Aid to Civilian Authorities) Bill 2006 (n 112) 26 [171].

Further, a criminal act is defined as ‘an act or omission that would, if done or omitted to be done in the Jervis Bay Territory, contravene the substantive criminal law of the Jervis Bay Territory’.¹³³

It is important to recognise that there are a number of things that the applicable criminal law provision does not do. First, it does not prevent the police forces of the states and territories from investigating offences allegedly committed by ADF members during a call out.¹³⁴ This makes sense in the context of the exercise of coronial jurisdiction, which would not be affected by the applicable criminal law provision, as well as allowing for an investigation for the purposes of the CDPP exercising their prosecutorial discretion. Second, while the provision ousts the criminal jurisdiction of the states and territories, it does not exclude action taken under the military justice system. This would include investigation and trial under the *DFDA* as well as administrative inquiries under the ADF’s military administrative law system.¹³⁵ Finally, the provision does not alter how concepts of criminal responsibility apply to an applied offence. This means that Australian Capital Territory (‘ACT’) offences that utilise common law concepts of criminal responsibility — which form the bulk of ACT criminal law offences¹³⁶ — are not forced to apply the model criminal code concepts of criminal responsibility found in ch 2 of the *Commonwealth Criminal Code*.

Notwithstanding its stated intent, pt IIIAAA’s applicable criminal law provision does not make it immediately clear how the provision is to operate. Part IIIAAA creates only two substantive offences: one applicable to defence members when they do not, when exercising certain powers, wear a uniform or identification,¹³⁷ and another that makes it an offence for a person to fail to comply with a direction given under divs 3, 4 or 5.¹³⁸ By contrast, the wording of the applicable criminal law provision does not, in and of itself, create an offence.

The first difficulty with the provision is that it is not clear what type of offence is committed when an ADF member’s conduct amounts to offence contrary to ACT criminal law. It is not apparent whether that conduct is an offence against the *Defence Act*, which would make the conduct a Commonwealth offence, or the substantive criminal law of the Jervis Bay Territory, which could be a Commonwealth offence or an ACT offence. This is important when determining: (1) whether an offence is indictable; (2) the law in relation to sentencing; and (3) the powers and functions of the CDPP. Part IIIAAA is silent on these issues.

¹³³ *Defence Act* (n 8) s 31 (definition of ‘criminal act’).

¹³⁴ *Ibid* s 51Y; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 43 of 2018–19, 13 November 2018) 36 (‘Digest No 43’).

¹³⁵ *Defence (Inquiry) Regulations 2018* (Cth); *Inspector-General of the Australian Defence Force Regulation 2016* (Cth).

¹³⁶ *Crimes Act 1900* (ACT) (‘ACT Crimes Act’). Some ACT offences do apply the model criminal code concepts of criminal responsibility: see s 7.

¹³⁷ *Defence Act* (n 8) s 50.

¹³⁸ *Ibid* s 51R.

Other Commonwealth legislation provides some assistance in interpreting the pt IIIAAA criminal law provision. Applying the substantive criminal law of the Jervis Bay Territory in pt IIIAAA is not a novel concept. A number of Commonwealth statutes adopt the substantive criminal law of the Jervis Bay Territory to deal with unusual jurisdictional situations of concern to the Commonwealth. Apart from pt IIIAAA, these jurisdictions include offences committed: on Heard or McDonald Islands;¹³⁹ in the Australian Antarctic Territory;¹⁴⁰ by certain Commonwealth officials and associated persons overseas;¹⁴¹ on aircraft;¹⁴² at sea;¹⁴³ and by defence members, defence civilians and prisoners of war.¹⁴⁴ Incorporating the substantive criminal law of the Jervis Bay Territory by reference provides a complete criminal code for these jurisdictions without the need for the Commonwealth Parliament to legislate for one and, perhaps more importantly, keep it updated. Another advantage is that the Jervis Bay Territory is a jurisdiction where the Commonwealth can control and modify what law applies through ordinances and regulations.¹⁴⁵ This means that the Commonwealth can utilise a consistent approach to applying a criminal code to these unusual jurisdictions.¹⁴⁶

A comparative analysis of pt IIIAAA and these other Commonwealth statutes provides some insight as to how pt IIIAAA's applicable criminal law provision operates. However, there is no uniform approach to incorporating Jervis Bay Territory law.

The *Heard Island and McDonald Islands Act 1953* (Cth) and the *Australian Antarctic Territory Act 1954* (Cth) use the method of applying the law to specific locations. These *Acts* provide that the substantive criminal law of the Jervis Bay Territory is 'in force' in their respective territories as if they formed part of the Jervis Bay Territory.¹⁴⁷ In addition, the legislation provides that ACT courts have jurisdiction over these territories.¹⁴⁸ Offences committed in these external territories are tried by ACT courts.¹⁴⁹ Both these *Acts'* criminal law provision do not themselves create any

¹³⁹ *Heard Island and McDonald Islands Act 1953* (Cth) ('*Heard and McDonald Islands Act*').

¹⁴⁰ *Australian Antarctic Territory Act 1954* (Cth) ('*Antarctic Territory Act*').

¹⁴¹ *Crimes (Overseas) Act 1964* (Cth) ('*Crimes (Overseas) Act*').

¹⁴² *Crimes (Aviation) Act 1991* (Cth) ('*Crimes (Aviation) Act*').

¹⁴³ *Crimes at Sea Act 2000* (Cth) ('*Crimes at Sea Act*').

¹⁴⁴ *DFDA* (n 1) s 61.

¹⁴⁵ *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4C.

¹⁴⁶ Explanatory Statement, *Crimes (Overseas) (Declared Foreign Countries) Amendment Regulations 2009* (No 1) 1.

¹⁴⁷ *Heard and McDonald Islands Act* (n 139) s 5(2); *Antarctic Territory Act* (n 140) s 6(2).

¹⁴⁸ *Heard and McDonald Islands Act* (n 139) s 9; *Antarctic Territory Act* (n 140) s 10; *Helicopter Resources Pty Ltd v Commonwealth* (2019) 264 FCR 174, 177 [3].

¹⁴⁹ An example is prosecution under s 11 of the *Work Health and Safety Act 2011* (Cth) ('*WHS Act*'), which has extra territorial application. See, eg, *May v Commonwealth* [No 2] [2019] ACTMC 31 ('*May*').

offence, instead specifying that the criminal laws are ‘in force in the Territory as if the Territory formed part of the Jervis Bay Territory’.¹⁵⁰ The result is that criminal conduct committed in Heard Island, McDonald Island or the Australian Antarctic Territory would likely be treated as offences against the respective provision of the Jervis Bay Territory criminal law being invoked, rather than a Commonwealth offence committed under the ‘parent’ *Act*. The criminal law regime created for these areas is thus different to what has been established for pt IIIAAA.

The *Crimes at Sea Act 2000* (Cth) (*‘Crimes at Sea Act’*) utilises two methods of applying the criminal law of the Jervis Bay Territory to locations and classes of persons. First, the legislation creates a regime to confer jurisdiction on the Commonwealth for offences committed at sea outside the ‘adjacent area’.¹⁵¹ The result is that outside the adjacent area the substantive criminal law of the Jervis Bay Territory ‘applies’ to Australian ships, activities controlled from an Australian ship, abandoned Australian ships¹⁵² and to foreign ships if the first country at which the ship or person calls is Australia.¹⁵³ Second, it also ‘applies’ outside the adjacent area to Australians on foreign ships, Australians in the course of activities controlled from a foreign ship, or Australians who have abandoned a foreign ship.¹⁵⁴ The consent of the Attorney-General must be obtained before a charge can proceed under the *Crimes at Sea Act*.¹⁵⁵ The wording of the consent provision usefully gives a clue as to how the offence provision is to work. It relevantly states that ‘[a] charge of an offence that arises under this section’ cannot proceed without the consent of the Attorney-General.¹⁵⁶ The logical conclusion to draw is that a criminal act that would fall under the jurisdiction of the *Crimes at Sea Act* is an offence under that *Act*, rather than an offence under the relevant law of the Jervis Bay Territory. The *Crimes at Sea Act* is silent on the issue of how to determine whether an offence is indictable or not.

There have been a few reported cases where the courts have considered how the *Crimes at Sea Act* criminal law provision operates.¹⁵⁷ However, these have been torts cases and the judgments have not been concerned with the substantive issues in applying the *Act’s* criminal law provision. Usefully, in the matter of *Rawlings v*

¹⁵⁰ *Heard and McDonald Islands Act* (n 139) s 5(2); *Antarctic Territory Act* (n 140) s 6(2).

¹⁵¹ The ‘adjacent area’ is the defined area applicable to each state and the Northern Territory: *Crimes at Sea Act* (n 143) sch 1 cl 14.

¹⁵² *Ibid* s 6(1).

¹⁵³ *Ibid* s 6(3).

¹⁵⁴ *Ibid* s 6(2).

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid* s 6(4).

¹⁵⁷ *Blunden v Commonwealth* (2003) 218 CLR 330; *Rawlings v Royal Caribbean Cruises Ltd* [2020] NSWDC 822, [240] (*‘Rawlings’*); *Royal Caribbean Cruises Ltd v Rawlings* (2022) 107 NSWLR 51 (*‘Rawlings Appeal’*).

*Royal Caribbean Cruises Ltd ('Rawlings')*¹⁵⁸ application of the *Crimes at Sea Act* criminal law provision was a small part of the case, and the facts reveal (in part) how it operated in practical terms.

Rawlings concerned a suit for false imprisonment. The plaintiff (an Australian) was accused of sexually assaulting another passenger on board a cruise ship when it was in international waters. He had been detained by the ship's security officers following the allegation.¹⁵⁹ The ship was registered in the Bahamas and its first port of call after the allegation was raised was New Caledonia. There, the police undertook some investigation into the allegation. In the course of providing consular support to the plaintiff, the Australian consular officer was advised by the Attorney-General's Department that the alleged offending likely fell within the scope of the *Crimes at Sea Act*¹⁶⁰ — the legal basis of the provision applying was the plaintiff being an Australian citizen onboard a foreign ship in the 'adjacent area'.¹⁶¹ However, discussions between the Australian Federal Police ('AFP') and New South Wales ('NSW') Police resulted in it being agreed that NSW Police would take carriage of the investigation when the ship arrived in Sydney.

When the ship docked in Sydney, NSW Police commenced the investigation into the alleged sexual assault. The trial judge considered that this was odd, given the NSW Police's lack of jurisdiction:

I accept that the NSW police were contacted about coming on board the ship when it arrived in Sydney. Quite why they were asked to be involved, bearing in mind the known jurisdictional limits on their capacity to take any action was not explained.¹⁶²

At the conclusion of their investigation, NSW Police referred the brief of evidence to the AFP. NSW Police were of the view that there was insufficient evidence to support a charge against the plaintiff and they also acknowledged that NSW did not have jurisdiction over the matter.¹⁶³ After reviewing the evidence, the AFP decided not to prefer charges against the plaintiff.¹⁶⁴ Ultimately, proceedings under the *Crimes at Sea Act* were never brought against the plaintiff.

Rawlings highlights some uncertainty as to how an investigation by civilian police would occur in the context of a pt IIIAAA operation. The stated intent of the

¹⁵⁸ *Rawlings* (n 157) involved an initial trial in the New South Wales District Court, which found for the plaintiff, and an appeal decision in the New South Wales Court of Appeal, which reversed the trial judge's finding in favour of the plaintiff: *Rawlings Appeal* (n 157).

¹⁵⁹ *Rawlings Appeal* (n 157) 60 [38].

¹⁶⁰ *Rawlings* (n 157) [240].

¹⁶¹ *Rawlings Appeal* (n 157) 61 [48]; *Crimes at Sea Act* (n 143) s 6(2)(a).

¹⁶² *Rawlings* (n 157) [411].

¹⁶³ *Ibid* [339].

¹⁶⁴ *Ibid* [340].

applicable criminal law provision in pt IIIAAA is that state and territory police would not be precluded from investigating an ADF member's alleged criminal conduct, as reflected in the note to the section.¹⁶⁵ The *Crimes at Sea Act* does not have an equivalent note stipulating the role of state or territory police. That NSW Police conducted the investigation in *Rawlings*, notwithstanding an inability to prosecute the offence, would tend to support the position that state and territory police can still investigate these Commonwealth crimes. Given the observation, albeit in obiter, by Judge Hatzistergos at first instance in *Rawlings*,¹⁶⁶ this position may not be settled and the issue was not raised or addressed in the subsequent appeal.¹⁶⁷ However, notwithstanding the note to the applicable criminal law provision in pt IIIAAA, it may be that in some situations, it is beyond the power of state or territory police forces to investigate the alleged offending or they may otherwise be constrained in investigating an offence outside of their jurisdiction. It is beyond the scope of this article to consider such issues in detail.

The *Crimes (Aviation) Act 1991* (Cth) ('*Crimes (Aviation) Act*') utilises the location method to apply the criminal law of the Jervis Bay Territory.¹⁶⁸ It does this by criminalising specified behaviour in relation to certain aircraft. However, unlike most of the other Commonwealth statutes discussed above, the *Crimes (Aviation) Act* creates offences incorporating specified laws applicable in the Jervis Bay Territory. It creates a range of specific aviation related offences, such as hijacking,¹⁶⁹ making threats or false statements to endanger the safety of an aircraft,¹⁷⁰ as well as two offences that could be described as incorporating criminal law offences on board aircraft in a general sense. These general offences adopt some of the criminal law applicable in the Jervis Bay Territory and applies this law in two ways. First, it is an offence to engage in an act of violence against passengers or crew on board certain aircraft if that act would have constituted an offence if committed in the Jervis Bay Territory.¹⁷¹ The second general offence provides that a person whose act or omission, had it taken place in the Jervis Bay Territory, would have been an offence against Commonwealth law and specified ACT statutes,¹⁷² has committed an offence.¹⁷³ These are offences against the *Crimes (Aviation) Act* rather than

¹⁶⁵ *Senate DLA 2005 Report* (n 93) 21; Digest No 43 (n 134); *Defence Act* (n 8) s 51Y.

¹⁶⁶ See above n 162 and accompanying text.

¹⁶⁷ *Rawlings Appeal* (n 157).

¹⁶⁸ *Crimes (Aviation) Act* (n 142) s 14(1)(b).

¹⁶⁹ *Ibid* s 13.

¹⁷⁰ *Ibid* s 24.

¹⁷¹ *Ibid* s 14.

¹⁷² *Ibid* s 15(1)(b). The laws specified are: a law of the Commonwealth in force in that Territory; *ACT Crimes Act* (n 136); *Criminal Code 2002* (ACT); *Prostitution Act 1992* (ACT); or any other law of the ACT prescribed by the regulations in its application to the Jervis Bay Territory.

¹⁷³ *Crimes (Aviation) Act* (n 142) s 15(1).

offences against the relevant law from the Jervis Bay Territory. As such, federal law dictates whether an offence is indictable or not.¹⁷⁴

The *Crimes (Overseas) Act 1964* (Cth) (*'Crimes (Overseas) Act'*) applies to a class of persons. The criminal laws of the Jervis Bay Territory 'apply' to certain classes of persons overseas who would not otherwise be subject to the criminal law where they are located.¹⁷⁵ In most cases, these are Australian government officials (and their families) serving overseas who enjoy diplomatic, consular or similar immunity in their host country.¹⁷⁶ Section 4(1) provides that the criminal laws of the Jervis Bay Territory apply as 'laws of the Commonwealth', to the act of a person as if the relevant act had occurred in the Jervis Bay Territory. The consent of the Minister must be provided for '[p]roceedings for an offence against the laws applied'.¹⁷⁷ Whether an offence is indictable is determined by reference to the relevant law of the Jervis Bay Territory, as if the offence had occurred there.¹⁷⁸ Jurisdiction is conferred on state and territory courts.¹⁷⁹ The construction of the provision suggests that an offence against the *Crimes (Overseas) Act* is an offence against that *Act* rather than an offence against an applied Jervis Bay Territory law.

The *DFDA* creates an offence by reference to the criminal law in force in the Jervis Bay Territory. It uses a form of 'legislative shorthand' to incorporate a complete criminal code into the statute,¹⁸⁰ known as a 'Territory offence'.¹⁸¹ A defence member, defence civilian or prisoner of war¹⁸² commits a Territory offence if they engage in conduct that, had it occurred in the Jervis Bay Territory, would be an offence against a law in force in the Jervis Bay Territory.¹⁸³ Such an offence is considered a service offence under the *DFDA* and not an offence under the 'borrowed' legislation

¹⁷⁴ *Crimes Act 1914* (Cth) s 4G. See also *Donovan v Wilkinson* [2005] NTSC 8, [20] (*'Donovan'*), where the law applicable in making a reparation order for an offence against the *Crimes (Aviation) Act* was *Crimes Act 1914* (Cth) s 21B rather than the equivalent Northern Territory legislation.

¹⁷⁵ *Crimes (Overseas) Act* (n 141) s 3A(1)(b).

¹⁷⁶ These are persons enjoying privileges afforded by the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) art 31 (*'VCDR'*); *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 43. See *Crimes (Overseas) Act* (n 141) ss 3A(1)(b)(i)–(ii).

¹⁷⁷ *Crimes (Overseas) Act* (n 141) s 4(2).

¹⁷⁸ *Ibid* s 5.

¹⁷⁹ *Ibid* s 7(1).

¹⁸⁰ *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 311–12 [3] (Gleeson CJ) (*'Re Aird'*).

¹⁸¹ *DFDA* (n 1) s 3 (definition of 'Territory offence').

¹⁸² The *DFDA* applies to prisoners of war as if they were defence members, subject to the *Geneva Conventions Act 1957* (Cth): *DFDA* (n 1) s 7.

¹⁸³ *Ibid* s 61.

from the Jervis Bay Territory.¹⁸⁴ Territory offences are regularly tried by service tribunals, and in the overwhelming majority of cases by a Defence Force Magistrate ('DFM') or court martial.¹⁸⁵ As will be explained in detail below, service offences are not tried on indictment and can only be tried by service tribunals.¹⁸⁶

Apart from the *DFDA*'s Territory offence provision,¹⁸⁷ these criminal law provisions appear to be rarely utilised. For example, the CDPP reports that in the 2021–22 financial year, there were nine prosecutions under the *Crimes (Aviation) Act*, with no indication which type of offence was tried.¹⁸⁸ In some incidents where applying these criminal law provisions was possible, authorities have instead relied upon Commonwealth offences that have extra-territorial application.¹⁸⁹ This has meant that prosecutors did not need to rely upon the provisions of the relevant statute applying the criminal law of the Jervis Bay Territory. Conversely, in 2021, across the 53 trials by restricted court martial and DFM, there were 34 convictions for Territory offences.¹⁹⁰

Outside of appeals of superior service tribunals to the Defence Force Discipline Appeal Tribunal ('DFDAT'), reported decisions involving these criminal offence provisions are even rarer.¹⁹¹ At the time of writing, only one reported instance of a reliance upon one of these criminal law provisions of the Commonwealth statutes described above has occurred. This concerned an offence committed on an aircraft and so involved the *Crimes (Aviation) Act*.¹⁹² In 2003, Michael Donovan was convicted of offensive behaviour following drunken actions onboard a Singapore

¹⁸⁴ *Re Tracey* (n 99) 554; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 473 ('*Re Nolan*'); *Hoffman v Chief of Army* (2004) 137 FCR 520, 527–8 [8] (Black CJ, Wilcox and Gyles JJ) ('*Hoffman*').

¹⁸⁵ In 2021, there were two convictions for Territory offences before summary authorities: Judge Advocate General, *Defence Force Discipline Act 1982: Report for the Period 1 January to 31 December 2021* (Report, 11 August 2022) annexes C–F ('2021 JAG Annual Report').

¹⁸⁶ *DFDA* (n 1) s 190.

¹⁸⁷ *Ibid* s 61.

¹⁸⁸ Commonwealth Director of Public Prosecutions, *Annual Report 2021–22* (Report, 11 October 2022) 78. Of those prosecutions, four were tried summarily and five on indictment.

¹⁸⁹ *Helicopter Resources Pty Ltd v Commonwealth* (2019) 264 FCR 174; *R v Kapociunas [No 1]* (2015) 305 FLR 241 ('*Kapociunas*').

¹⁹⁰ 2021 JAG Annual Report (n 185) annexes J–M.

¹⁹¹ It is possible that many of these offences are prosecuted summarily in Magistrate courts and, apart from possible media reporting, are not reported. See, eg, Shari Hams, 'Actor Aleh Sidorchyk Fined But Not Jailed After Indecently Touching Passenger on Flight to Australia', *ABC News* (online, 19 June 2023) <<https://www.abc.net.au/news/2023-06-19/actor-aleh-sidorchyk-fined-for-indecently-touching-passenger/102495782>>. It is beyond the scope of this article to ascertain the accuracy of this assessment.

¹⁹² *Donovan* (n 174).

Airlines flight from Singapore to Brisbane. The aircraft had to be diverted to Darwin, and Donovan was removed from the aircraft and arrested.¹⁹³ Donovan was convicted of an offence contrary to the *Crimes (Aviation) Act*,¹⁹⁴ to which he pleaded guilty and was convicted. Donovan was not charged with the referenced ACT offence of ‘offensive behaviour’.¹⁹⁵ This reflects the language of the provision which in and of itself creates a Commonwealth offence rather than an ACT one. This conclusion is supported by the manner by which the Northern Territory stipendiary Magistrate imposed a reparation order against Donovan for the loss suffered by Singapore Airlines, in having to divert their aircraft to Darwin. The reparation order was imposed pursuant to the *Crimes Act 1914* (Cth) rather than the relevant Northern Territory provision.¹⁹⁶

Other instances of prosecutions in these jurisdictions have relied upon the extra-territorial character of various Commonwealth offences rather than relying upon the criminal law as it applies to the Jervis Bay Territory. In 2019, the Commonwealth was convicted under the *Work Health and Safety Act 2011* (Cth) (*‘WHS Act’*), following the death of David Wood who fell down a crevasse in the Australian Antarctic Territory.¹⁹⁷ In convicting the Commonwealth, the presiding ACT Magistrate made no reference to the *Australian Antarctic Territory Act 1954* (Cth).¹⁹⁸ As the *WHS Act* itself ‘extends to every external Territory’¹⁹⁹ there was no need to consider relying upon the provision applying the criminal law of the Jervis Bay Territory.

Likewise, an alleged sexual offence against a child by the husband of an Australian diplomat was prosecuted as an extra-territorial offence under the *Commonwealth Criminal Code*.²⁰⁰ The *Crimes (Overseas) Act* criminal law provision was not used. In 2015, Vytas Kapociunas, the husband of an Australian diplomat, was tried in the ACT Supreme Court for the offence of having engaged in sexual intercourse with a child when overseas.²⁰¹ Family of diplomatic staff are inviolable²⁰² in the same way diplomatic staff are,²⁰³ meaning that the sending State, as opposed to the receiving State, has jurisdiction over their criminal conduct. This also meant

¹⁹³ Ibid [6].

¹⁹⁴ *Crimes (Aviation) Act* (n 142) s 15(1)(b)(ii).

¹⁹⁵ *ACT Crimes Act* (n 136) s 392.

¹⁹⁶ *Crimes Act 1914* (Cth) s 21B(1)(d); *Donovan* (n 174) [25].

¹⁹⁷ *May* (n 149); *WHS Act* (n 149) s 32.

¹⁹⁸ *May* (n 149).

¹⁹⁹ *WHS Act* (n 149) s 11.

²⁰⁰ *Criminal Code Act 1995* (Cth) s 272.8(1) (*‘Commonwealth Criminal Code’*); *Kapociunas* (n 189).

²⁰¹ *Kapociunas* (n 189) 242 [2], 243 [8].

²⁰² *VCDR* (n 176) art 37.

²⁰³ Ibid art 29.

that Kapociunas was charged with the more serious offences in the *Commonwealth Criminal Code*²⁰⁴ rather than the equivalent ACT offences.²⁰⁵

(a) *Trial on Indictment*

An issue not addressed by pt IIIAAA's applicable criminal law provision is when offences are to be tried on indictment. The uncertainty arises because of the differences between Commonwealth law and ACT law as to what is an indictable offence. An indictable offence against a law of the Commonwealth, unless a contrary intention is apparent, is an offence that is punishable by more than 12 months' imprisonment.²⁰⁶ Likewise, unless a contrary intention appears, a Commonwealth offence punishable by less than 12 months' imprisonment, or not punishable by imprisonment, is a summary offence.²⁰⁷ In the ACT, an indictable offence is one where, unless the offence states it is indictable, the penalty is more than two years' imprisonment.²⁰⁸ Part IIIAAA is silent on the issue of which offences are indictable. By contrast, the *Crimes (Overseas) Act* specifically addresses this issue, applying the laws in force in the Jervis Bay Territory to determine whether an offence is indictable.²⁰⁹

The question of whether an offence will be tried on indictment will dictate where the trial will be held. The *Australian Constitution* requires that the trial on indictment of any Commonwealth offence must be by jury and tried in the state where the offence occurred.²¹⁰ This factor alone may defeat the intended purpose of establishing a uniform means of applying criminal law to offences committed by ADF members on pt IIIAAA activities. In a pt IIIAAA operation, ADF members involved in the decisions that give rise to allegations of an offence being committed may be in different states or territories. In that scenario, assuming the offence is indictable, the trials may have to be heard in their respective locations. The *Australian Constitution* further provides that in situations where an indictable offence is not committed in a state — such as the offshore area — the trial will be held 'at such place or places' as prescribed by Parliament.²¹¹ No such prescription has been provided for in pt IIIAAA.

Analysis of these other Commonwealth statutes ultimately provides no definitive insight into how pt IIIAAA's applicable criminal law provision is to operate.

²⁰⁴ *Commonwealth Criminal Code* (n 200) s 272.9. The maximum penalty for this offence is 20 years imprisonment.

²⁰⁵ *ACT Crimes Act* (n 136) s 55(2). The maximum penalty for this offence is 14 years imprisonment.

²⁰⁶ *Crimes Act 1914* (Cth) s 4G.

²⁰⁷ *Ibid* s 4H.

²⁰⁸ *Legislation Act 2001* (ACT) s 190(1).

²⁰⁹ *Crimes (Overseas) Act* (n 141) s 5.

²¹⁰ *Australian Constitution* s 80.

²¹¹ *Ibid*.

The applicable criminal law provision falls into the category of applying to a class of persons: the question is how is the criminal law so applied? The general dearth of relevant reported decisions provides no suitable benchmark that could be used to assist in the interpretation of the applicable criminal law provision. The closest counterpart, the *Crimes at Sea Act*, has no reported decisions dealing with the substantive issues of how its criminal law provision is to operate. Like pt IIIAAA, the *Crimes at Sea Act* does not address which law, Commonwealth or ACT, is used to determine whether an offence is indictable or not. Those statutes that *apply* the substantive criminal law of the Jervis Bay Territory, as opposed to declaring such law to be *in force* would suggest that the answer is that any criminal offence committed by an ADF member in the course of a pt IIIAAA operation is a Commonwealth offence, committed under the *Defence Act*. The investigative response by both NSW Police and the AFP in *Rawlings* would suggest this is the approach that authorities have taken. In the context of a prosecution following arising out of a pt IIIAAA operation, the note in the applicable law provision seeking to preserve the investigative function of state and territory police, points towards a similar result in having state or territory police investigating criminal offences and Commonwealth authorities prosecuting a pt IIIAAA incident. This would seem to be more aligned with Parliament's intent as to how the ADF would be held accountable in the criminal justice system, and how the CDPP is to give effect to such accountability.

5 *Concurrency of Discipline Law*

Both pt IIIAAA and the Explanatory Memorandum for the 2005 Bill introducing the applicable criminal law provision are silent on the concurrent application of the *DFDA* during a pt IIIAAA operation. It is not clear whether this is a deliberate omission. At the same time the 2005 Bill was enacted in 2006, the *DFDA* was undergoing some of its most significant reform with regards to the prosecution of serious service offences. Legislation creating an independent military prosecuting authority, the Director of Military Prosecutions ('DMP'), was enacted on 12 December 2005,²¹² with the changes commencing on 12 June 2006.²¹³ Neither the Department of Defence submission nor the evidence given by the Department of Defence witnesses to the Senate Committee into the 2005 Bill make any mention of the operation of the *DFDA* during a pt IIIAAA operation.²¹⁴ Furthermore, the operation of the *DFDA* is not mentioned in the Senate Committee's final report.²¹⁵ This is odd, noting that the legislation creating the DMP had already been enacted by the time the evidence was given to the Senate Committee, albeit the DMP (as a statutory office) had not commenced operating yet. The only discussion of prosecutions in the public hearing before the Senate Committee was concerned with state

²¹² *Defence Legislation Amendment Act (No 2) 2005* (Cth) ('DLAA (No 2) 2005').

²¹³ *Ibid* s 2(1) item 6.

²¹⁴ Defence Submission on 2005 Bill (n 116); Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 31 January 2006, 45–64 (John Andrew Dunn, Michael Pezzullo and Mark Cunliffe).

²¹⁵ *Senate DLA 2005 Report* (n 93).

and territory police conducting investigations into alleged wrongdoing by ADF members during a call out.²¹⁶

The Department of Defence's silence on the application of the *DFDA* to a pt IIIAAA activity could not logically be seen as excluding the operation of the *DFDA*. While the Department's submission states that 'the CDPP will assume responsibility for any prosecution of ADF personnel', this could not be taken to mean such responsibility extends to service offences.²¹⁷ The submission is focused on the application of criminal law as opposed to disciplinary law. The CDPP and civilian courts do not have jurisdiction to try service offences.²¹⁸ The scope of potential service offences an ADF member could commit in the course of a pt IIIAAA operation, noting its disciplinary context, is far broader than the scope of offending under the criminal law. To take the example of the Corporal at the checkpoint: suppose that the Corporal, just before assaulting the man, used insulting language towards the victim. This would be a service offence,²¹⁹ but it may not reach the higher threshold of the closest criminal offence equivalent of offensive behaviour.²²⁰ It would be incongruous to suggest that the *DFDA* could not be utilised to deal with the Corporal's insulting words, irrespective of what action, if any, is taken in relation to the assault.

The result is there are two concurrent jurisdictions. In each jurisdiction is an independent statutory prosecuting authority that both have jurisdiction over offences committed by ADF members during a pt IIIAAA activity: the DMP and the CDPP. Apart from the consent requirements for specified Territory offences,²²¹ both offices have ostensibly equal rights to prosecute the Corporal for the alleged offending. How any jurisdictional impasse is to be resolved has already been developed.

In 2007, the DMP and Directors of Public Prosecution of all Australian jurisdictions entered into a memorandum of understanding ('MOU').²²² The MOU outlines how jurisdictional issues between the discipline and criminal systems will be resolved.²²³ The MOU provides that the DMP will consult with the Director of Public Prosecutions ('DPP') of the relevant states or territories, or the CDPP

²¹⁶ Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 31 January 2006, 51 (Mark Cunliffe).

²¹⁷ Defence Submission on 2005 Bill (n 116) 9.

²¹⁸ *CDPP Act* (n 123) ss 6(1)(a), (d) provides that the CDPP prosecutes summary and indictable offences against the laws of the Commonwealth — of which service offences are neither. Further, the *DFDA* does not grant civil courts jurisdiction over service offences: see *DFDA* (n 1) s 190(1).

²¹⁹ *DFDA* (n 1) s 33(d) where a person 'uses insulting or provocative words to another person' or s 60(1) which refers to prejudicial conduct.

²²⁰ *ACT Crimes Act* (n 136) s 392.

²²¹ *DFDA* (n 1) s 63(1).

²²² Director of Military Prosecutions, *Report for the Period 12 June 2006 to 31 December 2007* (Report, 24 April 2008) annex B ('*DsPP/DMP MOU*').

²²³ *Ibid* 5–8.

where the DMP is of the view that, while the alleged conduct is a breach of service discipline, it may also constitute an offence which should be dealt with in the criminal justice system.²²⁴

There are certain Territory offences that, if committed in Australia, require the consent of the CDPP before the matter can be tried by a service tribunal.²²⁵ For those service offences, the decision of the CDPP whether to grant consent for prosecution is a matter for the CDPP.²²⁶ The MOU highlights the military context of the alleged offending in making such a determination:

Whether the alleged conduct took place in circumstances which would be more appropriately dealt with by a military tribunal, for example during a military operation or related activity.²²⁷

However, for any other service offence, it is a matter for the DMP to decide whether to prosecute a matter as a service offence, irrespective of the advice or position of the relevant DPP.²²⁸

On its face, the MOU provides the mechanism for addressing the issue of concurrency between the civilian criminal jurisdiction and the military disciplinary jurisdiction. Now that the High Court has clarified that the disciplinary jurisdiction is not subordinate to the ordinary criminal law,²²⁹ it may be a matter of negotiation between the DMP and the CDPP as to which office will take carriage of a matter. An issue not specifically addressed in the MOU that is likely to affect a decision will be whether civilian or military police conduct an investigation. It may be that the matter is actually settled well before a brief of evidence is even compiled by investigators on the ground.

In a disciplinary context, the Corporal's alleged offending is likely to be considered a serious disciplinary incident when compared to its objective seriousness through a criminal law lens. When considering the wider intent of the applicable criminal law provision — that the military context of the pt IIIAAA operation would be considered by a prosecutorial authority before preferring charges — apart from very serious criminal activity, it is hard to argue that the CDPP is better placed than the

²²⁴ Ibid 7.

²²⁵ *DFDA* (n 1) s 63(1). The offences are: treason; murder; bigamy; manslaughter; sexual assault in the first, second and third degree; sexual intercourse without consent; sexual intercourse with a young person in its application to the Jervis Bay Territory; and any offence of which proceedings could not be brought into the Jervis Bay Territory without the consent of a Minister or the CDPP. It also includes an ancillary Territory offence in relation to any of the above.

²²⁶ *DsPP/DMP MOU* (n 222) 6.

²²⁷ Ibid

²²⁸ Ibid 8.

²²⁹ *Private R* (n 14) 335–6 [51] (Kiefel CJ, Bell and Keane JJ).

DMP to make such an assessment. The MOU, perhaps inadvertently, but certainly in a broad sense, has already addressed this very issue.

III MILITARY JURISDICTION

It is important then, noting that the *DFDA* applies to misconduct by ADF members arising out of a pt IIIAAA operation, to address what the military jurisdiction really is. Despite the streamlining of the common law,²³⁰ and the civilianisation of military law,²³¹ the jurisdiction of the service tribunals over the Profession of Arms has been recognised by the High Court of Australia. In *Private R*, the plurality noted that

[w]hile there may be an area of concurrent jurisdiction between civil courts and service tribunals, there is no warrant in the constitutional text for treating one as subordinate or secondary to the other.²³²

It is the suggestion of the authors that *Private R* is best read through the lens of ‘breadth’ and ‘depth’ of jurisdiction. The methodology was created by George Winterton to analyse constitutional executive power;²³³ its application in the military jurisdiction has never been raised before. Breadth can be defined in the military jurisdiction as the subject matters a service tribunal is empowered to hear, having regard to the constraints of the federal system,²³⁴ whilst depth denotes the precise actions which a service tribunal is empowered to undertake in relation to those subject matters.²³⁵ *Private R* highlighted that the breadth of the military jurisdiction waxes and wanes depending on subject matter: littering can be within the remit, but matters relating to violence and dishonesty are of stronger foundation.²³⁶ Offences of a pure military nature are core to the breadth of the jurisdiction. So too does the depth of punishment have stronger validity responding to matters of a purely military nature, but also corresponds to matters where there is no competition with the states.

Service tribunals, as part of a wider military justice process, seek to enforce the *DFDA*. The *DFDA* applies to all those that have ‘voluntarily subscribed to “the King’s hard bargain”’²³⁷ by becoming members of the ADF. To take the King’s hard bargain has been a ‘traditional description for the rendering of military service to

²³⁰ White, *Keeping the Peace of the Realm* (n 5) 13.

²³¹ See Matthew Groves, ‘The Civilianisation of Australian Military Law’ (2005) 28(2) *University of New South Wales Law Journal* 364.

²³² *Private R* (n 14) 335–6 [51].

²³³ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29–30.

²³⁴ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 96 [130] (Gageler J), citing Winterton (n 233) 29, 111.

²³⁵ *Ibid.*

²³⁶ *Private R* (n 14) 343 (Kiefel CJ, Bell and Keane JJ).

²³⁷ *Igoe v Ryan [No 2]* (2020) 280 FCR 327, 329 [1] (*Igoe*).

the Crown'.²³⁸ The effect of this is that without forfeiting their civil rights and obligations, ADF members undertake additional obligations — one of which being that they are subject to the *DFDA*.²³⁹

The *DFDA* is not a draconian piece of legislation, but a positive act of Parliament to provide military commanders with an ability to instil and maintain discipline in the ADF. In *White v Director of Military Prosecutions*,²⁴⁰ the plurality cited the following passage in the title 'Royal Forces' in *The Laws of England* with approval:

It is one of the cardinal features of the law of England that a soldier does not by enlisting in the regular forces thereby cease to be a citizen, so as to deprive him of any of his rights or to exempt him from any of his liabilities under the ordinary law of the land. He does, however, in his capacity as a soldier, incur additional responsibilities, for he becomes subject at all times and in all circumstances to a code of military law contained in the *Army Act*, the King's Regulations and Orders for the Army, and Army Orders.²⁴¹

This reflects the commonly held position that '[s]ervicepersons are not outlaws'.²⁴² But neither too are ADF members simply 'citizens in uniform'.²⁴³ As noted over a century ago, '[a] soldier upon enlistment provides the clearest modern instance in English law of a distinct legal status such as Roman law defined with so much care'.²⁴⁴

The *DFDA* applies many basic principles of civilian criminal law and rules of evidence: the onus of proof and criminal standards are synchronised with civilian equivalents;²⁴⁵ the accused is entitled to be legally represented without expense;²⁴⁶

²³⁸ Ibid.

²³⁹ Ibid 329 [2]. See generally Samuel White, 'Taking the King's Hard Bargain' (2022) 96(9) *Australian Law Journal* 666, 666–86. The nature of military service is reflected constitutionally, with the command power being enshrined in s 68 of the *Australian Constitution*. There are serious consequences to this. Military service is not employment; it entails a suite of common law duties and obligations.

²⁴⁰ (2007) 231 CLR 570 ('*White*').

²⁴¹ Ibid 601 [71] (Gummow, Hayne and Crennan JJ), quoting Earl of Halsbury, *The Laws of England* (Butterworth, 1913) vol 25, 42 [79].

²⁴² *Groves v Commonwealth* (1982) 150 CLR 113, 136 (Murphy J).

²⁴³ Samuel C Duckett White, 'A Soldier by Any Other Name: A Reappraisal of the "Citizen in Uniform" Doctrine in Light of Part IIIAAA of the *Defence Act 1903* (Cth)' (2018–19) 57(2) *Military Law and Law of War Review* 279, 280.

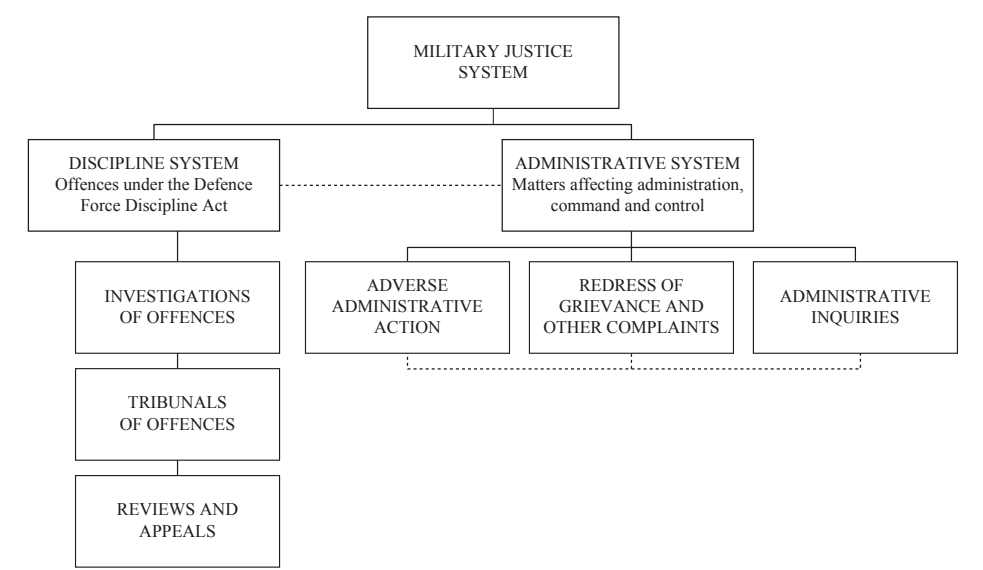
²⁴⁴ Viscount Birkenhead, *Points of View* (George H Doran, 1922) vol 2, 2.

²⁴⁵ *DFDA* (n 1) ss 10, 146, 146A; Justice John Logan, 'Military Court Systems: Can They Still Be Justified in This Age?' (Speech, Commonwealth Magistrate and Judges Association Triennial Conference, 10 September 2018). His Honour's speech was written to critique Pauline Therese Collins, *Civil-Military 'Legal' Relations: Where to From Here?* (Brill, 2019). Collins has most recently written on the Defence Force Discipline Appeal Tribunal ('DFDAT') in Pauline Collins, 'The Significance of the Defence Force Discipline Appeal Tribunal: Analysis of Its Activity over Four Years' (2022) 32(4) *Public Law Review* 348.

²⁴⁶ *DFDA* (n 1) s 137(2).

and importantly the accused is innocent until proven guilty.²⁴⁷ Part VII of the *DFDA* envisages a three-tiered system of enforcing military discipline which may operate outside of Australia: a lower form system of discipline officers to deal with minor disciplinary infringements,²⁴⁸ summary authorities to deal with the more serious offending;²⁴⁹ and an ad hoc higher form of service tribunal which is enacted through DFMs and courts martial, to deal with serious (and complex) service offences.²⁵⁰ It is complimented by a concurrent system of administrative sanctions²⁵¹ per Figure 1.

Figure 1: Military Justice System²⁵²



²⁴⁷ An implied right reiterated in *Randall v Chief of Army* (2018) 335 FLR 260, 262 [2] ('*Randall*'). See also *DFDA* (n 1) s 132.

²⁴⁸ *DFDA* (n 1) pt IA. As the jurisdiction of discipline officers is limited to disciplinary infringements, which are now managed administratively, it will not be dealt with in this article. Legislation was passed in 2021 that greatly expanded the role of discipline officers but clearly separates out 'disciplinary infringements' and specifies these are not considered service offences. See *Defence Legislation Amendment (Discipline Reform) Act 2021* (Cth) sch 1 div 3.

²⁴⁹ *DFDA* (n 1) pt VII div 2.

²⁵⁰ *Ibid* pt VII divs 3–4.

²⁵¹ *Re Tracey* (n 99); *Re Nolan*; *Ex parte Young* (1991) 172 CLR 460; *Re Tyler*; *Ex parte Foley* (1994) 181 CLR 18; *Re Aird* (n 180); *White* (n 241); *Lane v Morrison* (2009) 239 CLR 230.

²⁵² Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (Final Report, 16 June 2005) 8 [2.6]. The solid lines of Figure 1 represent the framework of the military justice system, while the dotted lines represent the interaction that can occur between all parts of the system. What is not represented in the diagram are discipline officers, which are not service tribunals: see *DFDA* (n 1) s 3 (definition of 'service tribunal').

At all tiers of the summary authority jurisdiction, whilst an accused does have a right to legal advice, they do not have a *prima facie* right to be represented by a lawyer at trial.²⁵³ Across the summary authority jurisdiction, however, these non-legally qualified officers may not imprison a member (although they may impose a punishment of detention).²⁵⁴ Whilst some of the punishments have civilian equivalents, there are some that are distinctly military in nature: reduction in rank;²⁵⁵ forfeiture of seniority;²⁵⁶ restriction of privileges;²⁵⁷ stoppage of leave;²⁵⁸ or extra drill.²⁵⁹ Regardless, summary authorities are required to give consideration to civilian sentencing principles along with the additional consideration of the need to maintain service discipline.²⁶⁰ Whilst summary authority proceedings account for the vast majority of matters dealt with by service tribunals,²⁶¹ it is likely that trial by a summary authority would be considered inappropriate or inadequate to deal with a matter such as the one identified in this scenario. This is for a few reasons. One is the objective seriousness of the alleged offending in a disciplinary context: the assault of a civilian, in Australia, by an ADF member during a pt IIIAAA operation. The powers of a summary authority — with the most serious punishment that can be imposed in this case being reduction in rank by two ranks²⁶² — is likely to be seen as insufficient to deal with such a serious disciplinary issue. These interests are reflected in both law and practice: a matter can be referred to the DMP directly by the military police, or can be referred to the DMP from the accused member's unit.²⁶³

²⁵³ *Summary Authority Rules 2019* (Cth) r 7(3).

²⁵⁴ *DFDA* (n 1) s 69C. The purpose of these two punishments is very different. A period of detention is served at a corrective detention centre such as the Defence Force Correctional Establishment, and the punishment is intended to be rehabilitative in nature. As such, detention cannot be imposed as a punishment if a punishment of dismissal from the ADF is also imposed: see *DFDA* (n 1) s 71(3). A period of imprisonment, however, is served in a civilian prison, and such a punishment can only be imposed if it is accompanied by a punishment of dismissal from the ADF: see *DFDA* (n 1) s 71(1). The effect of dismissal as a punishment equates to the colloquial notion of a 'dishonourable discharge'.

²⁵⁵ *DFDA* (n 1) s 68(1)(e).

²⁵⁶ *Ibid* s 68(1)(g).

²⁵⁷ *Ibid* s 68(1)(k).

²⁵⁸ *Ibid* s 68(1)(m).

²⁵⁹ *Ibid* s 68(1)(na).

²⁶⁰ *Ibid* s 70(1).

²⁶¹ Bryan Cavanagh and John Devereux, 'Reconsidering Summary Discipline Law' (2013) 32(2) *University of Queensland Law Journal* 295, 297. In the 2020 calendar year there were 1,211 summary authority hearings and 49 courts martial or DFM trials: Judge Advocate General, *Defence Force Discipline Act 1982: Report for the Period of 1 January to 31 December 2020* (Report, 28 June 2021) annexes E, N.

²⁶² *DFDA* (n 1) s 69C.

²⁶³ A charge can be referred to the DMP before a trial commences (*DFDA* (n 1) s 105A), or by a summary authority during the trial: *ibid* s 131A.

The sensitivity of an assault occurring during a pt IIIAAA call out, it is submitted, lends itself to a trial by a DFM, Restricted Court Martial ('RCM') or General Court Martial ('GCM'). This would better reflect the seriousness and gravity of the offending. Further, courts martial hold higher sentencing powers. Additionally, in the same way that open justice promotes public confidence in the courts,²⁶⁴ the interests of service discipline include maintaining public confidence in the military justice system; this dictates greater transparency and, therefore, that the trial should be held in public.²⁶⁵ This would not occur under a summary authority proceeding, which are not public hearings.

A court martial panel also brings with them their service knowledge and values.²⁶⁶ Unique to the military justice system, the hearing of service offences by 'officers, sworn to defeat the Queen's enemies, who are appropriately experienced in the servitude and grandeur of arms and the splendours and miseries of military life'²⁶⁷ can be traced back to the 17th century.²⁶⁸ The continued existence of a military discipline system separate from the civilian court system is indicative of a unique need, arising from the unique nature of military service. It further reflects the position inherent that an individual should be tried by their peers: those that have similarly taken the King's hard bargain.²⁶⁹ Importantly, there is no requirement at common law for members of a court martial to give reasons for sentencing — an exception that has existed to reflect the particular legal relationship of a defence member, and a Commanding Officer.²⁷⁰

An RCM consists of a panel of no less than three officers,²⁷¹ with a President of not less than lieutenant colonel (or equivalent) in rank, sitting with a judge advocate who provides directions on any question of law.²⁷² The maximum punishment an RCM can impose is six months imprisonment.²⁷³ At the apex of service tribunals is the GCM, which is convened as required for the most serious of service offences; it

²⁶⁴ *Hogan v Hinch* (2011) 243 CLR 506, 532 ('Hogan'); *John Fairfax Publications Pty Ltd v District Court* (NSW) (2004) 61 NSWLR 344, 351.

²⁶⁵ *US v Travers* 25 MJ 61, 62 (CMA 1987); *DFDA* (n 1) s 140. The President of a court martial, or a DFM, can order the proceedings to be closed if necessary in the interests of the security or defence of Australia, the proper administration of justice or public morals.

²⁶⁶ *DFDA* (n 1) s 147(1).

²⁶⁷ *Haskins v Commonwealth* (2011) 244 CLR 22, 61 [103] (Heydon J).

²⁶⁸ See *Boyson v Chief of Army* [2019] ADFDAT 2, [20] ('Boyson'), where Logan J traces the history and development of courts martial from Prince Rupert of the Rhine, in his capacity as Commander-in-Chief of England, in 1672.

²⁶⁹ See above nn 221–3 and accompanying text.

²⁷⁰ *Igoe* (n 237) 341 [58], citing *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

²⁷¹ *DFDA* (n 1) s 114(3).

²⁷² *Ibid* ss 117, 134, 196.

²⁷³ *Ibid* s 69A(3)(b).

consists of a panel of no less than five officers, with a President of colonel (equivalent) and above, sitting with a judge advocate, who provides binding opinions on questions of law.²⁷⁴ The maximum penalty a GCM can impose is life imprisonment.²⁷⁵

Although panel members may not be lower in rank than the accused,²⁷⁶ and their decisions are not required to be unanimous,²⁷⁷ as a tribunal of fact ‘a court martial panel in the military justice system is directly analogous [to] that undertaken by a jury’.²⁷⁸ Whilst similar to a jury in that courts martial members are not required to provide reasons, they further differ from a civilian jury in that they do not merely decide guilt but also decide punishments and impose orders following conviction.²⁷⁹ Members of a court martial panel, a judge advocate and a DFM enjoy the same immunities in the performance of their duties as a justice of the High Court.²⁸⁰

A DFM is appointed in writing by the Judge Advocate General (‘JAG’) from the judge advocates’ panel.²⁸¹ DFMs are legally qualified officers whose role is analogous to a judge-alone trial in the criminal justice system.²⁸² A DFM has the same powers of punishment as a RCM, the maximum punishment being imprisonment for up to six months.²⁸³

Prima facie, a trial by court martial or DFM is held in public.²⁸⁴ Previously, the DMP’s prosecution policy recognised that ‘in some cases, the ADF interests may require that a matter be resolved publicly by proceedings under the *DFDA* before a superior service tribunal’.²⁸⁵

This public setting is, however, subject to a limited class of restrictions imposed by the *DFDA*.²⁸⁶ This class of restrictions includes where it is necessary for the interests of security or defence of Australia, the proper administration of justice or

²⁷⁴ Ibid ss 114, 117, 134, 196.

²⁷⁵ Ibid ss 69A(2), 68(1)(a).

²⁷⁶ Ibid s 116(1)(c).

²⁷⁷ Ibid s 133(2).

²⁷⁸ *Boyson* (n 268) [17] (Logan J).

²⁷⁹ *DFDA* (n 1) s 132(1)(g).

²⁸⁰ Ibid s 193(1).

²⁸¹ Ibid s 127.

²⁸² Ibid ss 127, 135. The practice of sitting alone is common within Australia’s inferior courts.

²⁸³ Ibid s 129(1).

²⁸⁴ Ibid s 140(1).

²⁸⁵ Director of Military Prosecutions, *Prosecution Policy* (10 July 2020) 11 [1.4] (‘2020 DMP Prosecution Policy’). The 2021 DMP Prosecution Policy does not contain the same provision: Director of Military Prosecutions, *Prosecution Policy* (23 December 2021) (‘2021 DMP Prosecution Policy’).

²⁸⁶ *DFDA* (n 1) s 140(2).

public morals.²⁸⁷ Moreover, the tribunal may pronounce non-publication orders.²⁸⁸ Such an order, issued by the President of the court martial, requires consultation with the judge advocate.²⁸⁹ As of 14 December 2021,²⁹⁰ a list of upcoming proceedings and the outcomes of proceedings are publicly available on the internet.²⁹¹ The effect of this is covered in more depth below.

Upon conviction, all service tribunal proceedings are subject to a mandatory automatic review by a reviewing authority.²⁹² For review of courts martial and DFM trials, the report is prepared by a legal officer specially selected and recommended by the JAG.²⁹³

A convicted person can also lodge a petition with a reviewing authority for a review of the proceedings.²⁹⁴ The petitioner is required to set out the grounds why the reviewing authority should exercise their power of review.²⁹⁵ The reviewing authority must 'review the proceedings ... having regard to the grounds set out in the petition' and then give a notice in writing of the result to the petitioner.²⁹⁶

Before commencing either an automatic or requested review, the reviewing authority must obtain a legal report on the proceedings,²⁹⁷ which is binding upon the authority in relation to matters of law.²⁹⁸ This legal report may be referred

²⁸⁷ Ibid.

²⁸⁸ Ibid ss 140(2)(b), 148(2). Additionally, as the laws of evidence of the ACT apply to courts martial and DFM trials, a court martial or DFM can make non-publication orders in relation to sexual offences: see *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71.

²⁸⁹ *DFDA* (n 1) s 140(3).

²⁹⁰ Judge Advocate General, *Practice Note 1: Publication of Court Martial and Defence Force Magistrates Lists and Outcomes (Version 5)*, 14 December 2021 <<https://www.defence.gov.au/sites/default/files/2023-06/jag-practice-note-1.pdf>> ('JAG Practice Note 1').

²⁹¹ Details include the rank and name of the accused, the charges and nature of the service offence. See: 'Upcoming Superior Service Tribunal Proceedings', *Australian Government: Defence* (Web Page) <<https://www.defence.gov.au/about/governance/military-justice-system/upcoming-superior-service-tribunal-proceedings>>; 'Outcomes of Superior Service Tribunal Proceedings', *Australian Government: Defence* (Web Page) <<https://www.defence.gov.au/about/accessing-information/outcomes-superior-service-tribunal-proceedings>>.

²⁹² *DFDA* (n 1) s 152.

²⁹³ Ibid s 154(1)(a).

²⁹⁴ Ibid s 153(1).

²⁹⁵ Ibid s 153(3).

²⁹⁶ Ibid s 153(4).

²⁹⁷ Ibid s 154(1).

²⁹⁸ Ibid s 154(2).

to the JAG by the reviewing authority for a secondary, overriding and binding opinion.²⁹⁹

Finally, the CDF or a service chief can conduct a further review of the proceedings at any time.³⁰⁰ A further review is conducted in the same manner as the automatic review,³⁰¹ with the CDF or service chief obtaining a legal report, and being bound by a matter of law set out in the legal report.³⁰²

Notably, certain convictions by courts martial and DFMs are considered to form part of an individual's criminal record and may be disclosed as such.³⁰³ That is, these convictions will be disclosed, as a service offence, when a law requires disclosure of a conviction against a law of the Commonwealth.³⁰⁴

If convicted by a court martial or DFM, ADF members enjoy a limited right of appeal to the DFDAT under the *Defence Force Discipline Appeals Act 1955* (Cth). The DFDAT acts as a court of quasi-criminal appeal;³⁰⁵ an individual can only appeal against their conviction, and, unless leave is otherwise granted, only on a ground that is a question of law.³⁰⁶ Notable differences regarding rights of appeal in the military jurisdiction as opposed to the civilian jurisdiction are that a convicted person cannot appeal against their sentence, and there is no right to appeal for the prosecution. Appeals from the DFDAT on questions of law may go to the Federal Court of Australia,³⁰⁷ and with special leave may further appeal to the High Court of Australia.³⁰⁸ In the ordinary course of events, DFDAT sittings are public and held within Commonwealth courts.³⁰⁹

Membership of the DFDAT is an important consideration. It is restricted to judges and justices of federal courts and state or territory Supreme Courts³¹⁰ and appointed by the Governor-General by commission.³¹¹ The members of the DFDAT enjoy the same protections and immunities enjoyed by a justice of the High Court.³¹²

²⁹⁹ Ibid ss 154(3)–(4).

³⁰⁰ Ibid s 155(1).

³⁰¹ Ibid s 155(2).

³⁰² Ibid ss 155(3)–(4).

³⁰³ Ibid ss 190A, 190B.

³⁰⁴ Ibid s 190A(3). See also Explanatory Memorandum, Defence Legislation (Enhancement of Military Justice) Bill 2015 (Cth) 15.

³⁰⁵ *Hembury v Chief of General Staff* (1998) 193 CLR 614, 649 [17] (McHugh J) ('Hembury').

³⁰⁶ *Defence Force Discipline Appeals Act 1955* (Cth) s 20(1).

³⁰⁷ Ibid s 52.

³⁰⁸ See, eg: *Hembury* (n 305); *Li v Chief of Army* (2013) 250 CLR 328.

³⁰⁹ *Defence Force Discipline Appeals Act 1955* (Cth) s 18.

³¹⁰ Ibid s 8.

³¹¹ Ibid s 7(2).

³¹² Ibid s 40(1).

These membership requirements mean that the DFDAT is independent from both the Department of Defence and the CDF. While the members' roles are prescribed by statute, it is more involved in practice. Membership of the DFDAT has historically been reserved for serving members of superior courts with prior ADF experience as commissioned officers.³¹³ The effect of this service experience is that service knowledge is often merged with judicial foresight to ensure justice occurs. The benefit of this was explained by Logan J:

My experience is that prior military service experience is desirable. That is not just because that experience gives one a disposition to accept an additional commission on the DFDAT. It is because that experience brings with it a greater likelihood of an understanding of service terms, conditions and context and more ready assimilation of service publications and other documentary evidence. The appointment practice doubtless also adds to the credibility of the DFDAT in defence circles, senior and junior.³¹⁴

The interplay between 'justice' and 'military discipline' is a friction that has shaped discussions around the system for decades. On the one hand, there has been a great deal of criticism over the last 30 years concerning the fairness of the ADF's disciplinary system.³¹⁵ Parliament has had cause to conduct numerous inquiries into various facets of Australia's military justice system, including its disciplinary system.³¹⁶ The ADF has likewise also conducted a number of inquiries and reviews

³¹³ As the DFDAT is constituted at the time of writing: President Logan J was commissioned into the Australian Intelligence Corps in the Army Reserve and retired at the rank of Major; Perry J is a Legal Specialist Reservist in the Royal Australian Air Force and the Deputy Judge Advocate General for the Air Force; Barr J served as a Legal Officer in the Royal Australian Navy Reserve; and Slattery J was a longstanding member of the Royal Australian Navy Reserve, retiring at the rank of Rear Admiral, as well as Australia's Judge Advocate General from 2014–21: 'Members', *Defence Force Discipline Appeals Tribunal* (Web Page) <<https://www.defenceappeals.gov.au/about/members>>.

³¹⁴ Justice Logan, 'Military Court Systems: Can They Still Be Justified in This Age?' (Speech, 18th Commonwealth Magistrates and Judges Association Triennial Conference, 10 September 2018) 17.

³¹⁵ Some academic critiques of the military justice system include: Andrew D Mitchell and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (1999) 27(3) *Federal Law Review* 499; Groves, 'The Civilianisation of Australian Military Law' (n 231); Andrew D Mitchell and Tania Voon, 'Justice at the Sharp End: Improving Australia's Military Justice System' (2005) 28(2) *University of New South Wales Law Journal* 396.

³¹⁶ See, eg: Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Sexual Harassment in the Australian Defence Force* (Report, August 1994); Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Crash of RAAF Nomad Aircraft A18-401 on 12 March 1990* (Report, April 1996); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* (Report, April 2001); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice in the Australian Defence Force* (Report, June 1999).

into its disciplinary system.³¹⁷ Yet on the other hand, Parliament's intent has been clear that the system is to exist. The sum of the foregoing has resulted in numerous reforms to improve the fairness and impartiality of the disciplinary system, particularly in relation to superior service tribunals. The most significant of these reforms has been to who prefers charges, how the service tribunal is selected to try those charges and who is responsible for the prosecution and defence of the charges. Previously, decisions in relation to these matters were made by senior officers in the ADF.³¹⁸ While there was no suggestion that these senior officers carried out their duties in anything other than a fair and efficient manner, there remained a perception that the conflation of all these functions in one officer did not represent a fair and impartial process.³¹⁹ The result of these reforms has seen the creation of the DMP, the RMJ and an expanded role of the JAG.³²⁰ These statutory office holders now exercise these functions and their independence is enshrined in the *DFDA*. These appointments improve the perception of, if not the actual, impartiality and fairness of the disciplinary system.

IV COURT OR COURT MARTIAL?

So, then, to the Corporal.

A Reporting to Parliament

Built into the new call out regime is a reporting mechanism to Parliament.³²¹ The Minister is required to provide to Parliament a copy of the call out order, any specified area declarations related to the call out and a report about how the ADF was utilised under the call out order.³²² These must be provided to both Houses of Parliament within seven days from when the call out order ceases.³²³

The requirement to report to Parliament is an important means of providing oversight of a how a call out transpired.³²⁴ This in turn re-emphasises civilian

³¹⁷ AR Abadee, *A Study into Judicial System under the Defence Force Discipline Act* (Report, September 1997) ('Abadee Report'); JCS Burchett, *Report of an Inquiry into Military Justice in the Australian Defence Force* (Report, July 2001); Sir Laurence Street and Les Fisher, *Report of the Independent Review on the Health of the Reformed Military Justice System* (Report, 23 January 2009); *Review of the Summary Discipline System 2017* (Report, 16 November 2017).

³¹⁸ These officers were known as 'Convening Authorities'. The role was abolished and the functions split across the DMP, RMJ and JAG: *DFDA* (n 1) s 103, as enacted.

³¹⁹ Abadee Report (n 317) 151–3.

³²⁰ *Defence Legislation Amendment Act 2003* (Cth); *DLAA (No 2) 2005* (n 212).

³²¹ *Defence Act* (n 8) s 51ZA.

³²² *Ibid* s 51ZA(1).

³²³ *Ibid* s 51ZA(2).

³²⁴ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report No 12 of 2018, 27 November 2018) 110–11.

control over the ADF. The situation of the Corporal, however, presents a challenge in how the allegation would be reported to Parliament. A concern for the ADF would be to ensure that the Corporal receives a fair trial, while at the same time ensuring the Minister complies with their reporting obligations. The concern is one that can easily be addressed. Given the speed in which the report is to be provided to Parliament, it is highly unlikely that an investigation into the allegation against the Corporal would have been finalised beforehand, let alone charges being laid. There is nothing unusual in institutions, including the ADF, providing information to Parliament without risking the integrity of a potential follow-on trial.³²⁵

B *The Interests of Service Discipline*

The primary purpose of criminal law is the protection of the civil community. The primary purpose of military law is maintaining discipline, the degradation of which is the greatest danger which threatens the community. As Earl of Birkenhead Frederick Edwin Smith noted nearly a century ago:

The civil community, as we have known it in the past, from the greatness of its size and the fact that it is a natural growth, is stronger than the military community, which is an artificial structure created for a specific purpose, and relatively small in size. The strain to which the military community is exposed is moreover infinitely the greater.³²⁶

The civil community can thus normally afford to take greater risks in itself; the military cannot. In all cases, the adverse impact upon service discipline is contagious and has a higher impact than a disregard for law in civilian communities. The disciplinary ecosystem of the military is much closer and more intimate than that of a civil community. It is therefore natural, and necessary, that service offences should have severe consequences — what in civilian settings might be considered harsh and unjust.

In DFMs and courts martial, matters are prosecuted by the DMP.³²⁷ The position is independent from the military chain of command, and as ‘a general rule, the DMP

³²⁵ For example, the Chief of the Defence Force provided information in his opening remarks and follow-on questions to the Senate Foreign Affairs, Defence and Trade Legislation Committee after charges were preferred by the Director of Military Prosecutions against three members of the Australian Army following a civilian casualty incident in 2009. This information was given in such a way as not to prejudice the subsequent courts martial: Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 19 October 2010, 12–28 (Angus Houston, Air Chief Marshal).

³²⁶ Birkenhead (n 244) vol 2, 20–1.

³²⁷ A position established under the *DFDA* (n 1) s 188G, the functions of which are outlined in s 188GA.

is responsible for conducting the prosecution of alleged conduct which is a breach of service discipline'.³²⁸

While every ADF member of non-commissioned rank and above can be an investigating officer,³²⁹ the investigation of serious or complex service offences is carried out by the military police investigators from the Joint Military Police Unit ('JMPU'). The JMPU (headed by the Provost Marshal ADF) has provided an independent body to investigate service offences since 2008.³³⁰ The JMPU collects evidence within the constraints of the ADF jurisdiction and provides a brief of evidence to prosecutorial authorities, including the DMP, to determine whether a charge is preferred.

When an ADF member commits in Australia the offences of treason, murder, manslaughter, bigamy, sexual assault and any offence requiring consent of the CDPP or a Minister to prosecute,³³¹ consent must be sought from the CDPP in order to bring the matter before a service tribunal.³³² In determining whether consent shall be granted, the CDPP will have regard to whether it is in the public interest to have the matter prosecuted in the civilian criminal justice system as opposed to a service tribunal.³³³ One such circumstance which may merit the prosecution occurring in the military jurisdiction is that the conduct took place during a military operation.³³⁴ However, as Logan J has noted, '[j]urisdiction is one thing, occasion for its exercise is another'.³³⁵

Prosecutions for serious service offences are instituted by a charge under s 87(1) where the DMP reasonably believes that an ADF member has committed a service offence, and decides to exercise their prosecutorial discretion accordingly. This is aided by a prosecution policy which embraces the notion that not all suspected service offences should be prosecuted. Instead, a decision to prosecute must be based primarily on: (1) the interests of the ADF,³³⁶ in the same way its civilian

³²⁸ *DsPP/DMP MOU* (n 222) 3 [15].

³²⁹ *DFDA* (n 1) s 101(1) (definition of 'investigating officer'). The definition of 'investigating officer' also includes a 'police member'.

³³⁰ As a result of the Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Reforms to Australia's Military Justice System: Fourth Progress Report* (Report, September 2008) 3, 33. The original name of this unit was the 'Australian Defence Force Investigative Service'.

³³¹ Being an offence against *ACT Crimes Act* (n 136) ss 51–5 in its application to the Jervis Bay Territory.

³³² *DFDA* (n 1) s 63.

³³³ CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (Guidelines, 19 July 2021) 5–6 [2.10] as required under the *DsPP/DMP MOU* (n 222) 6 [29].

³³⁴ *DsPP/DMP MOU* (n 222) 6 [29]. See also Letts and McLaughlin (n 37).

³³⁵ *Igoe* (n 237) 338 [47].

³³⁶ 2021 DMP Prosecution Policy (n 285) 2 [12], 4–5 [17]–[18].

counterparts take into account the public interest when prosecuting crimes; and (2) the available, reliable evidence and reasonable prospect of conviction.³³⁷ In the context of disciplinary prosecutions, the ADF interest is defined primarily in terms of the requirement to maintain the good order and discipline of the ADF.³³⁸

Before deciding to proceed with a charge, the DMP may invite a superior authority to make representations as to whether the prosecution would be in the interests of the ADF.³³⁹ Such a representation is merely a submission and has no binding effect on the DMP. It does, however, allow for consideration of the particularities of service by the chain of command.³⁴⁰ Importantly, the DMP retains the right to prosecute ADF members where administrative sanctions have already been imposed on the member for the same misconduct.³⁴¹ This is so even where an accused's chain of command has given undertakings only to take administrative actions.

When laying the charges, the DMP can request that the Registrar of Military Justice refer the charge to be heard by a DFM, RCM or GCM.³⁴² Relevantly, such a decision considers the level of service knowledge necessary to assess the particular service context of the alleged conduct, and whether the level of service tribunal has sufficient powers of punishment.³⁴³

C *Concurrency of Systems*

As canvassed above, the military jurisdiction is neither subordinate, nor secondary, to the civilian criminal jurisdiction.³⁴⁴ This concurrency exists when civilian offences are committed by ADF members. The ADF requires its members to 'abide by the standards of behaviour prescribed by the criminal law applicable to all citizens'.³⁴⁵ Noting that ADF members are subject to the *DFDA* in addition to their ongoing legal obligations as a citizen, the relevance of service tribunals and the need for concurrent jurisdiction becomes apparent. The majority in *Private R* accepted that the requirement for ADF members to abide by the law of the land is inextricably

³³⁷ Ibid 2–4 [12]–[16].

³³⁸ Ibid 1–2 [5]–[12].

³³⁹ *DFDA* (n 1) s 5A.

³⁴⁰ As was the case with the Afghanistan charges: see Brereton (n 90) 93.

³⁴¹ *McCleave v Chief of Navy* (2019) 343 FLR 136, where the majority judgment upheld the right of the DMP to prosecute after administrative sanctions had been taken against the member by their respective chain of command.

³⁴² *DFDA* (n 1) ss 103(1)(c)–(d).

³⁴³ 2021 DMP Prosecution Policy (n 285) 8 [32].

³⁴⁴ *Private R* (n 14) 335 [51]. See above n 232 and accompanying text.

³⁴⁵ *Private R* (n 14) 321–2 [6].

linked with the maintenance of discipline;³⁴⁶ such that even '[t]rivial breaches ... if they occur frequently, may obviously have a serious bearing on discipline'.³⁴⁷

The right to be different is often raised in areas that appear separate and distinct from mainstream society: in counter-attacks on the imposition of court supervision over the administrative decisions of prison officials;³⁴⁸ the preservation of the internal disciplinary system of firemen;³⁴⁹ or more recently the right of university disciplinary proceedings to investigate and make findings of sensitive criminal law matters (sexual misconduct).³⁵⁰ The particularities of the fire-fighting service, prison service and tertiary academics can be easily distinguished from those of ADF members.

Sailors, soldiers and aviators are not employees, nor do they have contractual rights — they serve in accordance with the terms of their enlistment, while officers serve in accordance with the terms of their commission.³⁵¹ An ADF member cannot terminate their service as readily as a civilian may terminate their employment; yet, regardless of rank, an ADF member may be terminated for a number of reasons,³⁵² including that continuing their service is 'not in the interests of the Defence Force'.³⁵³ Just as an ADF member is not an employee, a theatre of operations (domestically or overseas) cannot and should not, in any sense, be construed as a normal workplace.³⁵⁴ To construe it as such would fail to acknowledge the exceptional powers granted to, and duties imposed on, ADF members when aiding the civil power under pt IIIAAA.

Whilst the *DFDA* does not grant a civil court jurisdiction to try a charge of a service offence,³⁵⁵ it does provide an 'important conduit for the influx of principles of the

³⁴⁶ Ibid 344–5 [80] (Kiefel CJ, Bell and Keane JJ), 355 [108] (Gageler J), 392 [194] (Edelman J).

³⁴⁷ Ibid 344 [80] (Kiefel CJ, Bell and Keane JJ).

³⁴⁸ The full details of which are expertly covered, and gratefully adopted, in Matthew Groves, 'Proceedings for Prison Disciplinary Offences: The Conduct of Hearings and Principles of Review' (1998) 24(2) *Monash University Law Review* 338, 349–51.

³⁴⁹ *Ex parte Fry* [1954] 1 WLR 730, in which the Court declined to interfere with the existing quasi-military discipline system. For criticism of the analogy, see SA de Smith, 'Discipline and Fireman Fry' (1954) 17(4) *Modern Law Review* 375.

³⁵⁰ *Y v University of Queensland* (2019) 280 A Crim R 63; *University of Queensland v Y* (2020) 5 QR 686.

³⁵¹ *Coutts v Commonwealth* (1985) 157 CLR 91, 120 (Dawson J) ('*Coutts*'), citing *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392, 441 (Windeyer J). See also: *Defence Act* (n 8) s 27; *Millar v Bornholt* (2009) 177 FCR 67, 87 [72]; *C v Commonwealth* (2015) 234 FCR 81, 86 [24], 88 [38], 90 [54]–[55].

³⁵² *Coutts* (n 351) 105 (Brennan J); *Marks v Commonwealth* (1964) 111 CLR 549, 586 (Windeyer J); *Commonwealth v Quince* (1944) 68 CLR 227, 241–2 (Rich J).

³⁵³ *Defence Regulation 2016* (Cth) reg 24(1)(c).

³⁵⁴ This raises the interesting, if slightly off topic, question of which body would investigate with regards to the *WHS Act* (n 149).

³⁵⁵ *DFDA* (n 1) s 190(1).

civilian criminal law'.³⁵⁶ This is through the aforementioned application of the external, civilian criminal law as it applies to the Jervis Bay Territory.³⁵⁷ There are multiple instances of both the DFDA,³⁵⁸ and the Full Court of the Federal Court of Australia,³⁵⁹ referring to and implementing civilian jurisprudence when determining offences under a military jurisdiction. This is important: whilst civilian law cannot be used to maintain service discipline, Australia's military justice system is able to absorb and maintain currency with developments in the common law.

Civilian jurisprudence does not, however, squarely apply to matters prosecuted under the *DFDA*. One area where this is observed is sentencing. When service tribunals are determining an appropriate sentence, they must have regard to civilian sentencing principles.³⁶⁰ However, for the same reason that an ADF member incurs additional responsibilities under military law,³⁶¹ the *DFDA* recognises that 'the need to maintain discipline in the Defence Force' is also a mandatory sentencing consideration.³⁶² As a result, a sentence imposed in the military jurisdiction may appear excessive or inadequate, and perhaps inconsistent, when compared with analogous civilian cases.³⁶³ That is, the connotation of the offending may be more serious in a service context, thereby justifying a more severe sentence.³⁶⁴ For the purposes of the scenario, this reflects, for example, the notion that

³⁵⁶ Groves, 'The Civilianisation of Australian Military Law' (n 231) 381–2.

³⁵⁷ *DFDA* (n 1) s 61.

³⁵⁸ *Kasprzyck v Chief of Army* (2001) 124 A Crim R 217 relating to property offences; *Mocicka v Chief of Army* (2003) 175 FLR 476, 479–80 [14] when considering the meaning of 'likely'. See also *Randall* (n 247) 261–2 [1]–[2] adopting the 'golden thread' in regard to the presumption of innocence.

³⁵⁹ See *Hoffman* (n 184) for example of civilian statutory construction principles.

³⁶⁰ *DFDA* (n 1) s 70(1)(a).

³⁶¹ *Private R* (n 14) 339 [65].

³⁶² *DFDA* (n 1) s 70(1)(b).

³⁶³ *Igoe* (n 237) 342–3 [62]; *White* (n 240) 581 [4] (Gleeson CJ), both citing *R v Généreux* [1992] 1 SCR 259, 294 (Lamer CJ).

³⁶⁴ *Igoe* (n 237) 342–3 [62] and *White* (n 240) 581 [4] (Gleeson CJ), both citing *R v Généreux* [1992] 1 SCR 259, 294 (Lamer CJ). Whether the matter would be classified as 'active service' however remains open, and remains a friction point for ADF members who risk wounding and death if called out under pt IIIAAA. The effect of this being that for offences committed while on active service the powers of punishment available to a summary authority increase: see *DFDA* (n 1) ss 69B–69C. Active service can arise from a declaration of active service by the Governor-General: see *DFDA* (n 1) s 3(1) (definition of 'active service'). The definition, however, also recognises that active service could be deemed to apply without such a declaration. The definition also allows for active service to mean 'service by the member in connection with operations against the enemy'. '[T]he enemy' is also defined: see *DFDA* (n 1) s 3(1) (definition of 'the enemy'). As it stands, it is uncertain whether, depending on the circumstances, a call out under pt IIIAAA would meet the threshold for active service. This issue could be considered in a later article.

[i]f Army members engage in ill-disciplined use of violence at home or at work, then Army's confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined.³⁶⁵

D *National Security Issues and the Operational Context*

As it stands, if prosecutions for misconduct arising under pt IIIAAA were to occur under civilian justice, civilian prosecutors would be expected to consider the operational context of the pt IIIAAA activity, which would include the relevant rules of engagement ('ROE').³⁶⁶ ROE are CDF directives issued to the ADF that regulate the way that force will be used by ADF members during an operation.³⁶⁷ ROE are specifically designed to comply with the law — in the context of pt IIIAAA, ROE need to comply with the Commonwealth's domestic legal obligations.

The simplicity of the consideration of the role of ROE has been described as a 'trap for the unwary'.³⁶⁸ ROE are classified.³⁶⁹ If prosecuted in the civilian sphere for a purported offence under pt IIIAAA, knowledge of the ROE would be required by the presiding civilian judge, prosecution, defence counsel and jury. Failure to do so, it is submitted, would be unjust, particularly due to the aforementioned obligation for ADF members to abide by their issued ROE. This would be of particular importance in a situation where civilians have been injured or killed as a result of the conduct of an ADF member during a pt IIIAAA operation. There may be occasions whereby civilian injury or death is unavoidable in order to neutralise a greater threat. As directives on the use of force, evidence and understanding of the ROE will be crucial in determining an ADF member's culpability if an offence is alleged to have occurred.

Yet it seems unlikely that Standard Operating Procedures and ROE would be de-classified.³⁷⁰ When prosecuted within a military jurisdiction and before a service tribunal, ADF members may be judged by those who understand the complex terrain. The opposite is true as well; following the abolition of a separate military justice system, members of the Dutch judiciary in the Appeals Chambers of the Arnhem Court have noted a manifest lack of understanding by the prosecution of military

³⁶⁵ Australian Army, *The Army Family and Domestic Violence Action Plan* (CA Directive 28/16, 2016) 1 [2].

³⁶⁶ EM, DLA (Aid to Civilian Authorities) Bill 2005 (n 7) 24.

³⁶⁷ Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Report, 2020) 22, 287.

³⁶⁸ Simon Bronitt and Dale Stephens, 'Flying under the Radar: The Use of Lethal Force against Hijacked Aircraft' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 275.

³⁶⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2005, 177 (De-Anne Kelly, Minister for Veterans' Affairs).

³⁷⁰ This reluctance is understandable and sensible: *ibid.* See also *Re Hocking* (1987) 12 ALD 554.

operations.³⁷¹ Additionally, a service tribunal avoids some, if not most, of the difficulties associated with trials involving classified information. Indeed, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('NSI Act') does not apply to service tribunals as service tribunals do not try offences summarily or on indictment.³⁷² Instead, the *DFDA* applies common law tests in determining applications of public interest immunity to protect national security information.³⁷³ Furthermore, participants in service tribunals (including the accused) are likely to possess a security clearance.

Officers participating in an RCM or GCM equally would, and should, understand the complexity surrounding the defence of superior orders, a defence under pt IIIAAA³⁷⁴ and the *DFDA*.³⁷⁵ The application of service knowledge — through courts martial, DFMs or on appeal to the DFDAT — would be invaluable when addressing the issues of identifying whether a member was a de facto or de jure superior, whether the order was indeed manifestly unlawful, and whether the action taken was reasonable and necessary to give effect to the order.³⁷⁶ Retrospective analysis of an immediate decision by a soldier may give insufficient weight to the operational stressors. For example, the *DFDA* specifically provides that a service tribunal shall have regard to the relevant activities the accused was engaged in for service offences that involve an element of recklessness.³⁷⁷ In a similar vein, for offences involving an element of negligence, the service tribunal shall have regard to the standard of care that would have been exercised by 'a member of the Defence Force with the same training and experience [who] was engaged in the relevant activities' that the accused was engaged in at the relevant time.³⁷⁸ These standards exist to reflect that nature of service offences, and the context that such offences occur in. Assessment of the factors cannot be sensibly made without a reasonable degree of

³⁷¹ Arne Willy Dahl, 'International Trends in Military Justice' (Speech, Oslo University, 23 November 2011) 8 <https://generaladvokaten.custompublish.com/getfile.php/5069677.3012.mnsutbqmn7azpk/_2011_11_international_trends_in_military_justice.pdf>. See further Bas van Hoek, 'Military Criminal Justice in the Netherlands: The "Civil Swing" of the Military Judicial Order' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press, 2016) 218.

³⁷² *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 13(1) ('NSI Act').

³⁷³ *DFDA* (n 1) ss 140, 148(2). Some of the relevant authorities include: *Sankey v Whitlam* (1978) 142 CLR 1, 43 (Gibbs ACJ); *Young v Quin* (1985) 4 FCR 483, 487–8 (Bowen CJ); *R v Fandakis* [2002] NSWCCA 5, [42].

³⁷⁴ *Defence Act* (n 8) s 51Z.

³⁷⁵ *DFDA* (n 1) s 14.

³⁷⁶ See Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210. This was an issue raised in the respective US and United Kingdom courts martial for behaviour by their military personnel in Abu Ghraib: see generally Sunita Patel, 'Superior Orders and Detainee Abuse in Iraq' (2007–8) 5(1) *New Zealand Yearbook of International Law* 91.

³⁷⁷ *DFDA* (n 1) s 11(1).

³⁷⁸ *Ibid* s 11(2).

service knowledge: this being knowledge that a service tribunal is likely to possess. Current, serving officers with relevant specialist knowledge and experience would, it is submitted, be a better judge for service offences arising under pt IIIAAA than a civilian judge who may lack such military experience. This is not to suggest ‘that the military should become a law unto itself’³⁷⁹ but to formally recognise that the ADF is, by necessity, a specialised society nested within civilian society.³⁸⁰ So too should the *curia specialis* be utilised, then, for an active decision by the executive to call out the ADF under an Act of Parliament.

Even within the ADF, there are special units nested within the institutions. These units are implicitly recognised and are reflected within pt IIIAAA, primarily through the interplay between div 3 and div 4 powers. The legislation makes clear that, although they are separate divisions, powers under div 3 may also be utilised under div 4. If a power could be used under both, it is taken to be exercised under div 3.³⁸¹ The reason for this is that it is presumed that Special Operations Command (‘SOCOMD’) personnel will primarily conduct div 3 operations. Although the scenario in this article falls under div 4, it merits considering the applicability of a court, or court martial, to try an offence occurring during a div 3 call out, noting that the domestic violence threshold is often one that will require div 3 powers to resolve it.

SOCOMD personnel are highly trained and experienced combat soldiers, with a unique subculture.³⁸² Importantly for pt IIIAAA, for the tenure of their postings their identities are protected from both civilians and other ADF members. This protection is not found in law, and presumably comes from policy.³⁸³ Yet, it is a policy that has *influenced* law, particularly pt IIIAAA, where for div 3 operations there is no requirement for soldiers to wear uniform or have any form of identification.³⁸⁴ Whilst lengthy, the justification provided in the Explanatory Memorandum merits replication:

The requirement to wear uniforms and identification applies to proposed Division 4, but not to proposed Division 3. This is because the tasks that the ADF will be required to perform under Division 3 are higher end military actions and may involve the Special Forces. These tasks may require the ADF to operate in a covert manner where

³⁷⁹ Groves, ‘The Civilianisation of Australian Military Law’ (n 231) 365.

³⁸⁰ The terminology of which is taken from the US Supreme Court in *United States ex rel Toth v Quarles*, 350 US 11, 17 (1950). See also Brereton (n 90) 95–6.

³⁸¹ *Defence Act* (n 8) ss 41, 43.

³⁸² The effect of this isolation on the culture of SOCOMD was reportedly addressed in an internal review by sociologist Samantha Crompvoets: see Dan Oakes, ‘Claims of Illegal Violence, Drugs and Alcohol Abuse in Leaked Australian Defence Report’, *ABC News* (online, 9 June 2018) <<https://www.abc.net.au/news/2018-06-08/allegations-of-australian-soldier-misconduct-detailed-in-report/9815182>>.

³⁸³ For a discussion of these issues see *Private R Army v Chief of Army* [2022] ADFDAT 1, [25].

³⁸⁴ *Defence Act* (n 8) s 43.

uniforms would be detrimental. ADF Special Forces soldiers have protected identity status because they are associated with sensitive capabilities. Protected identity status is required to maintain operational security and the safety of the individual and their family. By virtue of their protected identity status, ADF Special Forces soldiers are able to exercise powers under proposed Division 3 without being required to produce identification or wear uniforms. Tasks under Division 4 are more likely to be related to securing an area with, or in assistance to, the police. When carrying out Division 4 tasks, the ADF is more likely to need to display a visible presence and therefore uniforms will assist the conduct of these tasks.³⁸⁵

This raises interesting considerations of legal accountability and practical barriers that would occur in both military and civilian jurisdictions.

Protected identity, and the barriers this represents in a court, is neither novel nor unique to SOCOMD. In the case of *A v Hayden [No 2]*,³⁸⁶ the applicants, members of the Australian Secret Intelligence Service and one army officer, sought an injunction to prevent the Commonwealth disclosing their identities to civilian law enforcement on the basis that it would endanger national security.³⁸⁷ The applicants had been involved in a bungled training activity at the Sheraton Hotel in Melbourne. It was alleged that a number of offences, contrary to Victorian law, had been committed by the participants in the course of the activity, including possession of a prohibited weapon, burglary, criminal damage, assault and affray.³⁸⁸ Oddly, the Court did not have to decide whether a claim of national security would protect the identity as it was conceded by the Commonwealth that it was not a matter of national security.³⁸⁹ The question is thus unanswered at common law.

Relevantly, the Canadian experience of prosecuting Special Forces members charged with service offences has highlighted some of the barriers. In Afghanistan in 2005, a warrant officer in the highly regarded Joint Task Force 2 force element strangled another member for 45 seconds before being restrained; the offence and rank of the individual was deemed serious enough to merit a full court martial in Canada. However, the Chief Military Judge of the Canadian military declined to proffer charges because of the friction between an open court, and classified identities and the information surrounding the operation.³⁹⁰ In a case closer to home, a prosecution against a member of the Australian Army accused of mishandling corpses in East Timor in 1999 was abandoned, in part because of a refusal by the presiding

³⁸⁵ Explanatory Memorandum 2018 (n 24) 60 [332].

³⁸⁶ (1984) 156 CLR 532 (*'Hayden [No 2]'*).

³⁸⁷ Ibid 534. See also *A v Hayden [No 1]* (1984) 56 ALR 73.

³⁸⁸ *Hayden [No 2]* (n 386) 582 (Brennan J).

³⁸⁹ Ibid 575 (Wilson and Dawson JJ).

³⁹⁰ Moran (n 88) 1248–9; *Canada (Director of Military Prosecutions) v Canada (Court Martial Administrator)* [2007] FCA 390.

DFM to grant protective orders sought by members of the New Zealand Defence Force who were to appear as witnesses.³⁹¹

The notion ‘that justice should both be done and be manifestly seen to be done’³⁹² is more than just an adage. Open justice — consisting of public hearings, publicly communicated evidence, and public reasons for judgment — is a central feature of the common law and the administration of justice.³⁹³ This was recognised by the recent, and important, development within Australia’s military justice system, which will now publicly release the ‘decisions of courts martial and the decisions and reasons for decision of DFMs’ noting that it is ‘an essential component of the administration of military justice’.³⁹⁴ Just as within the civilian sphere, open justice within the military sphere is not absolute.³⁹⁵ Relevantly to the protected identity status of certain ADF members, courts may derogate by ordering proceedings to be heard in closed court or the records of the proceedings be restricted.³⁹⁶ Notice would be given under a court martial or DFM of the consequential publication, on which they may make contestations as to the effect it could have on the ‘security or defence of Australia’.³⁹⁷

The practical difficulties of both protected identity and classified material in civilian court may prove to be too much of a barrier to prosecutions. Take, for example, an attempt by a defendant to admit into evidence classified ROE, for the purpose of demonstrating that the actions taken were in accordance with them. If the civilian judge, sitting in civilian court, were satisfied that such material would likely prejudice national security if disclosed, then the use of the material would be constrained by operation of the *NSI Act*. While not insurmountable, classified information creates difficulties in a trial arising out of a situation such as envisaged in the scenario detailed above.³⁹⁸ Service tribunals are unlikely to suffer such difficulties

³⁹¹ Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 5 November 2003, 71–88 (Lt Gen Peter Leahy).

³⁹² *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).

³⁹³ See, eg: *Scott v Scott* [1913] AC 417; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–7 (McHugh J); *Ho v Loneragan* [2013] WASCA 20; *A-G (UK) v Leveiler Magazine Ltd* [1979] 1 All ER 745, 749–51 (Lord Diplock). See also Justice James Spigelman, ‘Seen to Be Done: The Principle of Open Justice (Pt 1)’ (2000) 74(5) *Australian Law Journal* 290, 292.

³⁹⁴ JAG Practice Note 1 (n 290) 1.

³⁹⁵ *Hogan* (n 264) 530 (French CJ); *DFDA* (n 1) s 140.

³⁹⁶ *DFDA* (n 1) s 140(2). For example, both the applicant and the Commonwealth sought to suppress the applicant’s name in *Private R* (n 14): see Transcript of Proceedings, *Private R v Cowen* [2020] HCATrans 23, 9–12. The recent case of *Boyson* (n 268) demonstrates the viability of these non-publication orders, where the name of the complainant was subject to a non-publication order in relation to a sexual offence.

³⁹⁷ JAG Practice Note 1 (n 290); *DFDA* (n 1) s 140(2).

³⁹⁸ In the past five years (2017–22), there have been five non-disclosure certificates issued under the *NSI Act* (n 372), four pursuant to s 26 (federal criminal proceedings), and one pursuant to s 38F (civil proceeding): see ‘National Security Information

by virtue of the participants. That is, a service tribunal can consist of personnel that are subject matter experts in relation to the information that may be harmful to national security if disclosed. The likely need to adduce national security information (in the form of ROE) appears to support that, at first instance, the DMP take carriage of the matter. This would be particularly so for an offence that may not be particularly serious, such as the assault scenario described. The effect of this is that an open court hearing may encounter the same practical difficulties whether in a military or civilian jurisdiction. In addition, civilian courts may allow for protected identities to continue, although in a jury situation this may prove difficult and could realistically present a barrier to justice.

Grounds of challenge cannot simply be asserted without any factual basis, and the presumption of regularity would need to be rebutted by the available facts including reasonable inferences. It is possible that the call out order may be of some assistance in this regard, although it would not be required to be made public until it has ceased to be in force, if at all. These grounds of challenge would require considering police and ADF intelligence relied upon in making that decision and the national security implications of divulging that information. The friction between national security

(Criminal and Civil Proceedings) Act 2004 Annual Reports', *Attorney-General's Department* (Web Page, 22 July 2021) <<https://www.ag.gov.au/national-security/publications/national-security-information-criminal-and-civil-proceedings-act-2004-annual-reports>>. Some of these matters, to which the certificates relate, are still on foot. An example of how the application of the *NSI Act* adds a level of complexity and delay to legal proceedings is the Bernard Collaery matter. In November 2018, the Attorney-General applied for the *NSI Act* secrecy provisions to operate in relation to the Collaery prosecution: *Dean v Collaery [No 1]* [2018] ACTMC 29. In October 2019, the ACT Supreme Court considered the operation of the secrecy provisions in relation to court processes following an order made under s 22 of the *NSI Act*, pending a s 27(3) hearing: *R v Collaery* [2019] ACTSC 278. In May 2020, the ACT Supreme Court considered the proper interpretation of ss 24–5 of the *NSI Act* in relation to the application of these provisions during a s 27(3) hearing: *R v Collaery [No 8]* (2020) 354 FLR 35. In June 2020, the ACT Supreme Court granted the Attorney-General's application for non-disclosure orders which would result in much of the subsequent proceedings being held in closed court: *R v Collaery [No 7]* (2020) 354 FLR 7. In October 2021, the ACT Court of Appeal set aside the decision in relation to those non-disclosure orders and remitted the matter to the primary judge. In reaching its decision, the Court of Appeal considered the issue of weighing the risk of prejudice to national security against the interests of the administration of justice: *Collaery v The Queen [No 2]* [2021] ACTCA 28. While the Court of Appeal has only released a judgment summary (Supreme Court of Australian Capital Territory, *Collaery v The Queen [No 2] [2011] ACTCA 28* (Judgment Summary, 6 October 2021) <https://www.courts.act.gov.au/___data/assets/pdf_file/0004/1870627/Collaery-v-The-Queen-Judgment-Summary.pdf>), the primary judge, upon remittal, examined the Court of Appeal's decision in order to consider the scope of the remittal: see *R v Collaery [No 10]* (2021) 363 FLR 299. On 7 July 2022, the Attorney-General, exercising his powers under the *Judiciary Act 1903* (Cth) s 71(1), declined to proceed further with the prosecution of Collaery: see CDPP, 'Prosecution of Mr Bernard Collaery' (Media Release, 7 July 2022) <<https://www.cdpp.gov.au/news/prosecution-mr-bernard-collaery>>.

and public interest is neither novel nor unique.³⁹⁹ This was made clear in the case of *Leghaei v Director General of Security* ('*Leghaei*') before Madgwick J in the Federal Court.⁴⁰⁰

Leghaei concerned an application for review under s 39B of the *Judiciary Act 1903* (Cth) of an adverse security assessment furnished by the Australian Security Intelligence Organisation ('ASIO') pursuant to s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). The assessment had determined that the applicant was 'directly or indirectly a risk to Australian national security'.⁴⁰¹ The furnishing of that assessment obliged the Minister for Immigration to cancel the applicant's bridging visa.⁴⁰² Relevant to this article is how the Court dealt with sensitive national security matters.

In *Leghaei*, when considering first whether ASIO had a duty to afford procedural fairness to the applicant, Madgwick J rejected the respondent's submission that the *ASIO Act* or considerations of confidentiality and national security necessarily implied that procedural fairness should be excluded, noting that the *Migration Act 1958* (Cth) required a person to be informed when their visa would be cancelled.⁴⁰³ Accordingly, Madgwick J held:

it is my view that an obligation positively to consider what concerns and how much detail might be disclosed to the subject visa holder to permit him/her to respond, without unduly detracting from Australia's national security interests, is minimally necessary to ensure a fair decision-making process. ... Thus, in relation to a lawful non-citizen etc, such as the applicant, whose visa would be directly threatened by an adverse security assessment, there was, in my view, a duty to afford such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security, at the primary decision-making stage.⁴⁰⁴

After determining that ASIO had a duty to afford procedural fairness to the applicant, Madgwick J considered whether this duty had been discharged. Ultimately, Madgwick J was satisfied on the confidential evidence before the Court that the Director-General had genuinely considered disclosure and had afforded procedural fairness to the applicant, noting however that the potential prejudice to the interests of national security involved in such disclosure meant 'that the content of procedural fairness, [was] reduced, in practical terms, to nothingness'.⁴⁰⁵ In coming to this conclusion, his Honour further stating that 'without the benefit of countervailing

³⁹⁹ Caroline Bush, 'National Security and Natural Justice' (2007) 57(1) *Australian Institute of Administrative Law Forum* 78, 84–6.

⁴⁰⁰ *Leghaei v Director General of Security* [2005] FCA 1576 ('*Leghaei*').

⁴⁰¹ *Ibid* [6].

⁴⁰² *Ibid* [9].

⁴⁰³ *Ibid* [73].

⁴⁰⁴ *Ibid* [82]–[83].

⁴⁰⁵ *Ibid* [88].

expert evidence in the present case, [his Honour was] not in a position to form an opinion contrary to those expressed in the confidential affidavit evidence in relation to disclosure' as the 'Courts are ill-equipped to evaluate intelligence'.⁴⁰⁶

A recent 4:3 decision in *SDCV v Director-General of Security*⁴⁰⁷ is of some relevance in this discussion. Specifically, Steward J (citing, among others, *Leghaei*) held that 'it is practically inevitable in such proceedings that the Director-General would successfully claim public interest immunity over certified documents'.⁴⁰⁸ It is significant that while the applicant in *Leghaei* was unable to access information relied upon in making the negative security assessment, classified information and materials were made available to the Court. This included 'counsel for the applicant and the applicant's instructing solicitor', after they had undergone the requisite security clearances and had given 'appropriate undertakings as to confidentiality'.⁴⁰⁹

Such a level of disclosure was enough for Madgwick J to consider that procedural fairness had been afforded to the extent possible in light of national security interests and that the adverse assessment decision was not affected by jurisdictional error.⁴¹⁰ But, as Madgwick J states, the amount of 'comfort' that the applicant and interested members of the public can take from this process is 'regrettably limited'.⁴¹¹ Accordingly, in the event a call out under pt IIIAAA occurred, it may indeed be possible to disclose sufficient materials to the court to allow for a determination as to whether it was valid or invalid.⁴¹²

This was an issue core to the Coronial inquest into the Lindt Café siege. The Coroner dedicated some space in his findings to discuss the difficulties of timeliness, and sensitive evidence. Although finding that there was 'no realistic likelihood that any other form of public inquiry would have proceeded more expeditiously',⁴¹³ it may have been beneficial for an inquiry to have taken place within the Law Enforcement Conduct Commission ('LECC').⁴¹⁴ The LECC is familiar with relevant policy and procedure and made up of individuals who understood the civilian police system; this may have allowed for appropriate findings to be made.

⁴⁰⁶ *Leghaei* (n 400) [84].

⁴⁰⁷ (2022) 405 ALR 209.

⁴⁰⁸ *Ibid* 291 [313].

⁴⁰⁹ *Leghaei* (n 400) [101].

⁴¹⁰ *Ibid* [88], [97].

⁴¹¹ *Ibid* [90].

⁴¹² This might include security situational reports or redacted intelligence updates. Equally, it might include text messages: see, eg, *Re Secretary, Department of Defence and Thomas* (2018) 74 AAR 379.

⁴¹³ *Lindt Café Inquest* (n 23) 435 [129].

⁴¹⁴ *Ibid* 435 [134].

The Coroner was sure to emphasise that this investigation take place in addition to, not in substitution of, a public hearing.⁴¹⁵ Yet the benefit of a court martial, conducted by individuals familiar with relevant policy, procedure, rank, experience, is that it is generally public.⁴¹⁶ As this article has demonstrated, fears of public transparency are not applicable to superior tribunal jurisdictions, in contradistinction to the stereotypes of summary authority jurisdictions.

E *Sentencing in Context*

An additional aspect for consideration is the context of the alleged offending and how this affects not only the decision to prosecute, but how an offender is sentenced if convicted. ADF members involved in a pt IIIAAA operation would anticipate that force would be used: a significant threat has been identified and the ADF has been deployed to deal with it. The ADF and the government expects that members of the ADF will use force in a controlled and measured way, and in a way directed by the ROE. In addition to training and strong leadership, exercised through a hierarchical structure, the ADF also uses its discipline system to enforce standards of behaviour. These standards of behaviour are different to those expected of ordinary civilians; it is why the purpose of the disciplinary system differs from the criminal law.⁴¹⁷ The Corporal in the fictitious example is, due to the nature of the operation, exposing themselves to potential harm. Furthermore, the Corporal is obliged to do so as a matter of law.⁴¹⁸ An ADF member engaging in misconduct during an operation to aid the civil power presents a serious disciplinary issue for the ADF.

Courts in the United Kingdom have grappled with the difficulty of determining the criminal responsibility of defence members performing their duties on domestic operations.⁴¹⁹ In a number of cases that arose out of the Troubles in Northern Ireland, the House of Lords had to consider the implications of a soldier's duty on their criminal responsibility with regards to homicides arising out of operations in Northern Ireland.⁴²⁰ These cases highlight the tension in application of the ordinary criminal law to military operations, particularly operations in aiding the civil power.

The tension was aptly summarised by Lord Diplock in *A-G's Reference No 1*.⁴²¹ His Lordship observed that, *prima facie*, to kill or seriously wound another person

⁴¹⁵ Ibid 435 [132]–[133].

⁴¹⁶ *DFDA* (n 1) s 140.

⁴¹⁷ *Re Tracey* (n 99) 564; *Private R* (n 14).

⁴¹⁸ At a minimum, the Corporal would likely be guilty of the service offence of 'disobeying a lawful command': *DFDA* (n 1) s 27, if they did not follow an order to carry out duties as part of Operation Green and Gold.

⁴¹⁹ *R v MacNaughton* [1975] NI 203; *Reference under s 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937 (*A-G's Reference No 1*); *R v Clegg* [1995] 1 All ER 334 (*Clegg*).

⁴²⁰ The key cases were *A-G's Reference No 1* (n 419) and *Clegg* (n 419).

⁴²¹ *A-G's Reference No 1* (n 419) 940–9.

by shooting is unlawful.⁴²² However, this presumption does not necessarily hold true when the military is engaged in aiding the civil power. This was, in part, the issue the House of Lords was asked to consider in *A-G's Reference No 1*: what was the criminal responsibility of a soldier using lethal force to prevent the escape of someone the soldier honestly and reasonably believed was a member of the organisation they were called out to respond to?⁴²³ Lord Diplock acknowledged the difficulty with the law dealing with a situation whereby a soldier is asked to risk their life, in circumstances that were similar to, but not exactly the same, as a law enforcement activity.⁴²⁴ The 'tool' provided to perform those duties was a lethal weapon (a rifle), such that the soldier had no real discretion in the level of force that could be used: '[i]t was a case of all or nothing'.⁴²⁵

Similar issues arose in the case of *R v Clegg*.⁴²⁶ In that case Private Clegg was convicted of the unlawful killing of the passenger of a vehicle that drove through a vehicle checkpoint. His claim of self-defence was found to be invalid on the facts.⁴²⁷ Private Clegg's use of force was found to be excessive and unreasonable in the circumstances. The House of Lords was of the view that it was regrettable, because of the special circumstances Private Clegg found himself in, that the only finding that could be made was of murder, as opposed to manslaughter.⁴²⁸ Ultimately, the House of Lords determined that whether the conduct should amount to manslaughter was a matter for Parliament,⁴²⁹ and found that Private Clegg was rightly convicted of murder.⁴³⁰

The Northern Ireland cases concern instances of the most serious offence on the criminal calendar. The reasoning of their Lordships in the cases shows a reluctance to attribute full criminal culpability for murder because of the special circumstances of the offending. That is: there is a recognition that homicide in the course of operations in aid of the civil power is different to cases of homicide normally faced by criminal courts. However, at the other end of the seriousness of offences against the person, it would appear a different approach is taken.

The objective seriousness of the fictional Corporal's assault, from the perspective of the criminal law, is towards the lower end of the scale. However, in the context of the maintenance of good and discipline of the ADF, the conduct is a serious breach of discipline. The ADF is more likely to treat such offending as serious given the context in which it occurred. The ADF is rightly sensitive to instances

⁴²² Ibid 946.

⁴²³ Ibid 944.

⁴²⁴ Ibid 946–8.

⁴²⁵ Ibid 949.

⁴²⁶ *Clegg* (n 419).

⁴²⁷ Ibid 338–9 (Lord Lloyd).

⁴²⁸ Ibid 341.

⁴²⁹ Ibid 346–7.

⁴³⁰ Ibid 347.

of defence members using force in an unlawful manner against members of the public, and particularly so on operations, where improper use of force will garner public anger and distrust of the ADF and its mission. Quick and proper action in response that demonstrates disapproval of the misconduct is necessary to show the government and public at large that misbehaviour amongst ADF members will be treated seriously. Likewise, deterrence and the effect of the offending on morale is likely to loom large in a prosecutorial decision.

Most members of the ADF expect that members who fall short of the standards required of them will be disciplined in a fair, but robust manner. Misconduct that has not been dealt with properly is deleterious to the effectiveness of the ADF for two reasons: other members may not be deterred from engaging in similar unlawful behaviour in the future; and law-abiding members will be reluctant to serve with members they see as not upholding the standards and values of the wider ADF.

These disciplinary issues do not, as a matter of course, arise in the context of civilian criminal proceedings. In particular, they do not form part of considerations for sentencing, whereas they are mandatory factors before service tribunals.⁴³¹ Taking into account disciplinary factors would likely result in what a civilian court would hold to be a harsher sentence compared to one it might impose. This is not, in and of itself, a valid reason for preferring one jurisdiction over another. However, the implications of either not prosecuting, or of imposing — when considered through a disciplinary lens — an inadequate sentence, supports having the Corporal dealt with by a court martial rather than a court. A service tribunal can deal with both the ‘criminality’ of the Corporal’s offending, while at the same time taking into account the disciplinary issues as well.

V CONCLUSION

The second reading speech that introduced pt IIIAAA to Parliament noted ‘the unsatisfactory state of the existing call-out framework, including anachronistic provisions’.⁴³² The intent of the Bill was to, among other things, ‘modernise the procedures to be followed for call-out of the Defence Force’.⁴³³ In 2005, the legislative regime was reformed and expanded into areas which were recognised, at the time, to be authorised under the constitutional executive power.⁴³⁴ This codification of the Royal prerogative, whilst subject to critique,⁴³⁵ demonstrates a clear intent by Parliament to provide legal certainty to the domestic deployment of the ADF. It is lamentable, then, that such clarification has not been provided to the aftermath

⁴³¹ *DFDA* (n 1) s 70.

⁴³² Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, 18410 (Sharman Stone).

⁴³³ *Ibid* 18411.

⁴³⁴ See, eg, Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 92 of 2005–06, 7 February 2006) 3.

⁴³⁵ See White, *Keeping the Peace of the Realm* (n 5) 11–17.

of responding to instances of domestic violence — a term that, as this article has expanded upon, often will require powers beyond those shared by all citizens to respond to.

This article has argued that a court martial, rather than court, should be the preferred jurisdiction to deal with the alleged misconduct of the fictional Corporal. Service tribunals retain a spectrum of powers that allow for appropriate punishments to be imposed for service offences, and allow for service knowledge to be applied when determining whether an ADF member has committed an offence in the course of ADF operations. Moreover, service tribunals retain an ability to appropriately deal with sensitive information and protected identities in a way that civilian courts cannot.

How the police and ADF interact will be a key consideration as this will impact how the scene is processed and individuals are investigated. Although the intent of pt IIIAAA would appear to be maintaining a clean delineation between state police and ADF members who are called out,⁴³⁶ this may not necessarily be the case. Seeking clarity on prosecutions is one way that this may be mitigated.

The lack of defined outcome, post action, will have an impact on how the ADF plans for these scenarios. When the ADF plans for armed conflict in another country there is explicit knowledge that kinetic action can be taken lawfully, without fear of prosecution. This is integral to the ADF being able to risk manage the use of lethal force in an uncertain environment, where collateral damage can occur regardless of planning and rehearsals.

Lack of clarity in the consequences for ADF members operating under pt IIIAAA increases the risk threshold in a number of ways. Organisationally, it increases the risk threshold that must be planned as the tolerance for collateral damage is now significantly decreased. This creates a unique dilemma for planning, as it is the post action consequences that must be considered while planning for the kinetic actions. As a capability the ADF could potentially lose not only the operators, through the ensuing legal action, but also be subject to various enquiries from Comcare Australia, the coroner, state police and ADF internal investigations and administrative inquiries. This could absorb a significant amount of ADF resources that would ordinarily be focused on defending national interests, on top of the opportunity cost and capability building.⁴³⁷

⁴³⁶ Army Knowledge Centre, 'Working with Police' (2019) 56 (March) *Smart Soldier* 29–32.

⁴³⁷ See Justice John Logan, 'Administrative Discharge in Lieu of Military Disciplinary Proceedings: Supportive or Subversive of a Military Justice System?' (Speech, Queensland Tri-Service Reserve Legal Officer Panel Training Day, 16 November 2018) 5. Justice Logan addressed the costs of training soldiers, officers and Australian Defence Force Academy graduates respectively.

In order to mitigate this risk, two options are viable. The first is for Parliament to explicitly carve out the court martial option through clear, legislative amendments. The second is to update the MOU from 2007⁴³⁸ in a way that reflects post-*Private R* developments and delineates responsibility in domestic operations. If the purpose of the applicable criminal law provision in pt IIIAAA was to ensure that the prosecuting authority deciding on charges against an ADF member involved in a call out would consider the military context in which the alleged offending occurred, then it stands to reason that the more appropriate body to hear such a charge would be a service tribunal rather than a criminal court. A statutory provision exists in the *DFDA* for chain of command to make representations on the interest of the ADF to the DMP for a possible trial of a defence member before a DFM or court martial.⁴³⁹ Carving out court martial jurisdiction over pt IIIAAA activities risks creating a lacuna, particularly in instances where civilian authorities consider an accused ADF member's conduct not warranting criminal prosecution, but the ADF considers the matter serious from a disciplinary prospective.

There will always be a need for transparency of activities to ensure that the public has faith in the ADF as an organisation, and the conduct of inquiries post domestic kinetic action is a key mechanism to ensure that the public will accept that the military is not overstepping into what could have been a police action.

For the individual operator, there will need to be consideration on how those under the cloud of legal action are managed and supported. This will create a significant burden on the ADF welfare system for the unit who must manage the individual while they await the outcome of any investigation. This kind of inter-agency investigation involving many different departments could drag out over an extended period of time which will keep any member under investigation in limbo until the investigation and court case is complete. The possibility of this outcome could erode the confidence an ADF member has in executing their duties and potentially reduce their effectiveness.

⁴³⁸ See *DsPP/DMP MOU* (n 222).

⁴³⁹ *DFDA* (n 1) s 5A.

LIMITING OVERLAP OF COPYRIGHT EXCLUSIVE RIGHTS ONLINE: LESSONS FROM CANADA'S *SOCAN V ESA* CASE ON STREAMING AND DOWNLOADS

ABSTRACT

Copyright owners' exclusive right to communicate to the public includes the 'making available' of a work, as set out in the *WIPO Internet Treaties* of 1996. The right has been implemented in countries such as Australia and Canada, however, the overlap between the 'making available' aspect of the communication right and the reproduction right remains unresolved. The Supreme Court of Canada has sought to limit overlaps between these rights. In *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association of Canada* ('*SOCAN v ESA*'), the Court held that when a person makes a durable copy of a work available for download, this is not a communication of a work to the public, but merely an 'authorisation' of its reproduction, and therefore an exercise of the reproduction right. The Canadian approach and sentiment towards overlaps may be contrasted with that of Australian courts, which tend to take overlaps in protection as a given, and show limited concern about double dipping or doctrinal clarity. The *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* case and relatively recent cases involving Redbubble Ltd decided by the Federal Court of Australia are examples of this. In drawing out lessons from the groundbreaking *SOCAN v ESA* decision, this article prompts Australian courts to interpret the communication right in a careful and considered manner that limits overlaps in protection.

I INTRODUCTION

The scope of copyright owners' right to communicate their work to the public by 'making available' remains uncertain, decades since it was established through the *WIPO Copyright Treaty* ('*WCT*')¹ and the *WIPO Performances*

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¹ *WIPO Copyright Treaty*, opened for signature 20 December 1996, 2186 UNTS 121 (entered into force 6 March 2002) ('*WCT*').

and *Phonograms Treaty* ('WPPT'),² collectively known as the *World Intellectual Property Organisation* ('WIPO') *Internet Treaties*. This is particularly so in the media streaming context, where the line between ephemeral streaming and downloads is not clear cut. Consider the example of a streaming service that allows downloads of content for offline use at users' leisure, when users are unable to access the internet.³ Should this give rise to claims that the service provider has exercised both the reproduction right and the right to communicate to the public? One might think that content dissemination models providing downloads of content only (not streams) would be relatively straightforward, but this has nevertheless given rise to claims that both the reproduction right and right to communicate to the public should apply. The concern here is that overlapping rights apply to a single exploitative use of copyright content. This increases licensing complexity and transaction costs unnecessarily, as authorisation is needed from holders of different rights.

The Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association of Canada* ('SOCAN v ESA')⁴ sought to avoid this problem by drawing a line between downloads of durable copies and ephemeral streaming. It held that if a person, who is not the copyright owner, makes a durable copy of a work available for download, this would infringe the right to *authorise* the making of reproductions,⁵ but would not infringe the right to communicate a work to the public, by 'making available'.⁶ The decision prompts closer consideration of Australian decisions that fail to engage with the question of whether overlapping rights may lead to undesirable policy outcomes. One angle is to consider the distinction between reproductions and communications, which was the primary concern in *SOCAN v ESA*. In addition, the Canadian Court's use of authorisation of reproduction as a distinct right of the copyright owner prompts consideration of overlap between primary and secondary liability for copyright infringement which constitutes a secondary and less obvious angle of this critique.

In contrast, Australian courts tend to take overlaps in protection as an inherent part of copyright law. For example, in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* ('Optus TV'),⁷ the Federal Court of Australia limited its analysis to the reproduction right when assessing the legality of a service permitting the streaming of content from the cloud (an activity which falls squarely within the copyright owners' interest in making content accessible to the public).⁸ In these

² *WIPO Performances and Phonograms Treaty*, opened for signature 20 December 1996, 2186 UNTS 203 (entered into force 20 May 2002) ('WPPT').

³ See, eg, Spotify, 'How to Download and Listen to Music and Podcasts: Offline and on the Go', *For the Record* (Web Page, 24 May 2019) <<https://newsroom.spotify.com/2019-05-24/how-to-download-and-listen-to-music-and-podcasts-offline-and-on-the-go/>>.

⁴ [2022] SCC 30 ('SOCAN v ESA').

⁵ Ibid [107].

⁶ Ibid [75].

⁷ (2012) 201 FCR 147 ('Optus TV').

⁸ See ibid 151–2 [1]–[9].

instances, Australian courts have not stopped to question the interplay between exclusive rights. In terms of the overlaps between primary and secondary liability, the Federal Court cases involving ‘print-on-demand’ website Redbubble Ltd show how factors of control and overall coordination of a platform or system (ordinarily more relevant to secondary liability) were sufficient to give rise to primary infringement of the communication right.⁹

Today, copyright interests are extensively divided. Rights may be held by different owners and administered by different collecting societies. When combined with overlapping rights, this necessitates licences from multiple rightsholders should a third party wish to exploit a work.¹⁰ Each licence that partially permits the same activity is devalued in such instances, but the overall increase in transaction costs may discourage market entry and the initiation of certain content dissemination models.¹¹ Put simply, having more rightsholders collect fees for the same interest does not necessarily increase the size of the pie of profits for creators. This merely divides the pie into more slices and adds complexity. Therefore, on the whole, overlapping rights impede efficient dissemination of content and information without a commensurate increase in authorship and content production incentives.¹²

This article draws out lessons from the Canadian *SOCAN v ESA* case to highlight blind spots in our approach to overlapping rights in Australia.¹³ These lessons relate to the policy perspective taken by the Canadian Supreme Court and its overall willingness to engage with the issue of overlapping rights, as opposed to doctrinal approaches for direct adoption. The article nevertheless highlights relevant doctrinal differences and the need to treat the Canadian legal solution to overlapping rights with caution.¹⁴ Notably, the Canadian approach considers both the interests of the copyright owner in controlling access and the perspective of copyright consumers. Taking a copyright consumer’s perspective focuses our attention on what the consumer receives (perhaps a durable copy or mere ephemeral access to content), regardless of the process or underlying technology utilised to achieve this. Likewise,

⁹ *Hells Angels Motorcycle Corporation (Australia) Pty Ltd v Redbubble Ltd* (2019) 369 ALR 408 (*‘Hells Angels’*); *Pokémon Company International Inc v Redbubble Ltd* (2017) 351 ALR 676 (*‘Pokémon’*). These cases are discussed further in Part IV(B) of this article.

¹⁰ Mark A Lemley, ‘Dealing with Overlapping Copyrights on the Internet’ (1997) 22(3) *University of Dayton Law Review* 547, 571.

¹¹ *Ibid.*

¹² For discussion of copyright’s dual authorship and dissemination functions, see Cheryl Foong, *The Making Available Right: Realizing the Potential of Copyright’s Dissemination Function in the Digital Age* (Edward Elgar, 2019) 37–8, 46–50.

¹³ For discussion of how the reproduction right should be interpreted in instances involving background, technical copies, see Cheryl Foong, ‘Immaterial Copying in the Age of Access’ (2022) 44(9) *European Intellectual Property Review* 513.

¹⁴ One caution relates to the distinct nature of Canada’s authorisation right and whether this in turn leads to duplication or overlap with the reproduction right, which is discussed in Part III(C) and Part V of this article.

the focus on owners' interests considers the key value being extracted from the content, not the underlying technological steps that could be counted for purposes of remuneration.

Overall, the Canadian approach urges a contextual interpretation of the law that aligns the scope of exclusive rights and authorisation of infringement with the relevant copyright interests in online dissemination markets. Australian lawmakers and courts should take inspiration from the Supreme Court of Canada's willingness to address overlaps in the context of online dissemination. However, this is a complex issue that requires in-depth analysis and potentially fundamental reforms. While the decision seems to mitigate the problem of overlapping rights in the immediate term for Canada, it may not bring the doctrinal clarity and consistency needed for the long-term sustainability of copyright law.

II COMMUNICATION BY 'MAKING AVAILABLE'

The general right of copyright owners to reproduce their works is a longstanding staple of copyright law, set out in the *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention*'), first adopted in 1886.¹⁵ Ancillary rights such as the right to broadcast were present in the *Berne Convention*,¹⁶ but the technological capability to provide access to content via the internet raised uncertainty about the adequacy of existing rights. The *WIPO Internet Treaties* sought to resolve these ambiguities and gaps left by the *Berne Convention*.¹⁷ The *WIPO Internet Treaties* were concluded in 1996 through a diplomatic conference involving over 130 countries, which followed a period of 'guided development' led by WIPO and preparations for a 'possible protocol' to the *Berne Convention*.¹⁸ A key objective was to ensure that merely making content accessible to members of the public would be a protected activity under copyright law, requiring the authorisation of

¹⁵ *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 331 UNTS 217 (entered into force 1 August 1951) art 9 ('*Berne Convention*').

¹⁶ *Ibid* art 11*bis*.

¹⁷ See Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd ed, 2005) vol 1, 741–2.

¹⁸ See generally: Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford University Press, 2002) 414–15 ('*The Law of Copyright and the Internet*'); Mihály Ficsor, 'Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument: The Rorschach Test of Digital Transmissions' in P Bernt Hugenholtz (ed), *The Future of Copyright in a Digital Environment* (Kluwer, 1996) 112–18 ('Towards a Global Solution'). See World Intellectual Property Organization, 'Diplomatic Conference on Certain Copyright and Neighboring Rights Questions', *Meeting Documents* (Web Page) <http://www.wipo.int/meetings/en/details.jsp?meeting_id=3010>.

the copyright owner.¹⁹ This technology-neutral access right, unconnected to copies, was stated in art 8 of the *WCT* and art 14 of the *WPPT*. The *WCT* provided that a communication to the public includes ‘the making available to the public ... in such a way that members of the public may access these works from a place and at a time individually chosen by them’.²⁰

Under the so-called ‘umbrella solution’, the *WIPO Internet Treaties* did not prescribe the particular form of implementation.²¹ The *WIPO Internet Treaties* were acceded to by most countries, but the form of implementation has varied.²² In Australia, the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) amended the *Copyright Act 1968* (Cth) to define ‘communicate’ to mean ‘make available online or electronically transmit’ (that is, it did not follow the wording of the *WCT*).²³ Canada’s legislative amendment to recognise this broadened communication right was implemented

¹⁹ World Intellectual Property Organization, *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions* (CRNR/DC/4, 30 August 1996) 44 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2481>. Note that the *WCT* is considered a special agreement under the *Berne Convention*: Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (Oxford University Press, 2nd ed, 2015) 7. Ficsor notes that the legal nature of the so-called ‘protocol’ was not precisely or conclusively determined in the terms of reference issued in 1989, but was later established by increasing agreement on the ‘special-agreement’ approach: Ficsor, *The Law of Copyright and the Internet* (n 18) 18–19. See also Ricketson and Ginsburg (n 17) 145.

²⁰ *WCT* (n 1) art 8 (entered into force for Australia 26 July 2007; entered into force for Canada 13 August 2014). The *WPPT* expresses the making available right of performers and phonogram producers as a standalone right in relation to their respective fixed performances/phonograms: *WPPT* (n 2) arts 10, 14 (entered into force for Australia 26 July 2007; entered into force for Canada 13 August 2014).

²¹ See Ficsor, *The Law of Copyright and the Internet* (n 18) 204–6. The act of digital transmission would be described in a neutral way, free from specific legal characterisation, and the actual choice of the right or rights to be applied would be left to national legislation.

²² For example, the European Union explicitly introduced a right to communicate to the public in terms similar to the *WIPO Internet Treaties* via art 3(1) of the *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society* [2001] OJ L 167/10 (known as the ‘InfoSoc Directive’), while the United States (‘US’) has relied on its existing suite of rights to give effect to the right: *Copyright Act of 1976*, 17 USC § 106 (2016). See also: US Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (Green Paper, July 2013) <<http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>>; US Copyright Office, *The Making Available Right in the United States: A Report of the Register of Copyrights* (Report, February 2016) <http://copyright.gov/docs/making_available/>.

²³ *Copyright Amendment (Digital Agenda) Act 2000* (Cth) s 6; *Copyright Act 1968* (Cth) s 10(1) (definition of ‘communicate’) (‘*Copyright Act* (Cth)’).

relatively late, in 2012.²⁴ Section 2.4(1.1) of the Canadian *Copyright Act*, RSC 1985, c C-42 (*Copyright Act 1985 (Can)*) provides in its interpretation segment that communication to the public by telecommunication includes making it available to the public ‘in a way that allows a member of the public to have access to it from a place and at a time individually chosen by [them]’ (that is, in terms almost mirroring the *WCT*).

The introduction of the right to ‘make available’ as a part of the communication right in the *WIPO Internet Treaties* marked the first time that a right crossed the traditional borders between ‘copy-related rights’ and ‘non-copy-related rights’ through which works are made available to the public.²⁵ The umbrella solution solved a threshold issue in providing that making works accessible (whether via downloads or streams) must be protected acts within the exclusive rights of the copyright owner.²⁶ This is how it is mandated at the international level, but it is still up to countries as to how this obligation is implemented. In accordance with the umbrella solution, the *WIPO Internet Treaties* would not dictate which rights or what form the rights should take to protect the accessibility of copyright works. It was a compromise to address what was seen as an urgent task that had to be settled at the international level.²⁷ The choice was between a right of communi-

²⁴ *Copyright Act*, RSC 1985, c C-42, s 2.4(1.1) (*Copyright Act (Can)*), as amended by *Copyright Modernization Act*, SC 2012, c 20, s 3 (*CMA*). See also ss 15(1.1)(d) regarding sound recordings of performers’ performances, 18(1.1)(a) regarding sound recordings. Note that a number of reform bills were produced from 2005 to 2012, but only Bill C-11, also known as the *CMA*, made it through and took effect on 7 November 2012: Yaxi Wang, ‘Filling the Gap: How Should *ESA* vs *SOCAN* Interact with the New Making Available Right’ (LLM Thesis, University of Toronto, 2013) 18–19.

²⁵ Ficsor, *The Law of Copyright and the Internet* (n 18) 498–9 [C8.08]. Note that Ficsor, former Assistant Director General of WIPO, is recognised as having played a decisive role in the preparation, negotiation, completion and adoption of the *WCT* and the *WPPT*: see vii (Foreword by Kamil Idris, then Director General of WIPO). Ficsor further explains that copy-related rights (such as public distribution or right of rental) cover ‘acts by means of which copies are made available to the public, typically for ‘deferred’ use’, since ... the perception (studying, watching, listening to) of the signs, images and sounds in which the work is expressed ... (that is, the actual ‘use’) by the members of the public differ in time. Non-copy-related rights (such as the right of public performance, the right of broadcasting, the right of communication to the public by wire), on the other hand, cover acts through which works and objects of related rights are made available for direct — that is not ‘deferred’ — use (perceiving, studying, watching, listening to) by the members of the public’.

²⁶ Ginsburg observes that it is not entirely clear whether the making available right may be considered a substantive enlargement of *Berne Convention* rights or a mere affirmation of the existing scope of rights, and prefers to describe it as ‘clarification’: Jane C Ginsburg, ‘The (New?) Right of Making Available to the Public’ in D Vaver and L Bently (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R Cornish* (Cambridge University Press, 2004) 234, 246 (‘The (New?) Right of Making Available to the Public’).

²⁷ Ficsor, ‘Towards a Global Solution’ (n 18) 136. See also Mihály Ficsor, *Copyright in the Digital Environment: The WIPO Copyright Treaty (WCT) and the Wipo Performances and Phonograms Treaty (WPPT)* (Report, WIPO National Seminar

cation (a ‘non-copy-related right’) preferred by the European Communities and a right of distribution (a ‘copy-related right’) preferred by the United States (‘US’).²⁸ Overlaps between existing rights and this new making available right do not appear to have been at the forefront of delegates’ minds, and this is reflected in the mere acceptance in the *WCT* that the general reproduction right in the *Berne Convention* would continue to apply.²⁹

In short, the umbrella solution was primarily concerned with providing effective coverage for the accessibility of copyright works and left the issue of overlap between the reproduction right and the communication right unresolved.³⁰ National implementation has raised the issue of overlap between the broadened right to communicate to the public by making available and the longstanding reproduction right, particularly in the digital age. The Supreme Court of Canada in particular has sought to address the issue head on in *SOCAN v ESA*, in the context of downloads.

III THE CANADIAN APPROACH: *SOCAN v ESA*

The initial proceedings before the Copyright Board of Canada involved setting a tariff for online music services.³¹ The Board held that when a work is distributed online, two royalties are payable for the separately protected and compensable activities that may occur at different times:

- (1) when the work is made available online; and
- (2) when the work is actually streamed or downloaded.³²

on Copyright, Related Rights and Collective Management, February 2005) 13–14 (*‘Copyright in the Digital Environment’*).

²⁸ Ficsor, *Copyright in the Digital Environment* (n 27) 12.

²⁹ *WCT* (n 1) art 1(4).

³⁰ As explained by Ficsor, the focus of the umbrella solution was to eliminate gaps in the *Berne Convention*: Ficsor, *Copyright in the Digital Environment* (n 27) 14. See also Ficsor, ‘Towards a Global Solution’ (n 18) 128, where Ficsor seems to accept that overlaps would be inevitable, and that they should be resolved via contract: ‘[i]f both communication to the public and reproduction take place, both the right of communication to the public and right of reproduction must be applied. It is up to appropriate contractual practice to take into account the close relationship of the two acts or the two aspects of the same complex act’.

³¹ *SOCAN, CSI, SODRAC — Tariff for Online Music Services, 2010–2013 — Scope of Section 2.4(1.1) of the Copyright Act — Making Available* (2017) CB-CDA 2017-085 <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366772/index.do>> (*‘Scope of Section 2.4(1.1) of the Copyright Act — Making Available’*).

³² The Federal Court interprets the Copyright Board decision as requiring payment of a separate fee for subsequent streams as these would constitute a transmission, although this is not made particularly clear on the face of the Copyright Board decision: see *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* [2021] 1 FCR 374, 400 [51] (*‘ESA v SOCAN’*).

According to the Copyright Board, the initial ‘making available’ to the public is ‘legally distinct’ from transmissions that may result, and therefore the subsequent stream or download must be ‘evaluated [in] their own right’.³³ Under this finding, making a work available for download would remain an exercise of the communication right, regardless of whether it is subsequently streamed or downloaded (with a download attracting separate royalties for exercise of the reproduction right).³⁴ However, the Copyright Board’s decision was overturned on appeal. The Federal Court of Appeal held that downloads and streams should not be subject to two royalties, and the Supreme Court agreed.³⁵

Before proceeding further, key differences in terminology and the way that rights are structured in the Canadian legislation should be highlighted. How the rights are laid out has substantive implications for the interpretation of the Canadian ‘making available’ right, which will be elaborated upon. In Australia, the right of copyright owners to communicate to the public in relation to works is set out in s 31 of the *Copyright Act 1968* (Cth) as a standalone right, among a list of other rights such as reproduction and public performance.³⁶ The Canadian legislation, on the other hand, provides that copyright means the sole right to reproduce in material, perform in public or publish an unpublished work (or any substantial part of the work).³⁷ The right to communicate to the public is not listed as one of these three rights, but is stated in a separate, inclusive list that illustrates these three rights.³⁸ Therefore, in Canada, the right to communicate to the public is a type of ‘performance’, which in turn encompasses ‘making available’ to the public as established by the 2012 amendment to s 2.4(1.1) of the *Copyright Act 1985* (Can). It is worth noting this terminological difference at the outset, as Canadian courts may use the terms ‘communication’ and ‘performance’ interchangeably, which would not be appropriate in Australia.

A Making Streams Available a ‘Performance’

According to the Supreme Court of Canada, the making available right was not a new compensable right, but a mere clarification that the performance right covers making a performance accessible for on-demand streaming.³⁹ As Rowe J, writing for the majority, explained in summarising the respondent’s argument, ‘the stream is part of one continuous act of performance that began when the work was “made available” for streaming’.⁴⁰ The Court held that one cannot seek a royalty for the

³³ *Scope of Section 2.4(1.1) of the Copyright Act — Making Available* (n 31) [203].

³⁴ *Ibid* [16].

³⁵ *ESA v SOCAN* (n 32), *affd SOCAN v ESA* (n 4).

³⁶ For subject matter other than works such as sound recordings or broadcasts, see *Copyright Act* (Cth) (n 23) ss 85–8.

³⁷ *Copyright Act* (Can) (n 24) s 3(1).

³⁸ *Ibid* s 3(1)(f).

³⁹ *SOCAN v ESA* (n 4) [17]–[20].

⁴⁰ *Ibid* [20].

initial act of making a work accessible, and then seek another separate royalty for when the work is actually streamed.⁴¹

Therefore, while the Canadian concept of performance by communication had been broadened to accord with the digital streaming environment, the Supreme Court found that this did not create multiple acts of performance requiring independent remuneration each time a stream occurred. Justice Rowe made this position clear, stating:

while I agree that the act of “making a work available” is a separate physical activity from a download or stream, I disagree with the view that the act of “making a work available” gives rise to distinct communications to the public (ie, distinct performances). The making available of a stream and a stream are both protected as a single communication to the public, while the making available of a download is protected as an authorization to reproduce, and the download is protected as a reproduction.⁴²

The position on making a stream accessible and the eventual stream is relatively uncontroversial, ie both form part of a single remunerable ‘act’ of performance by communication. This is because the making available right, as articulated in the *WIPO Internet Treaties*,⁴³ and legislatively implemented in Canada,⁴⁴ is a sub-right of the right to communicate to the public. However, the position on the reproduction right is less clear.

B *Making Downloads Available an ‘Authorisation’ of Reproduction*

According to the Canadian Supreme Court in *SOCAN v ESA*, a ‘person implicitly authorizes the work’s reproduction’ by making a work available for downloading.⁴⁵ A question arises as to how making a work accessible for download and its eventual download both fall within a singular interest of the copyright owner in controlling reproduction of the work that can only be remunerated once.

Unique to the Canadian context is the fact that copyright owners have three fundamental copyright interests under the *Copyright Act 1985* (Can). The opening paragraph of s 3(1) is said to exhaustively set out the three interests, which are: (1) to produce or reproduce a work in any material form; (2) to perform in public;

⁴¹ Ibid [110]–[113].

⁴² Ibid [75].

⁴³ *WCT* (n 1) art 8; *WPPT* (n 2) arts 10, 14.

⁴⁴ See, eg, *Copyright Act* (Can) (n 24) s 2.4(1.1).

⁴⁵ *SOCAN v ESA* (n 4) [106], citing *Apple Computer Inc v Mackintosh Computers Ltd* [1988] 1 FC 673, 697, affd *Apple Computer Inc v Mackintosh Computers Ltd* [1990] 2 SCR 209. Note that this point is obiter dicta by Hugessen J, as the majority (including Hugessen J) had held that the reproduction right had been exercised.

and (3) to publish an unpublished work.⁴⁶ A further list of activities is set out in sub-paragraphs (a)–(j), and following this list of activities is a statement that the owner also has the right ‘to authorize any such acts’. According to the Canadian Supreme Court, the list of activities in ss 3(1)(a)–(j) are merely illustrative of the activities that fall within these three interests.⁴⁷ The Court explains that these three rights are distinct, and ‘[a] single activity can only engage one of the three copyright interests’.⁴⁸

On first impression, this interpretation may seem at odds with the plain language of the statutory provision, which refers to the making available of ‘works’ and does not distinguish durable downloads from ephemeral access. If one reads s 2.4(1.1) in isolation from the rest of the statute and in light of its similarity to *WCT* art 8, one might summarily conclude that communication covers the accessibility of works, regardless of whether in the form of ephemeral streams or durable downloads. However, the section must be read in the context of the statute as a whole. Section 2.4(1.1) defines communications as part of the performance right. As Abraham Drassinower explains, ‘s.2.4(1.1) has, strictly speaking, nothing to do with the right of reproduction’, therefore ‘no viable reading of s.2.4(1.1) can capture making available for downloading’.⁴⁹

Beyond the statutory structure, the Court identified control as a major factor in differentiating the two key interests of reproduction and performance (or communication as it would be referred to in Australia). With an impermanent performance, the work can be withdrawn from the user once the performance is over, but with a download or reproduction, the user is given a durable copy of the work.⁵⁰ The owner will ‘lose significantly more control’ as they can no longer ‘limit when, how, or the number of times a user experiences the work’.⁵¹ In light of this, the Court concluded that a download, which gives users a durable copy of a work, engages the reproduction right.⁵² Therefore the question of who has control seems to be a determinant — a consumer gaining control is associated with the exercise of the reproduction right, while the platform or service provider’s maintenance of control is associated with exercise of the performance right.

⁴⁶ *SOCAN v ESA* (n 4) [54]. The *Copyright Act* (Can) (n 24) provides that copyright ‘means the sole right to produce or reproduce the work ... to perform the work ... in public or, if the work is unpublished, to publish the work’, and goes on to list a series of activities, including the sole right ‘to communicate the work to the public by telecommunication’: at s 3(1)(f) (emphasis added).

⁴⁷ *SOCAN v ESA* (n 4) [54].

⁴⁸ *Ibid* [55].

⁴⁹ Abraham Drassinower, ‘Authorizing Two Royalties: A Comment on *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*’ (2023) 67(2) *Canadian Business Law Journal* 384 (‘Authorizing Two Royalties’).

⁵⁰ *SOCAN v ESA* (n 4) [56].

⁵¹ *Ibid*.

⁵² *Ibid*.

The Court also analogises a download with the purchase of a physical copy. In doing so, the Court emphasises that '[t]o determine which copyright interest is engaged by an activity, one must examine what that activity does to the copyrighted work'.⁵³ The Court asserts that, in adhering to the principle of technology neutrality, 'purchasing an album online should engage the same copyright interests, and attract the same quantum of royalties, as purchasing an album in a bricks-and-mortar store' since each of these activities are 'functionally equivalent'.⁵⁴ Notably, the Court focuses on functional equivalence from the consumer's point of view, stating that '[w]hat matters is *what* the user receives, not *how* the user receives'.⁵⁵

The Court in this instance took a holistic approach to its interpretation of the rights, taking into account the intersection of the communication right and reproduction right and the coherence of the *Copyright Act 1985* (Can) as a whole.⁵⁶ It was seeking to align remuneration for the exercise of rights with the relevant interest of the copyright owner. However, the doctrinal approach taken warrants further analysis.

C *A Merging Theory of Rights*

Over the years a range of cases in Canada have considered the scope of the communication right.⁵⁷ However, *SOCAN v ESA* presents the clearest attempt to distinguish the two rights. In the initial Copyright Board of Canada decision from 2017, the Board considered the 'merging theory' which was devised to address overlapping rights and raised some concerns. As articulated by the Copyright Board:

merging theory essentially means that once a work or other subject-matter is made available to the public and is then subsequently transmitted, that subsequent transmission merges with the initial act of making available to become a single protected act, and, arguably, subject to a single right.⁵⁸

⁵³ Ibid.

⁵⁴ Ibid [63].

⁵⁵ Ibid (emphasis in original). See also ibid [70].

⁵⁶ See ibid [51] explaining that its 'interpretation is more consistent with the text, structure and purpose of the *Copyright Act*'.

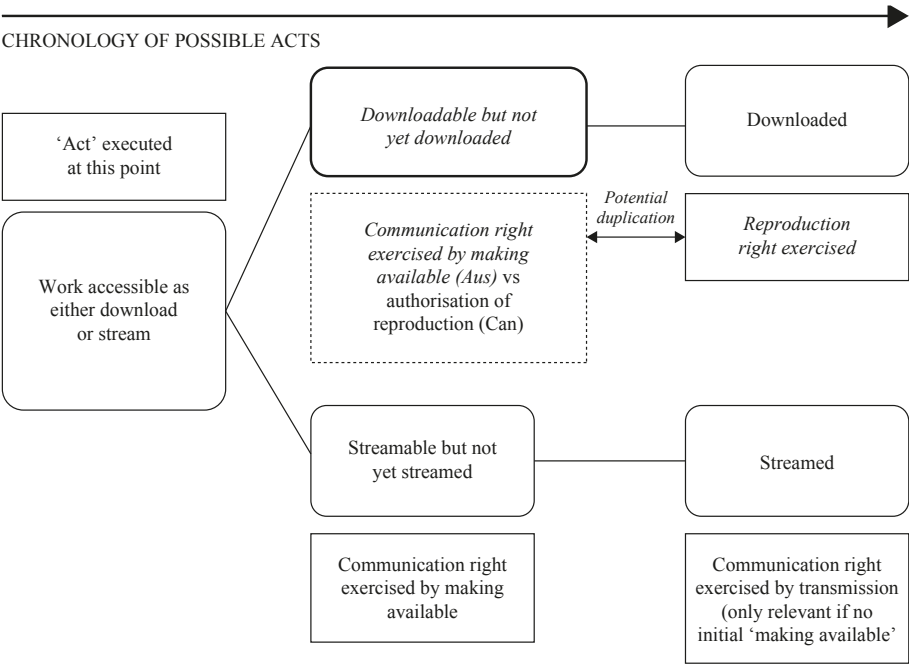
⁵⁷ See, eg: *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* [2012] 2 SCR 231 ('*ESA v SOCAN* (2012)'); *Rogers Communications v Society of Composers, Authors and Music Publishers of Canada* [2012] 2 SCR 283 (holding that individualised on-demand transmissions of music streams were communications 'to the public'). In the *ESA v SOCAN* (2012) decision, the Supreme Court held that downloads, subsequent to the making available of copies for download, was not a communication. However, it did not address the question of the initial availability for download as a communication (the communication right had yet to come into force via the *CMA*). See also the legislative developments leading up to the *CMA* referred to in n 24 above.

⁵⁸ *Scope of Section 2.4(1.1) of the Copyright Act — Making Available* (n 31) [187].

The Copyright Board identified a temporal problem with this merging theory, that is liability ‘could be altered retroactively by the sole action of a third party’.⁵⁹ However, this position assumes that making a work available for download would constitute a communication, and that a subsequent download would subsume the initial making available of the download within the exercise of the reproduction right.⁶⁰ In other words, whether the initial making available of content for download constitutes exercise of the communication right depends on a subsequent action not occurring, ie the lack of a download.

This would not be feasible and creates uncertainty as to the legal characteristics of the initial act. Indeed, this would be the case if the initial act could still be considered a communication, but the Supreme Court removes that option. The Supreme Court’s interpretation is that making durable downloads available would not be a communication to the public at all and would merely be an authorisation of reproduction, therefore no retroactive change to the legal character of the initial act would take place. A diagrammatic representation of the Canadian approach, contrasted against an approach that could give rise to exercise of both the reproduction right and communication right (in italicised text), is illustrated by Figure 1 below.

Figure 1



⁵⁹ Ibid [193].

⁶⁰ As the Copyright Board explains, ‘[t]his would occur, for example, where a transmission subsequent to a making available changes the legal nature of the making available from an act of communication to the public by telecommunication into one of reproduction’: *ibid*.

The Canadian Supreme Court confirmed that authorisation under Canadian law is a right distinct from the primary act of infringement. It explained that '[a] user who unlawfully authorizes a reproduction or performance of a work may be held liable for infringement of that right, *regardless of whether the work is ultimately reproduced or performed*'.⁶¹ Authorisation occurs when one grants or purports to grant, 'either expressly or by implication, the right to do the act complained of'.⁶² The authoriser must also 'have some degree of actual or apparent right to control the actions' of the primary infringer.⁶³ The term 'authorise' has been interpreted by Canadian courts to mean 'sanction, approve, and countenance'.⁶⁴ Furthermore, '[c]ountenance' in the context of authorisation of copyright infringement is to 'be understood in its strongest dictionary meaning', that is to "give approval to; sanction, permit; favour, [or] encourage".⁶⁵

Interestingly, the Supreme Court cites the Copyright Board's Tariff 22 Decision regarding the communication right from 1999 — which preceded Canada's legislative implementation of an explicit making available right — as support for the assertion that making a work available for download is an authorisation of reproduction.⁶⁶ In this decision, the Copyright Board held that 'it is the act of posting that constitutes authorization' of the communication right, as this is an invitation to 'anyone with Internet access to have the work communicated to them', and the person does this with the sole purpose, full knowledge and intention that such a communication would occur.⁶⁷ Despite the different characteristics of the acts encompassed by these rights, and the subsequent legislative amendment to explicitly

⁶¹ *SOCAN v ESA* (n 4) [105] (emphasis added), citing *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213 [112]–[113]; *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427, 474 [120]; Barry B Sookman, Steven Mason and Carys Craig, *Copyright: Cases and Commentary on the Canadian and International Law* (Carswell, 2nd ed, 2013) 1001. The Court reiterates this point, stating that: '[i]f a person makes a work available for downloading without authorization, that person infringes the copyright owner's right to authorize reproductions. That is so regardless of whether the works are ultimately downloaded': *SOCAN v ESA* (n 4) [107].

⁶² Sookman, Mason and Craig (n 61) 1001.

⁶³ *Ibid.*

⁶⁴ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 399, 361 [38].

⁶⁵ *Ibid.*; Sookman, Mason and Craig (n 61) 1001.

⁶⁶ *SOCAN v ESA* (n 4) [106], citing *Statement of Royalties to be Collected for the Performance or the Communication by Telecommunication, in Canada, of Musical or Dramatico-Musical Works*, (1999) Public Performance of Musical Works 1996, 1997, 1998 (Copyright Board of Canada) ('Tariff 22 Decision'). However, note that the Tariff 22 Decision also held that '[a] single activity may give rise to liability under more than one head of subsection 3(1) of the *Act*. Thus, a facsimile transmission results in a communication even though it involves a reproduction': at 16.

⁶⁷ *SOCAN v ESA* (n 4) [106], quoting Tariff 22 Decision (n 66).

include making available as part of the communication right, the Supreme Court concludes that this point is ‘similarly applicable to reproductions’.⁶⁸

The *SOCAN v ESA* case attempts to carve the making available of downloads out of the communication right entirely by keeping streaming and downloads on two separate tracks with each corresponding to the exercise of the communication right and reproduction right respectively. The approach treats both making a stream available and making a download available as counterparts under different rights, with the former being a communication and the latter an authorisation of the reproduction right. A stream would be subsumed within the initial act of making available, as an exercise of the communication right. A download that eventuates, however, would implicate the reproduction right, which is separate from the right to authorise such reproductions.

In summary, the decision seeks to put the acts and rights into alignment in the manner represented in Table 1 below, even though these rights were not specifically designed to align in this manner.

Table 1

	Act	Exclusive Right	Act	Exclusive Right
Initial act	Making a stream available	Communicate to the public (by making available)	Making a download available	Authorise reproduction
Potential subsequent act	Streaming content	Communicate to the public (by transmission) but subsumed within initial act of making available	Downloading a copy	Reproduction

As Drassinower explains, ‘the right of authorization cannot do in respect of the right of reproduction what s 2.4(1.1) does in respect of the right of performance’.⁶⁹ Avoiding duplication between the reproduction right and the authorisation right ‘requires both that the right deployed for that purpose not be a standalone right, and that the act falling within the scope of the right be construable as part and parcel of a single act of reproduction’.⁷⁰ Drassinower describes making available and transmissions as possessing ‘juridical homogeneity’, that is they are ‘each and both juridically characterized as modes of performance’, which ‘permits the view that what we have is a single performance technologically divided into two temporally discrete, yet juridically indistinct, moments’.⁷¹ This ‘juridical homogeneity’, while applicable to making available and transmissions, simply does not apply to authorisation and reproduction.⁷²

⁶⁸ *SOCAN v ESA* (n 4) [107].
⁶⁹ Drassinower, ‘Authorizing Two Royalties’ (n 49) 387.
⁷⁰ *Ibid.*
⁷¹ *Ibid* 388.
⁷² *Ibid.*

Put simply, the Court is shoehorning the role of authorisation of reproduction and eventual reproductions into the same role occupied by the communication right's coverage of making available and eventual transmissions. Making a work available for streaming and the eventual stream itself may be distinct physical or technical acts, but doctrinally they are both part of the same exclusive right to communicate to the public. In contrast, exercise of the reproduction right refers to the making of copies, while authorisation of reproduction is the facilitation or encouragement of reproduction by third parties — these are distinct acts covered by different forms of protection. Indeed, there is an initial act and a subsequent act that could eventuate, but the copyright protection for these two sets of acts has different characteristics and different legal relationships with each other. Reproductions and authorisations are not unified acts under the law, but rather they are envisaged to be carried out by different parties.

IV AUSTRALIAN APPROACH TO THE COMMUNICATION RIGHT

There is no Australian decision comparable to *SOCAN v ESA* which unequivocally seeks to limit overlaps between the communication right and the reproduction right in the context of downloads. Furthermore, the Australian cases discussed here do not specifically address whether downloads should be considered reproductions or communications. Therefore, the analysis goes beyond legal doctrine to compare the general approaches or attitudes of the courts to overlaps. The following comparative exercise requires a degree of extrapolation from the reasoning and findings.

A consideration of *Optus TV* shows how Australian courts tend to ignore the underlying interest at stake. That is, in the course of the judgment, there is no identification of what the disseminators are fighting for control over — in this instance, streaming of content online as opposed to technical copying in the background to enable such access.⁷³ Rightsholders were seeking to control ephemeral access by consumers, not copying per se or access to copies of works (even if copying was undertaken to facilitate such access).

In terms of authorisation liability, the comparison is indirect as *SOCAN v ESA* involved authorisation and reproduction, while the Australian cases under critique relate to authorisation and communication. There is nevertheless a central thread tying these decisions together. A deficiency in the Canadian Court's reasoning is that it does not clearly recognise the potential overlaps between authorisation and other rights, despite its well-intentioned use of authorisation to eliminate gaps in protection. In Australia, the Federal Court has simply shown no signs of distinguishing authorisation of a primary act from the primary act itself, particularly where the primary act is a communication to the public of copyrighted content. Again, the distinction between the authorisation of a communication and the communication itself was not at issue in *SOCAN v ESA*, so this is not a direct doctrinal comparison. The critique is more so prompted by the Canadian approach, which through its

⁷³ *Optus TV* (n 7) 151–2 [3].

own shortcoming shines a light on a blind spot in Australian case law. The cases highlight the ambiguity of authorisation as a legal doctrine in both jurisdictions.

A Lack of Distinction between Communication and Reproduction

In Australia, a case that exemplifies disregard of potential overlaps between the communication right and the reproduction right is *Optus TV*.⁷⁴ The Optus TV Now service offered by Singtel Optus allowed both time-shifting and ‘almost live’ viewing of free-to-air television programs.⁷⁵ Optus set up a TV antennae and digital format receiver in most capital cities and would capture a recording of a program if a subscriber requested that the program be recorded.⁷⁶ When a subscriber clicked the ‘play’ button for the recorded program, the system would then send the relevant recording to a subscriber’s device.⁷⁷

Unlike the Canadian Supreme Court’s approach in *SOCAN v ESA*, here there was no clear attempt to distinguish the exclusive rights or to identify the key interest at stake in this case. If we focus on the nature of the technical tool being utilised, the Optus TV Now system replaced time-shifting of free-to-air broadcasts using video recording devices. This would tend to indicate that the relevant right in question was the reproduction right. However, the system also crossed the boundary of reproduction and communication, as it allowed both delayed and almost live access to the content. Furthermore, consumers would not actually be in control of the copies being made within the system.

If we overlook the technical steps taken by the system and focus more on the outcome — ie members of the public being able to access content from the cloud — it could be argued that this Optus TV Now system mainly related to interests in the communication of content to the public. This is further bolstered by the fact that the case was brought by the National Rugby League and the Australian Football League — parties whose lucrative licensing deals for the live online streaming of their sports events were disrupted by the availability of the Optus TV Now service.

Moreover, from the consumer’s perspective, the way in which copies of the content were being made or where they were located was of little concern. From the copyright owners’ perspective, the concern was a drop in value of the existing exclusive online streaming licences it had granted. The interest was to control access by the public and not to control the making of copies (which existed in the

⁷⁴ Ibid.

⁷⁵ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd [No 2]* (2012) 199 FCR 300, 312 [26]. Note that ‘almost live’ streaming with a two minute delay was only available to subscribers using Apple devices.

⁷⁶ Ibid 312–13 [27]–[30].

⁷⁷ Ibid 314 [35].

background).⁷⁸ The case was nevertheless resolved on the basis of primary infringement of the reproduction right — due to Optus's overall involvement in the process of making reproductions on its system, even though each specific reproduction on the system was initiated by users.⁷⁹ As this was deemed sufficient to resolve the case in the copyright owners' favour, the Full Court of the Federal Court did not consider whether Singtel Optus had exercised the communication right.⁸⁰

A thorough experiment might be to consider the *Optus TV* case through the lens of the Canadian Supreme Court's reasoning, particularly the approach articulated in *SOCAN v ESA*. If the Australian Court had been more conscious of the issue of overlaps and the interest of concern, would the decision have been different? Perhaps not in terms of the outcome, but the reasoning certainly would have been. The Court could have considered if the copies made in the background to enable time-shifting or streaming had independent value. It could also have considered the control factor highlighted by the Canadian Supreme Court, ie who had control of the copies. In this instance, users of the system did not have control of the copies even if they had initiated the making of those copies. The copies made did not have independent significance or value outside of the Optus system, unlike an instance where a consumer purchases a durable digital download of copyright content. Ultimately, the conclusion might still be that the principle of technology neutrality cannot override the plain language of the statute regarding copying and the limited exception for time-shifting.⁸¹ However, rather than resolving the issue based on the reproduction right alone, the Court would have also considered if this cloud time-shifting nevertheless constituted a 'making available' of content.⁸² That is, the Court could have closely analysed the degree of control exercised and the way it enables access through its system even if consumers exercise a form of limited

⁷⁸ The author has argued that such background copies should be considered 'immaterial' under Australian copyright law. See Foong, 'Immaterial Copying in the Age of Access' (n 13) 530.

⁷⁹ *Optus TV* (n 7) 165 [67]. The Court considered that Optus's role in the making of a copy (ie capturing the broadcast and then embodying it in a hard disk) was 'so pervasive that, even though entirely automated, it cannot be disregarded' in identifying who does the copying. This finding, in turn, disqualified Optus from taking advantage of the s 111 time-shifting exception. Optus, a commercial provider of the TV Now service, was not exempt from infringing copyright because it was not doing so 'solely for private and domestic use': at 168–9 [80]–[87], quoting *Copyright Act* (Cth) (n 23) s 111(1). It may also be noted that s 111 only exempts the making of copies of copyright material and does not apply to the communication right, therefore it would have been sensible to consider the application of the communication right as well: see generally Samsung Xiaoxiang Shi, 'Time Shifting in a Networked Digital World: Optus TV Now and Copyright in the Cloud' (2012) 34(8) *European Intellectual Property Review* 519, 12.

⁸⁰ *Optus TV* (n 7) 152 [7].

⁸¹ *Ibid* 170 [96].

⁸² For arguments to this effect, see Cheryl Foong, 'Making Copyright Content Available in the Cloud vs The Making of Copies: Revisiting *Optus TV* and *Aereo*' (2015) 41(3) *Monash University Law Review* 583.

choice or autonomy over what program is recorded or streamed back to them. A genuine attempt to engage with these factors in the context of *Optus TV* would have brought us closer to understanding the scope of the communication right in Australia and its intersection with the reproduction right.

It should be noted that the Supreme Court of Canada has not always been consistent in its approach to technical, background copies. A case on point is *Canadian Broadcasting Corporation v SODRAC 2003 Inc.*⁸³ The majority in this case held that background copies made in the course of digital systems for enabling broadcasts would infringe the reproduction right and required separate authorisation, even though authorisation to broadcast had already been obtained from the relevant rightsholders.⁸⁴ It is arguable that this 2015 decision would have been decided differently today — the approach and principles espoused in Abella J's dissent aligns with the majority decision in *SOCAN v ESA*.⁸⁵ In dissent, Abella J emphasised the principle of technology neutrality and how analogue broadcasting systems did not require separate authorisation of the reproduction right.⁸⁶ An argument was that temporary copies created in the course of streaming music files were treated 'as an exercise of the [communication] right, not as a separate exercise of the reproduction right'.⁸⁷ Furthermore, Abella J asserts that broadcasters should not be penalised for adopting more efficient digital technologies, as '[t]he essential character of the *broadcasting* activity does not change with the adoption of modern digital technologies that are dependent on the creation of incidental copies in order to accomplish the activity'.⁸⁸

B *Overlap between Primary and Secondary Infringement*

The Supreme Court of Canada utilised authorisation to fill a perceived gap in protection, that is for the availability of copies for download. While this has brought forth concerns about overfilling the gap,⁸⁹ what is more concerning is the way Australian courts tend to disregard distinctions between authorisation and primary

⁸³ [2015] 3 SCR 615 ('*Canadian Broadcasting Corporation v SODRAC 2003 Inc*').

⁸⁴ Ibid 646 [55].

⁸⁵ Ibid 669–97 (Abella J).

⁸⁶ Ibid 685 [164]. For further arguments regarding technology neutrality and how it relates to fundamental principles on the subject matter of copyright protection, ie works of original expression, see Abraham Drassinower, 'Remarks on Technological Neutrality in Copyright Law as a Subject Matter Problem: Lessons from Canada' (2022) 81(1) *Cambridge Law Journal* 50. In essence, Drassinower argues that we should distinguish material form from the work and that use for 'merely technical purposes *independent of its expressive significance*' is not a relevant use at all: at 62, 66 (emphasis in original).

⁸⁷ *Canadian Broadcasting Corporation v SODRAC 2003 Inc* (n 83) 683–4 [159]; *ESA v SOCAN* (2012) (n 57).

⁸⁸ *Canadian Broadcasting Corporation v SODRAC 2003 Inc* (n 83) 685 [164] (emphasis in original).

⁸⁹ See Drassinower, 'Authorizing Two Royalties' (n 49). This is discussed further in Part V of this article.

infringement of the communication right. While *SOCAN v ESA* involved a different exclusive right and context, the stark contrast in approaches to overlapping rights and interests is nevertheless apparent.

Secondary liability for the infringing acts of third parties arises in Australia through the notion of authorisation of infringement, similar to Canada. This is because infringement of copyright as set out in the *Copyright Act 1968* (Cth) covers both the doing of any act comprised in the copyright and authorising such an act.⁹⁰ However, unlike the Canadian position, this secondary form of liability requires proof that a primary act of infringement has taken place in order to be satisfied.⁹¹

Authorisation was initially explained according to its ordinary dictionary meaning as ‘sanction, approve, countenance’, in the 1975 High Court of Australia decision *University of New South Wales v Moorhouse*.⁹² The common law principles were purportedly codified in the *Copyright Act 1968* (Cth) in 2000.⁹³ The legislation provides that the following inclusive list of factors are to be considered in determining whether authorisation of infringement has occurred:

⁹⁰ *Copyright Act* (Cth) (n 23) ss 36(1), 101(1), 13(2). Note that authorisation liability in Australia is said to be distinct from general law principles of joint tortfeasorship and vicarious liability: Jane C Ginsburg and Sam Ricketson, ‘Inducers and Authorisers: A Comparison of the US Supreme Court’s *Grokster* Decision and the Australian Federal Court’s *KaZaa* Ruling’ (2006) 11(1) *Media and Arts Law Review* 1, 10.

⁹¹ That is, authorisation of infringement ‘is not complete unless there is an act of infringement of the kind allegedly authorised (that is, the doing in Australia of any act comprised in the copyright)’: *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380, 416 [175] (*Cooper*), citing *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399, 421. A court may ‘enjoin a defendant in an appropriate case in respect of an authorisation where the act of infringement that is the subject of the authorisation is apprehended *quia timet*’, but a clear basis for this must be shown for an injunction of that nature: *Cooper* (n 91) 416–17 [175], citing *WEA International Inc v Hanimex Corp Ltd* (1986) 17 FCR 274, 288 (*WEA International*).

⁹² (1975) 133 CLR 1, 12 (Gibbs J), 20 (Jacobs J), citing *Falcon v Famous Players Film Co Ltd* [1926] 1 KB 393, affd *Corporation of the City of Adelaide v Australasian Performing Right Association Ltd* (1928) 40 CLR 481, 489–97. Justice Gibbs summarised the key factors relevant in this case as: (1) the control of the ‘means by which an infringement of copyright may be committed’; (2) ‘knowing, or having reason to suspect that it is likely to be used for the purpose of committing an infringement’; and (3) ‘omitting to take reasonable steps to limit its use to legitimate purposes’: at 13.

⁹³ The amendments were introduced by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). Note the criticism that, contrary to legislative intent, the reform introduced ‘further uncertainty to the already-muddled law on authorisation liability’: Richard G Kunkel, ‘Indifference and Secondary Liability for Copyright Infringement’ (2016) 33(1) *Santa Clara High Technology Law Journal* 1, 17, citing David Lindsay, ‘ISP Liability for End-User Copyright Infringements: The High Court Decision in *Roadshow Films v iiNet*’ (2012) 62(4) *Telecommunications Journal of Australia* 53.1, 53.22.

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.⁹⁴

While much of the debate has centred on the degree of control or knowledge that should give rise to authorisation of infringement (in a broader sense), a defendant may also be liable for approving conduct that is infringing, absent control or knowledge.⁹⁵

Importantly, s 22(6) provides that a communication is 'made by the person *responsible for determining the content of the communication*'.⁹⁶ This is a key provision for determining whether one is a primary infringer of the communication right. If conduct falls outside of this provision, we would then have to resort to the authorisation factors set out in the legislation. An application of this is found in *Universal Music Australia v Cooper*, one of the early Australian decisions to consider on-demand access to music by the public.⁹⁷ A defendant, Mr Cooper, managed and owned 'mp3s4free.net', a 'highly structured and organised website' which allowed third party visitors to the website to post hyperlinks to sound recordings hosted on remote websites.⁹⁸ Justice Tamberlin of the Federal Court of Australia held that while Mr Cooper may have had capacity to prevent hyperlinks to the website, this was not the same as having an ability to determine the content of a communication from a remote website.⁹⁹ However, Mr Cooper's power to remove hyperlinks and capacity to prevent hyperlinks from being added to the website gave rise to liability for: (1) authorising infringement of the reproduction right by users in Australia who downloaded the files; and (2) authorising infringement of the right to communicate to the public by operators of the remote websites.¹⁰⁰

Recent cases have failed to grasp this distinction between the primary infringing act and authorisation, particularly in the context of the communication right. The two cases discussed here involve Redbubble, a website which operates as a

⁹⁴ *Copyright Act* (Cth) (n 23) ss 36(1A), 101(1A).

⁹⁵ *WEA International* (n 91) 286–7; *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444, 504 [243] (Jagot J). This would arguably cover the specific invitation to exercise the copyright owner's reproduction right, as envisioned by the Canadian courts in regard to the 'making available' of downloads.

⁹⁶ *Copyright Act* (Cth) (n 23) s 22(6) (emphasis added).

⁹⁷ *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 ('*Universal Music Australia v Cooper*'). The findings in regard to Mr Cooper were affirmed in *Cooper* (n 91).

⁹⁸ *Universal Music Australia v Cooper* (n 97) 5 [13].

⁹⁹ *Ibid* 75 [18].

¹⁰⁰ *Ibid* 20–2, *affd Cooper* (n 91) 390 [42] (Branson J), 411–12 [148]–[149] (Kenny J), French J agreeing at 382 [1].

‘print-on-demand’ internet marketplace that connects artists or designers with consumers.¹⁰¹ Artists are able to upload images, drawings or photographs onto the website and can nominate the types of goods their works can be applied to (eg mugs, T-shirts or caps).¹⁰² The *Hells Angels* case involved uploads of the infamous motorcycle club Hells Angels’ logo,¹⁰³ while the *Pokémon* case involved representations of Pokémon characters,¹⁰⁴ and in both instances content was uploaded by third party artists to the Redbubble website without prior permission.

The Federal Court justices in each case recognised that under s 22(6) of the *Copyright Act 1968* (Cth), a communication is ‘made by the person *responsible for determining the content of the communication*’ and purports to apply this standard.¹⁰⁵ However, their interpretation of responsibility broadly included operation of a website and an overall business model built upon the public being able to perceive content, regardless of the source of that content. In *Hells Angels*, Greenwood J of the Federal Court held that hosting a website and operating an overall business model that allows others to post material online is sufficient to constitute communication to the public, even if the website host is not the originator of the material.¹⁰⁶ Rather than focusing on the act of communication, Greenwood J focused on the nature of the business model, stating:

The entire focus of the business model is to enable works to be made available online so that consumers can pick and choose amongst the works so as to have them applied to goods. It would be difficult to imagine a more directly engaged participant than one deploying the business model adopted by Redbubble.¹⁰⁷

¹⁰¹ *Hells Angels* (n 9); *Pokémon* (n 9).

¹⁰² *Hells Angels* (n 9) 410 [2]; *Pokémon* (n 9) 679 [5].

¹⁰³ *Hells Angels* (n 9) 412 [17].

¹⁰⁴ *Pokémon* (n 9) 678 [3].

¹⁰⁵ *Hells Angels* (n 9) 486 [430]; *Pokémon* (n 9) 699 [47] (emphasis added).

¹⁰⁶ *Hells Angels* (n 9) 486–9. Justice Greenwood found that ‘it was Redbubble and Redbubble’s software ... which caused the *communication* to be made ... and it was Redbubble’s software that determined the content of the communication ... by causing the relevant images to be displayed on it in Australia’: at 487–8 [433] (emphasis in original).

¹⁰⁷ *Ibid* 488 [435]. Justice Greenwood’s consideration of Redbubble’s business model encompassed ‘the transactional engagement between an artist and a buyer’ and its facilitation of the payment, printing and delivery of the good to the buyer. See also the conclusion at 408 [436]. In very broad terms, Greenwood J stated that it was Redbubble ‘which *caused* the communication to be made’ to the user of the website: at 487–8 [433] (emphasis in original) and ‘but for the Redbubble website, the transactions would not occur’: at 488 [435]. The decision seems to mix up all aspects of the business with the communication to the public, which involved one aspect of the website’s functionalities, and this was arguably ancillary to the primary business which was to sell merchandise bearing the images of the copyright owners. The overall reproductions of the images on products, while relevant to a consideration of the reproduction right and whether its infringement had been authorised, is arguably less relevant to the issue of who communicated the content to the public.

Likewise, Pagone J in *Pokémon* held that Redbubble Ltd was the primary infringer of the right to communicate to the public, as it was ‘responsible for determining [the] content through its processes, protocols and arrangements with the artists’.¹⁰⁸

Redbubble Ltd was held to be the primary infringer of the communication right in both cases despite recognition by the respective justices that the content originated from a third party — the artist — and did not originate from Redbubble Ltd.¹⁰⁹ Both Courts in *Hells Angels* and *Pokémon* relied on Tamberlin J’s explanation in *Cooper* that ‘[i]t is the entitlement and role of the designer, operator and owner of a remote website to determine what is placed on that website and therefore what is the “content” of that website’.¹¹⁰ However, it should be recognised that this statement was made in the abstract, without consideration of the specific circumstances of those websites, as primary liability of the remote website hosts was not at issue in *Cooper*.¹¹¹

Justice Greenwood in *Hells Angels* concluded that Redbubble Ltd was the primary infringer, but went on to find that, if in the alternative, primary infringement was found to be conducted by the artist who posted the work, then Redbubble would be held to have authorised infringement by the third party artists. The basis of this alternative finding was conduct and characteristics closely mirroring those in the reasons for finding Redbubble itself to be a primary infringer of the communication right.¹¹² In this context, Greenwood J found that ‘Redbubble conceived,

¹⁰⁸ *Pokémon* (n 9) 701 [48].

¹⁰⁹ *Hells Angels* (n 9) 486. Justice Greenwood held that it is possible to have ‘more than one person’ responsible for determining the content of a communication: at 486 [430]. See also *Pokémon* (n 9) 701 [48]–[49].

¹¹⁰ *Universal Music Australia v Cooper* (n 97) 18 [76], cited in *Hells Angels* (n 9) 487 [432]; *Pokémon* (n 9) 699 [47].

¹¹¹ Justice Pagone considered Redbubble Ltd’s position distinguishable from a website proprietor that allows others to post links on that website or an ISP that merely supplies an internet service to persons who post infringing content online. It was noted that: (1) Redbubble Ltd was the host of the website with the infringing material; and (2) Redbubble Ltd had user agreements with artists that recognised the possibility of infringing materials, an IP policy, and a team dedicated to dealing with impermissible content on the website: see *Pokémon* (n 9) 699–701, distinguishing *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285 (*‘Roadshow Films’*) and *Universal Music Australia v Cooper* (n 97). Justice Pagone in *Pokémon* seems to find further support in Nicholas J’s explanation in *Roadshow Films* (n 111) that ‘[t]he content of the relevant communication is determined by the person who responds to the request, not the person who makes it, because it is the person who responds to the request who determines the content of the response’: at 440 [685], cited in *Pokémon* (n 9) 701 [48]. Again, this statement is made in the abstract to distinguish a website that allows the posting of links from a source website (without considering the circumstances of the source website). This broad finding is made despite Pagone J’s note that ‘[i]t may be necessary, in evaluating the facts, to consider in this context the technical, contractual and other practical matters that may bear upon an ability to determine the content of a communication’: *Pokémon* (n 9) 700 [48].

¹¹² *Hells Angels* (n 9) 489.

deployed, operates, manages and controls the means by which the artist makes the work available for application to relevant goods' and it had the 'power' and 'control' of the entire process.¹¹³

C *Overlapping Interests Taken as a Given*

In Australia, courts have yet to carefully consider what rights or interests are at issue in a given dispute relating to copyright, nor have they recognised the need to disentangle overlapping interests. In *Optus TV* for example, the Federal Court did not consider it necessary to address infringement of the communication right, even though the main interest at stake in this dispute was the provision of on-demand content access to members of the public.

The *Hells Angels* case further shows how Australian courts have treated communication to the public and authorisation of communication as satisfied by the same conduct. Indeed, the broadly worded communication right *could* be interpreted to encompass such a process of authorisation, depending on the technology it is being applied to.¹¹⁴ Furthermore, platforms providing the means to access content online, even if acting as an intermediary and not supplying that content, tend to exercise more overall control over the platform's functionalities. A reproduction, on the other hand, is a temporally discrete act. A third party user who downloads content is clearly initiating and effecting the reproduction of content on their storage device, at the moment the download occurs. This is not to say that that person or platform cannot be a primary infringer of the communication right because they are not the originator of the content. The point is that courts should be clear about what the act is, as opposed to deeming overall control of a business model to be the relevant 'act' of communication (which strays well into the territory of secondary liability for authorising infringement).¹¹⁵

¹¹³ Ibid 489 [439]–[440]. Authorisation of the communication right was not considered in *Pokémon*, although authorisation of the reproduction right for printing on merchandise was considered at length: see *Pokémon* (n 9) 704–14. Similar to Greenwood J's reasoning in *Hells Angels*, it was the development and operation of a system 'to achieve Redbubble's commercial objectives' that gave rise to authorisation liability for the reproduction right: *Pokémon* (n 9) 709 [58].

¹¹⁴ See, eg, *Copyright Act* (Cth) (n 23) ss 10(1), 31(1), 85(1), 86, 87.

¹¹⁵ In the US context, Scalia J of the US Supreme Court had, in dissent in a case involving technology somewhat similar to the Australian *Optus TV* case, highlighted the importance of the volition standard in maintaining the distinction between primary and secondary liability. The aim, Scalia J notes, is not to excuse the defendant from accountability, 'but to channel the claims against them into the correct analytical track': *American Broadcasting Companies Inc v Aereo Inc* 573 US 431, 455 (2014). Such an approach could help to focus our attention on a specific volitional act, but as argued elsewhere, it can also be used to broaden the scope of liability where fault factors are incorporated into this notion of volition: see Cheryl Foong, 'Volition and the "New Public": A Convergence of US and EU Judicial Approaches to Communications to the Public' (2020) 42(4) *European Intellectual Property Review* 230.

Again, viewing the *Hells Angels* case through the lens of the Supreme Court of Canada, one would more closely consider if a single course of conduct should give rise to two grounds of liability. It is arguably incongruous to conclude that one could, through the same course of conduct, be both the primary infringer and secondary infringer of an exclusive right. This is apparent when we consider the rationale for having a secondary form of liability. Secondary liability serves to compel the defendant, who exercises more control or oversight over a third party, to inhibit or stop the infringements executed by the third party. As Gummow and Hayne JJ of the High Court in *Roadshow Films v iiNet [No 2]* explained, secondary liability in copyright has ‘an economic rationale similar to that of the tort of inducing breach of contract, namely a lower cost of prevention of breach of the primary obligation’.¹¹⁶ It would be inconsistent to conclude that one has communicated content to the public, but at the same time authorised themselves through the control they are exercising.¹¹⁷ Indeed, a finding of authorisation is only relevant to communications by third parties and may serve as an alternative finding (as was the case in *Hells Angels*).¹¹⁸

V LESSONS (AND CAUTIONS) FROM CANADA

Can Australia adopt the seemingly clean division of downloads as reproductions and streams as communications, in the manner conceived by the Canadian Supreme Court? A transplant into Australian law is not feasible because, unlike Canada, authorisation of infringement in Australia is dependent on proof of a primary act of infringement. Nevertheless, having contrasted *SOCAN v ESA* with a number of Australian cases, this article distils two key lessons for Australian courts.

First, where infringement of both the communication right and the reproduction right is alleged, courts should fully consider and apply the relevant right in the circumstances. Determining which right is relevant may depend on what interest is being affected by the system. No doubt, this will become increasingly challenging as advanced systems for communication give rise to hybrid models of dissemination that do not fit within neat categories of conduct, for example providing access to content but also granting consumers a degree of control akin to the possession of durable copies. The Canadian Supreme Court has sought to focus on what ‘copyright

¹¹⁶ *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42, 79–80 [110] (Gummow and Hayne JJ), citing William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) 118–19.

¹¹⁷ This point is made by Roger Hughes in regard to the Canadian Copyright Board’s Tariff 22 Decision, which held that the act of posting content constituted authorisation of the communication right. Hughes asks, as the Board did not make clear who is authorised in this instance, ‘[d]oes that person authorize themselves?’: Neal Armstrong, Roger T Hughes and Susan J Peacock, *Hughes on Copyright and Industrial Design* (LexisNexis Butterworths, 2nd ed, 2005) 506 n 16; Tariff 22 Decision (n 66) 455–7.

¹¹⁸ See *Hells Angels* (n 9) 489.

interest' is engaged by the activity. This then raises the question as to how such interests should be determined.¹¹⁹ As a preliminary observation, two perspectives are relevant to this identification of a relevant 'copyright interest': (1) the interests of the copyright owner, in the sense of what they are seeking to control; and (2) the interest of the copyright consumer, in what they receive, regardless of the process or underlying technology utilised.¹²⁰

Second, Australian courts should distinguish more clearly the authorisation of infringement from the primary infringing act. This is particularly important due to the broadly worded nature of the communication right. The use of authorisation of reproductions to distinguish the two streams of activities or rights in *SOCAN v ESA* indirectly prompts us to consider the role of authorisation more carefully in this context. Even if we take a different approach from Canada (ie authorisation is not a distinct right, but dependent on proof of primary infringement), judgments should make clear which party is the primary infringer and which is the authoriser. The primary infringing act should be distinguished from an overall course of conduct construed as authorisation of that infringing act.

The preceding two points could guide interpretation and application of exclusive rights and infringement in a direction that minimises overlap. Consider the making available of durable downloads, for example. Unlike the Canadian Supreme Court, an Australian court is likely to consider making content available for download to be an exercise of the right to communicate to the public.¹²¹ Australian courts may also conclude that in the course of making the initial copy available for download,

¹¹⁹ While this separation of three interests — identified above at Part III(B) — is said to be found in the text and structure of the *Copyright Act* (Can) (n 24) (see *SOCAN v ESA* (n 4) [54]), this is not apparent in the Australian legislative context.

¹²⁰ Taking an approach that focuses on substantive interests may assist us in gaining clarity on the communication right. With interests in mind, courts may take a more targeted approach to exclusive rights and be more mindful of unnecessary overlaps between exclusive rights. However, it should be noted that while the Canadian court's attempt to limit overlaps and double dipping in the online environment is commendable, it is unclear whether the approach is truly technology neutral. The durable copy/ephemeral access distinction that is a centrepiece of the *SOCAN v ESA* distinction arguably relies on prominent copyright industries of the past, eg publishing and performing.

¹²¹ The practice of Australian collecting societies, which does not appear to have been contested, is to collect fees for both rights in the context of downloads and streaming. Australian collecting societies apply a 50:50 split, which may be contrasted with German collecting societies that, in the case of downloads, collect 66.67% share of royalties for holders of mechanical rights, with the remainder for holders of performing rights, and vice versa in the case of streaming: Mihály Ficsor, 'Expert Opinion on the International Norms on the Right of Making Available to the Public and on Its Application in Countries Where It Has Been Implemented' (Expert Opinion, 6 March 2013) 23 ('Expert Opinion'), citing email from Richard Mallet to Mihály Ficsor, 27 February 2013. See also GEMA, *Verteilungsplan Der GEMA* [Distribution Plan of GEMA] (Report, 18–19 May 2022) <https://www.gema.de/documents/d/guest/009_verteilungsplan>.

a person also exercises the reproduction right. Furthermore, multiple reproductions may take place when downloads are initiated by users of the service or platform, subsequent to that initial reproduction. However, the initial act of reproduction is not the core copyright interest of concern in this context. The main interest of the copyright owner is in controlling access to their content by members of the public. The initial reproduction is ancillary to this main interest. The subsequent downloads by users may be of concern to the owner, but these downloads are initiated by users taking advantage of the access provided by the platform proprietor.¹²²

Making content available for download could also be seen as an authorisation of the reproduction right in regard to subsequent downloads (as is the case in Canada). However, if primary infringement of the communication right is likely to be found, analysis and application should be focused on this key right. Again, if we consider the rationale for secondary liability, there is no need to resort to authorisation of the reproduction right to address this act of making downloads available.¹²³ These points would be relevant to both the question of infringement and also an assessment of value. When assessing royalties for the purpose of licensing, focus should be on the primary act that relates to the key interest of the copyright owner, ie access to content.¹²⁴

A caution regarding the Canadian approach is that the treatment of authorisation as a distinct right could itself lead to overlapping rights. If authorisation warrants separate treatment for infringement or remuneration as a distinct right, then this

¹²² As noted in n 130 below, copyright should regulate the conduct of commercial enterprises, not that of copyright consumers or users.

¹²³ It may be argued that this conclusion is inconsistent with the point made earlier, ie the consumer interest in receiving a durable copy means that the reproduction right should be exercised. However, as noted below in n 127, this may be based more in analogies with historical publishing and performing industries and is less relevant to models for dissemination going forward. Furthermore, reliance on the communication right refocuses our analysis on the conduct of the commercial provider of the service, as opposed to on the conduct of consumers. Historically the reproduction right would have been exercised by intermediaries that would disseminate the resulting copies to the public, but in the digital age reproductions are easily made by members of the public. Therefore, shifting our focus to the communication right ensures that copyright directly regulates commercial actors, as opposed to copyright consumers: see Daniel J Gervais, 'The Purpose of Copyright Law in Canada' (2005) 2(2) *University of Ottawa Law and Technology Journal* 315 (arguing that copyright should regulate commercial entities and not encroach upon the private sphere of individuals).

¹²⁴ Collecting societies already do this, but to varying degrees, where rights are jointly licensed by performing rights societies and mechanical rights societies. Mihaly Ficsor explains that under these joint licences, '[t]he nature/purpose of the interactive use (whether streaming or downloading) ... is taken into account in the shares due to the owners of the respective rights; usually in a way that, in the case of streaming, a bigger share goes to "performing rights," [sic] while in the case of downloading, a bigger share goes to "mechanical rights" (on the understanding that the making available right is applicable in all these cases)': Ficsor, 'Expert Opinion' (n 121) 4.

could create duplication between making a download available and the eventual download (if we say that the latter results in a distinct right being infringed). As discussed, distinct rights to authorise reproduction and to make reproductions do not operate in the same way as the communication right, with the initial making available and the eventual transmission both falling within the same communication right.¹²⁵ Some degree of duplication occurs, ie two rights arise for a single act of exploitation, even though these rights apply to two different parties (authorisation by the disseminator making downloads available and reproduction by users initiating the downloads).

A further question raised by *SOCAN v ESA* is whether secondary infringement of a right is sufficient to give effect to art 8 of the *WCT*. The Canadian Supreme Court finds that ‘there is nothing novel about relying on a combination of rights to give effect to the obligations under art 8’, citing US law as an example.¹²⁶ Relying on a combination of primary acts of infringement is arguably different from relying on the right to authorise reproductions, although one’s conclusion on this may depend on how broadly the umbrella solution is construed.¹²⁷

In Australia, whether the making of copies available for download can be fully carved out from the communication right remains an open question. Until we are able to develop a clearer approach to the communication right that limits overlap with other rights such as the reproduction right, it is likely to fall upon sensible licensing practices and remuneration structures to minimise double dipping by rightsholders. As posited in the Canadian Copyright Board’s Various Tariffs 1996 decision, the royalty should be set for ‘principal use’ of the work, irrespective of any

¹²⁵ This point was discussed in Part III(C) of this article, on the ‘merging theory’ of rights.

¹²⁶ *SOCAN v ESA* (n 4) [109].

¹²⁷ On the face of it, the *WIPO Internet Treaties* do not carve the provision of a downloadable copy of a work out from the notion of ‘making available’. However, if we consider Canada’s treatment of authorisation as a distinct right of the owner, irrespective of whether a reproduction occurs, one could also argue that this in substance means that the right to communication to the public by making available is sufficiently protected: see Cheryl Foong, ‘Copyright’s Making Available Right: Distinguishing Downloads and Streams under the WIPO Internet Treaties’ [2023] (September) *Singapore Journal of Legal Studies* (forthcoming). Note that *SOCAN* also argued that authorisation was insufficient as the *WCT* requires strict liability, and although the Copyright Board did not express a view on this point, the Supreme Court quoted the explanatory text accompanying art 8, which emphasised that the ‘extent of liability’ shall be matters for ‘national legislation and case law according to the legal traditions of each Contracting Party’: *Scope of Section 2.4(1.1) of the Copyright Act — Making Available* (n 31) [171]; *SOCAN v ESA* (n 4) [88]. Support for this view is found in the respective expert opinions of Sam Ricketson and Jeremy de Beer, cited in *Scope of Section 2.4(1.1) of the Copyright Act — Making Available* (n 31) [151]–[154].

incidental use involved in the process.¹²⁸ However, private ordering or regulatory processes should not be seen as *the* solution to an issue as central to copyright as overlapping reproduction and communication rights.

VI CONCLUSION

An objective of the *WIPO Internet Treaties* was to ensure that on-demand, interactive means of disseminating content online would be subject to copyright protection. The right to make works available to the public, regardless of whether via downloads of copies or ephemeral streams, held potential to encroach upon means of exploiting works already covered by the reproduction right. However, overlap between the communication right and the reproduction right was not a major concern then, so long as ‘making available works and objects of related rights to the public in an interactive electronic network’ would effectively be covered by a finding of infringement.¹²⁹ Overlap between the ‘making available’ right and secondary forms of infringement, such as authorisation liability, was considered but effectively sidestepped using an agreed statement to art 8 that the mere provision of physical facilities for enabling or making a communication would not itself amount to communication.¹³⁰

The ‘making available’ sub-right and the umbrella solution for implementation was devised at a time when content industries were beginning to explore business models for making their content accessible online.¹³¹ As dissemination models that permit streaming and downloads of content develop and mature, the issue of overlapping rights has come before the courts. The approach of the Supreme Court of Canada in *SOCAN v ESA* prompts closer consideration of Australian law and highlights blind spots in our treatment of overlapping rights and interests. Broadly speaking, two lessons may be distilled from the decision. First, more effort needs to be invested by our courts in distinguishing exercise of the reproduction right from the communication right. Second, a distinction should be made between acts that give rise to authorisation of the communication right and those giving rise to primary infringement of the communication right.

¹²⁸ *Statement of Royalties to Be Collected for the Performance or Communication by Telecommunication, in Canada, of Musical or Dramatico-Musical Works in 1994, 1995, 1996 and 1997* (1996), 71 CPR (3d) 196, 20 (Copyright Board of Canada).

¹²⁹ Ficsor, *Copyright in the Digital Environment* (n 27) 11.

¹³⁰ The inclusion of this agreed statement was the result of intense lobbying by non-governmental organisations representing internet service providers and telecommunication companies: Ficsor, *The Law of Copyright and the Internet* (n 18) 509. Far from clarifying the issue, it has led to speculation about its overlap with secondary liability involving non-physical forms of enabling communications: see, eg, Ginsburg, ‘The (New?) Right of Making Available to the Public’ (n 26) 243.

¹³¹ Ficsor, *Copyright in the Digital Environment* (n 27) 4.

In terms of the first lesson, *SOCAN v ESA* indicates that the interests of copyright owners in what they seek to control and the perspectives of copyright consumers in terms of what they receive should be considered when identifying the relevant right in the circumstances. How such interests and perspectives ought to shape the scope of exclusive rights remains unclear, and much more discussion and analysis is needed in this space. In the immediate term, royalty rates and payment structures should be realistically aligned with the copyright interest being exercised, to minimise double dipping by rightsholders.

However, this does not solve the transaction costs and efficiency concerns raised by overlapping rights. In the longer term, conscious and concerted efforts to address overlapping copyright rights and interests are needed if copyright is to remain relevant to online dissemination models that transcend traditional boundaries. This article does not purport to solve all the issues raised by *SOCAN v ESA*, but sets out key points for consideration by Australian courts tasked with interpreting and applying overlapping rights in the online context. Given the opportunity, law and policymakers should critically consider the intersection of key exclusive rights of copyright owners and whether these rights need reframing in the digital environment.

HEARING FRIENDLY VOICES: A CASE FOR INCREASED INDIGENOUS CONSTITUTIONAL INTERVENTION BEFORE THE HIGH COURT OF AUSTRALIA

ABSTRACT

Amidst heightened contemporary debate over mechanisms to improve Indigenous democratic engagement, the vehicle of constitutional intervention warrants study. This article proposes that increased Indigenous intervention in constitutional litigation may prove a valuable tool for increased Indigenous influence over Indigenous affairs. Given the scarcity of empirical scholarship in this field, quantitative and qualitative analysis is undertaken on the High Court's approach to Indigenous interventions in constitutional cases between January 2012 and June 2023. Despite historic criticism of the High Court's reluctant and inconsistent approach towards non-party intervention generally, this analysis suggests the Court may hold a larger-than-anticipated appetite to hear from Indigenous voices in constitutional litigation. Subsequently, by drawing on the expansive constitutional intervention practice by Aboriginal Canadians in the Supreme Court of Canada, an argument is advanced for increased Indigenous interventions in the High Court. Three distinct advantages are identified from such practice: (1) the clarification of 'constitutional facts'; (2) the provision of pertinent 'social facts'; and (3) its normative value. This article concludes with consideration of the divergent constitutional frameworks and procedures between Canada and Australia as potential — but arguably not fatal — impediments to increased Indigenous constitutional intervention in Australia.

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I INTRODUCTION

As the ‘existential prayer’ to better engage and amplify Indigenous voices within Australia’s democratic system continues unfulfilled,¹ the potential for increased constitutional intervention by Indigenous Australians in the High Court of Australia warrants study. Intervention is a legal procedure through which non-party individuals or groups may seek the leave of the court to be heard in proceedings — either as an ‘amicus curiae’ (literally, ‘friend of the court’) or ‘intervener’.² Historically, influenced by the predominant paradigm of legal formalism and the strictures of the adversarial litigation tradition, the High Court has displayed reluctance to permit non-party participants in constitutional proceedings.³ This practice contrasts starkly with the permissive intervention attitudes of final courts of other jurisdictions, including the Supreme Court of Canada, which has enabled increased influence by native groups in constitutional rights adjudication.⁴

¹ Noel Pearson, ‘A Rightful Place: Race, Recognition and a More Complete Commonwealth’ (2014) 55 (September) *Quarterly Essay* 1, 2. See also: Kirstie Parker, ‘Building a New, Better Legacy’ in Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Publishing, 2016) 76, 77–9; Shireen Morris, “‘The Torment of Our Powerlessness’: Addressing Indigenous Constitutional Vulnerability through the Uluru Statement’s Call for a First Nations Voice in Their Affairs’ (2018) 41(3) *University of New South Wales Law Journal* 629, 632–5 (‘The Torment of Our Powerlessness’); Melissa Castan, ‘Constitutional Recognition, Self-Determination and an Indigenous Representative Body’ (2015) 8(19) *Indigenous Law Bulletin* 15, 15–17.

² Dorne J Boniface, ‘More Changes Proposed in Addition to the Changes Already Proposed: The Human Rights and Responsibility Commission — a Friend in Need?’ (1999) 5(1) *Australian Journal of Human Rights* 235, 237–8, 247–8; Patrick Keyzer, ‘Participation of Non-Party Interveners and *Amici Curiae* in Constitutional Cases in Canadian Provincial Courts: Guidance for Australia?’ in Linda Cardinal and David Headon (eds), *Shaping Nations: Constitutionalism and Society in Australia and Canada* (University of Ottawa Press, 2002) 273, 274–81. See generally Macy Mirsane, ‘The Roles of Amicus Curiae (Friend of the Court) in Judicial Systems with Emphasis on Canada and Alberta’ (2022) 59(3) *Alberta Law Review* 669, 670–7.

³ *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331 (Dixon J); *Bropho v Tickner* (1993) 40 FCR 165, 172 (‘*Bropho*’); Sir Anthony Mason, ‘Future Directions in Australian Law’ (1987) 13(3) *Monash University Law Review* 149, 156–8; Ernst Willheim, ‘Amici Curiae and Access to Constitutional Justice in the High Court of Australia’ (2011) 22(3) *Bond Law Review* 126, 127–34 (‘Amici Curiae and Access to Constitutional Justice’); Benjamin Robert Hopper, ‘Amici Curiae in the United States Supreme Court and the Australian High Court: A Lesson in Balancing Amicability’ (2017) 51(1) *John Marshall Law Review* 81, 82.

⁴ See: Jillian Welch, ‘No Room at the Top: Interest Group Interveners and Charter Litigation in the Supreme Court of Canada’ (1985) 43(2) *University of Toronto Faculty of Law Review* 204, 221; Benjamin RD Alarie and Andrew J Green, ‘Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance’ (2010) 48(3–4) *Osgoode Hall Law Journal* 381, 398–9; Kathryn Chan and Howard Kislowicz, ‘Divine Intervention: Narratives of Norm Entrepreneurship in Canadian Religious Freedom Litigation’ (Pt 2) (2021) 44(2) *Dalhousie Law Journal* 509, 527–8 (‘Divine Intervention (Pt 2)’).

In the contemporary context, while the High Court's relatively low⁵ and inconsistent intervention rates continue to be criticised,⁶ its attitude towards Indigenous interveners and amici in constitutional litigation is uncertain. The High Court rarely provides reasons for granting (or refusing) discretionary leave to non-party participants to constitutional intervention.⁷ Moreover, unlike well-established practices in the United States⁸ and Canada,⁹ empirical study of non-party intervention in Australia is nascent.¹⁰ Consequently, notwithstanding a breadth of valuable academic commentary on non-party intervention generally, there exists little quantitative basis from which to ascertain the High Court's appetite for Indigenous constitutional intervention and undertake qualitative analysis to explore its reasoning.

This article seeks to provide a modest contribution to this lacuna in literature. In doing so, it argues that increased Indigenous intervention in constitutional litigation

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- ⁵ Enid Campbell, 'Intervention in Constitutional Cases' (1998) 9(4) *Public Law Review* 225, 258; George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 386–7 ('The Amicus Curiae and Intervener'); Jason Pierce, 'The Road Less Travelled: Non-Party Intervention and the Public Litigation Model in the High Court' (2003) 28(2) *Alternative Law Journal* 69, 71; Jason L Pierce, David L Weiden and Rebecca D Wood, 'The Changing Role of the High Court of Australia' (Conference Paper, Research Committee on Comparative Judicial Studies, International Political Science Association, 22 June 2010) 3, 30; Hopper (n 3) 85; Ruth Parsons and Darren R Halpin, 'Organised Interests and the Courts: Non-Party Access to the High Court of Australia between 2012 and 2017' (2022) 68(4) *Australian Journal of Politics and History* 544, 552.
 - ⁶ See, eg: Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 (October) *Law Quarterly Review* 537; Pierce (n 5); Hopper (n 3); Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3); Williams, 'The Amicus Curiae and Intervener' (n 5).
 - ⁷ Australian Law Reform Commission, *Beyond the Door-Keeper: Standing To Sue for Public Remedies*, (Report No 78, 1996) 70–1 [6.36]; MG Sexton, 'Intervention' in Graeme Blank and Hugh Selby (eds), *Appellate Practice* (Federation Press, 2008) 107, 108; Pierce, Weiden and Gill (n 5) 6; Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 127; Williams, 'The Amicus Curiae and Intervener' (n 5) 376–7.
 - ⁸ See, eg: Joseph D Kearney and Thomas W Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148(3) *University of Pennsylvania Law Review* 743; Linda Sandstrom Simard, 'An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism' (2008) 27(4) *Review of Litigation* 669; Ronald Mann and Michael Fronk, 'Assessing the Influence of Amici on Supreme Court Decision Making' (2021) 18(4) *Journal of Empirical Legal Studies* 700.
 - ⁹ See, eg: Alarie and Green (n 4); Donald R Songer, John Szmer and Susan W Johnson, 'Explaining Dissent on the Supreme Court of Canada' (2011) 44(2) *Canadian Journal of Political Science* 389.
 - ¹⁰ A total of six empirical studies have been identified which capture *any* data on non-party intervention in Australia to date: see above n 5. Only Williams, 'The Amicus Curiae and Intervener' (n 5) and Enid Campbell (n 5) distinguish intervener participation in constitutional and non-constitutional cases.

may not only be more feasible than presumed, but desirable on pragmatic and normative bases.

Part II distinguishes the roles and rights of the Australian amicus curiae and intervener, and the legal tests for, and judicial attitudes towards, their appearance before the High Court. Thereafter, empirical analysis is undertaken on all prospective and successful Indigenous amici and interveners to constitutional proceedings in the High Court between January 2012 and June 2023. Notably, the results of this research contrast with existing criticism of the Court's generally reluctant intervention practice, and as such, offer tentative encouragement for increased Indigenous intervention applicants in future constitutional litigation.

Part III considers the potential benefits from bolstered Indigenous interventions in Australia, by critically examining the comparative role of Aboriginal¹¹ interventions in constitutional cases before the Canadian Supreme Court. The Supreme Court serves as an ideal comparator, given among other practices, its permissive approach¹² and well-developed procedures¹³ regarding Aboriginal constitutional intervention. Three benefits are identified and examined in further detail. First, as demonstrated in the case studies of *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* ('Ktunaxa')¹⁴ and *R v Sharma* ('Sharma'),¹⁵ Aboriginal interveners can enhance the quality of constitutional adjudication through the clarification of 'constitutional facts'. Further, as observed in *R v Boudreault* ('Boudreault'),¹⁶ it is demonstrated how Aboriginal intervener submissions (ie 'factums') can enrich judicial deliberation through the provision of germane 'social facts',¹⁷ alerting the Court to potentially detrimental constructional choices. Finally, Aboriginal interventions can offer distinct normative benefits, publicly signalling judicial respect for the principle of democratic inclusion and reinforcing the dignity and self-respect of those permitted to intervene.

Part IV engages with notable distinctions between the Canadian and Australian constitutions and procedural practices as potential impediments to the benefits of an enhanced Indigenous intervention practice in the High Court. First, the deliberately scarce substantive individual and Indigenous rights prescribed under the *Australian Constitution* as distinguished from the *Canadian Charter of Rights and Freedoms*

¹¹ 'Aboriginal peoples' includes the 'Indian, Inuit and Métis peoples of Canada': *Canada Act 1982* (UK) c 11, sch B s 35(2) ('*Constitution Act 1982*').

¹² Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (State University of New York Press, 2002) 39; Alarie and Green (n 4) 399.

¹³ Gary Magee, 'Trends in Applications for Leave To Intervene in the Supreme Court of Canada' (2009) 25(1) *National Journal of Constitutional Law* 205, 208.

¹⁴ [2017] 2 SCR 386 ('Ktunaxa').

¹⁵ 420 CCC (3d) 1 ('Sharma').

¹⁶ [2018] 3 SCR 599 ('Boudreault').

¹⁷ For discussion on the definition of 'social facts' and examples, see below Pt III(C).

(‘*Charter*’)¹⁸ and *Constitution Act*¹⁹, may constrain the functional role of Indigenous interventions. Second, in contrast to the Canadian practice, the lack of procedural clarity in the tests governing admission for intervention to the High Court has the potential to impede the Court’s appropriate use and evaluation of information from Indigenous submissions. Finally, there is uncertainty whether and on what basis the High Court may ascertain and rely on social facts provided by interveners in its constitutional adjudication.

There are important implications for examining this topic. It is widely recognised that proper Indigenous representation and consultation are necessary to close the gap and effect legitimate and sustainable Indigenous policy.²⁰ More substantive mechanisms to this end will and must continue to be agitated.²¹ However, constitutional intervention may provide a valuable accompaniment with which to amplify Indigenous voices in future constitutional rights adjudication affecting Indigenous affairs.

II INTERVENTIONS BEFORE THE HIGH COURT OF AUSTRALIA

Non-parties without a statutory right to intervene in constitutional litigation before the High Court of Australia²² may seek discretionary leave to appear via the procedures of *amicus curiae* or intervener.²³ However, the High Court’s purported reluctance to

¹⁸ *Canada Act 1982* (UK) c 11, sch B pt I (‘*Charter*’).

¹⁹ *Constitution Act 1982* (n 11).

²⁰ See, eg: Commonwealth, *Closing the Gap Report 2020* (Report, 2020) 9–10; Shireen Morris, ‘The Argument for a Constitutional Procedure for Parliament To Consult with Indigenous Peoples When Making Laws for Indigenous Affairs’ (2015) 26(1) *Public Law Review* 166, 170–3 (‘The Argument for a Constitutional Procedure’); MC Dillon, ‘Co-Design in the Indigenous Policy Domain: Risks and Opportunities’ (Discussion Paper No 296/2021, Centre for Aboriginal Economic Policy Research, Australian National University, 2021) 7–10.

²¹ See, eg: National Indigenous Australians Agency, ‘Referendum on an Aboriginal and Torres Strait Islander Voice’ (Web Page) <<https://www.niaa.gov.au/indigenous-affairs/referendum-aboriginal-and-torres-strait-islander-voice>>; Referendum Council, ‘Uluru Statement from the Heart’ (First Nations National Constitutional Convention, 26 May 2017); Asmi Wood, ‘Australia and Pandemics v BLM: No, Love Lost (at the High Court)’ (Pt 2) (2021) 46(4) *Alternative Law Journal* 314, 316–19; Shireen Morris and Harry Hobbs, ‘Imagining a Makarrata Commission’ (2022) 48(3) *Monash University Law Review* 19.

²² Cf Commonwealth, State and Territory Attorneys-General: *Judiciary Act 1903* (Cth) s 78A(1). Further, special-purpose Commissioners including the Human Rights Commissioner may seek leave to appear before the Federal Court and Federal Circuit and Family Court of Australia (Division 2) as *amicus curiae* per s 46PV of the *Australian Human Rights Commission Act 1986* (Cth). The Australian Human Rights Commission (‘AHRC’) may seek the leave of a court to intervene in proceedings involving human rights issues: at s 11(1)(o).

²³ *Levy v Victoria* (1997) 189 CLR 579, 603–5 (Brennan CJ) (‘*Levy*’); Sexton (n 7) 108.

exercise discretionary grants of leave to permit non-party intervention has been the subject of sustained criticism.²⁴ While such critique finds some support in earlier empirical research, the methodology of existing studies limits insight into the High Court's contemporary attitude towards *Indigenous* constitutional intervention. In addressing this gap, empirical analysis is undertaken on prospective and successful non-party Indigenous interventions before the High Court between 1 January 2012 and 12 June 2023.²⁵ Notably, the results of this analysis depart from longstanding critiques of the High Court's aversion to non-party constitutional intervention generally. Accordingly, it is proposed that the High Court holds a wider-than-anticipated appetite to hear from Indigenous voices in constitutional adjudication.

A *Distinguishing the Australian Amicus Curiae and Intervener*

Contrasting the contemporary trend across many common law jurisdictions to blur the historically discrete concepts of intervener and amicus curiae,²⁶ the Australian practice has been to maintain some doctrinal distinction between their roles, rights and rules to participation.²⁷

1 *Amicus Curiae: Roles, Rights and Tests for Entry*

The amicus curiae in early English common law was typically a 'disinterested bystander', counsel appointed to assist the court by providing relevant information on law or fact overlooked or otherwise unavailable to the parties.²⁸ In contrast, the modern Australian iteration of the amicus curiae can engage in partisan advocacy²⁹ and typically seeks to be heard on the basis that the general issues as identified by the parties 'may indirectly affect it, or those associated with or like it'.³⁰ While the modern amicus may lack the impartial neutrality of its predecessors, its role is

²⁴ Levy (n 23) 650–1 (Kirby J); *A-G (Cth) v Breckler* (1999) 197 CLR 83, 135–6 [106] (Kirby J); Kirby (n 6); Pierce (n 5); Hopper (n 3); Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3); Williams, 'The Amicus Curiae and Intervener' (n 5); Boniface (n 2) 252–3.

²⁵ For comments on methodology, see below Part II(B)(1).

²⁶ Philip L Bryden, 'Public Interest Intervention in the Courts' (1987) 66(3) *Canadian Bar Review* 490, 496; Edward Clark, 'The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand' (2005) 36(1) *Victoria University of Wellington Law Review* 71, 81; S Chandra Mohan, 'The Amicus Curiae: Friends No More?' [2010] (2) *Singapore Journal of Legal Studies* 352, 353.

²⁷ Kirby (n 6) 543–4.

²⁸ Williams, 'The Amicus Curiae and Intervener' (n 5) 368. See also Samuel Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72(4) *Yale Law Journal* 694, 694–5.

²⁹ Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20(1) *Adelaide Law Review* 159, 161 ('Interveners and Amici Curiae'); Williams, 'The Amicus Curiae and Intervener' (n 5) 368.

³⁰ Kirby (n 6) 543.

frequently confined to assisting the court by drawing attention to some aspect of a case otherwise not presented by parties.³¹

Procedurally, amici appearing before the High Court are not joined as parties,³² and therefore lack the accompanying rights and liabilities — including leading evidence, calling and examining witnesses and subjection to costs orders.³³ Their appearances are highly circumscribed, ordinarily limited to written submissions or, in exceptional circumstances, time-limited oral arguments on discrete issues.³⁴ Moreover, as non-parties, principles of natural justice do not apply to amici, and the High Court is not obliged to consider submissions they place before the Court.³⁵

The common law test for granting discretionary leave for an amicus curiae is articulated in *Levy v Victoria* ('Levy').³⁶ There, Brennan CJ observed that an amicus curiae must satisfy the Court that 'it will be significantly assisted' by the amicus's submissions, and that 'any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected'.³⁷ The threshold of 'significant assistance' appears to require that the amicus curiae provide a distinct submission from those arguments already before the Court.³⁸ In *Wurridjal v Commonwealth* ('Wurridjal'), French CJ stated that the Court

may be assisted where a prospective amicus curiae can present arguments on aspects of a matter before the Court which are *otherwise unlikely to receive full or adequate treatment by the parties* because (a) it is not in the interests of the parties to present argument on those aspects or (b) one or other of the parties lacks the resources to present full argument to the Court on them.³⁹

³¹ *Bropho* (n 3) 172; Boniface (n 2) 248; Ronnit Redman, 'Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner' (2004) 27(3) *University of New South Wales Law Journal* 849, 851; Christopher Staker, 'Application To Intervene as Amicus Curiae in the High Court' (1996) 70(5) *Australian Law Journal* 387, 387–9.

³² *Re Medical Assessment Panel; Ex parte Symons* (2003) 27 WAR 242, 250 [19]–[20] (Heenan J); Andrea Durbach, Isabelle Reinecke and Louise Dargan, 'Enabling Democracy: The Role of Public Interest Litigation in Sustaining and Preserving the Separation of Powers' (2020) 26(2) *Australian Journal of Human Rights* 195, 203.

³³ Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 135; Sexton (n 7) 109–10; Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Discussion Paper No 80, March 2014) 227–8 [15.38].

³⁴ Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20(1) *Adelaide Law Review* 173, 174 ('Interveners and Amici Curiae'); Kirby (n 6) 543–4.

³⁵ Mason, 'Interveners and Amici Curiae' (n 34) 174; Angel Aleksov, 'Intervention in Constitutional Cases' (2012) 86(8) *Australian Law Journal* 555, 555.

³⁶ *Levy* (n 23).

³⁷ *Ibid* 604–5.

³⁸ Transcript of Proceedings, *Clubb v Edwards* [2018] HCATrans 181.

³⁹ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 312 (emphasis added) ('Wurridjal').

His Honour further observed that '[i]n some cases it may be in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer'.⁴⁰ However, the parameters of such a larger view remain untested.⁴¹

The degree of difference required of a prospective amicus' submissions from those of parties to meet the threshold of 'significant assistance', or afford the Court a 'larger view', appears substantial in practice. Commentators have variously characterised the High Court's policy towards amici as 'anaemic',⁴² 'conservative',⁴³ and 'ad hoc'.⁴⁴ Justice Kirby has characterised the High Court's amicus policy as 'hostile',⁴⁵ while Jason Pierce suggests the Court's view of an amicus's prospective input to its adjudicative task is an 'unnecessary distraction'.⁴⁶ The resultant effect of the Court's approach has been to 'place formidable obstacles in the way of' amici interventions.⁴⁷

Such criticisms appear supported by quantitative data. Pierce found that in the fifty-year period between 1947 and 1997, amici were granted leave to appear in a mere 15 cases before the High Court.⁴⁸ Further, notwithstanding a marginal increase in admissions in the subsequent period, Benjamin Hopper has observed that amicus curiae have 'remain[ed] largely unwelcome at the High Court'.⁴⁹ Between 2010 and 2017, successful amicus curiae applications were made in only 24 cases, equating to appearances in just 5.5% of the Court's total case load.⁵⁰ Consistent with this low trend, only three amici applications were successful in 2018.⁵¹

⁴⁰ Ibid.

⁴¹ See Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 134. This has not prevented counsel relying on this basis to seek admission as an amicus, for example, see: The National Congress of Australia's First Peoples Ltd, 'Submissions of the National Congress of Australia's First Peoples Ltd Seeking Leave To Intervene as an Amicus Curiae', Submission in *Maloney v The Queen*, B57/2012, 28 November 2012, 1 [5].

⁴² Pierce (n 5) 70.

⁴³ Christopher Goff-Gray, 'The Solicitor-General in Context: A Tri-Jurisdictional Study' (2012) 23(2) *Bond Law Review* 48, 78–9.

⁴⁴ Henry Burmester, 'Interveners and *Amici Curiae*' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 356, 357.

⁴⁵ Kirby (n 6) 537.

⁴⁶ Pierce (n 5) 70.

⁴⁷ Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 137.

⁴⁸ Pierce (n 5) 70.

⁴⁹ Hopper (n 3) 85.

⁵⁰ Ibid.

⁵¹ *AB (a Pseudonym) v CD (a Pseudonym)* (2018) 362 ALR 1; *Republic of Nauru v WET040* (2018) 361 ALR 405; *Republic of Nauru v WET040 [No 2]* (2018) 362 ALR 235.

2 *Interveners: Roles, Rights and Tests for Entry*

In contrast to the *amicus curiae*, prospective interveners granted discretionary leave to appear before the High Court are joined as parties to proceedings.⁵² Reflecting the common law tradition characterising litigation as a private controversy between those with a ‘genuine grievance’,⁵³ an intervener participates on the basis that their interests would be directly, or ‘indirect[ly] and contingent[ly]’ but ‘substantial[ly]’, affected by the decision.⁵⁴

Here, it is necessary to distinguish non-parties seeking to intervene as ‘of right’, and those joined at the discretion of the court. As Brennan CJ stated in *Levy*, prospective interveners whose legal interests would be *directly* affected have an absolute right to intervene on natural justice principles, which entitles their appearance to protect their interest liable to be affected.⁵⁵ Thus interventions by parties directly affected by a constitutional proceeding are not reliant on the High Court’s grant of discretionary leave.⁵⁶

In contrast, the following commentary guides grants of discretionary leave for prospective interveners with an ‘indirect’ but substantial affectation of interest. The High Court has stated that a prospective intervener will meet the requisite interest in a High Court matter if that matter determines legal principles or law governing pending proceedings in a lower court to which the intervener is a party.⁵⁷ Further, in addition to the requisite interest, the prospective intervener must show that the existing parties ‘may not present fully the submissions on a particular issue’.⁵⁸ That is, the intervener applicant must provide information which the Court ‘should have to assist it to reach a correct determination’ or ‘prevent an error that would affect the interests of the intervener’.⁵⁹ Subsequently, submissions ‘merely repetitive’ of those provided by parties⁶⁰ or those seeking ‘to expand the scope of the issues in contest’ will be denied.⁶¹

⁵² Kenny, ‘Interveners and Amici Curiae’ (n 29) 159.

⁵³ *A-G (The Gambia) v N’Jie* [1961] AC 617, 634 (Lord Denning).

⁵⁴ *Levy* (n 23) 602.

⁵⁵ *Ibid* 601.

⁵⁶ *Ibid* 601, 603; Michael Douglas, ‘The Media’s Standing To Challenge Departures from Open Justice’ (2016) 37(1) *Adelaide Law Review* 69, 91–2. Similarly, those with a statutory right to intervene have an automatic, non-discretionary right of intervention, for example in the case of Commonwealth and State Attorneys-General in constitutional matters: *Judiciary Act 1903* (Cth) s 78A.

⁵⁷ *Levy* (n 23) 602.

⁵⁸ *Ibid* 603.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* 603–4.

⁶¹ Aleksov (n 35) 562.

If no terms are imposed on the scope of their involvement as parties, the rights and liabilities of an intervener can be expansive. Interveners may properly engage with and seek to influence the legal process by filing pleadings, adducing evidence, calling and examining witnesses, presenting extensive oral arguments and exercising their rights to appeal.⁶² Further, interveners will be subject to costs orders and are bound by the Court's judgment.⁶³

However, notwithstanding some reported increase of discretionary interventions before the High Court in the last two decades,⁶⁴ a more liberal approach to permitting interventions has not been found in the Court's contemporary practice.⁶⁵ Scholars have characterised the Court's approach to interveners as remaining very 'restrictive',⁶⁶ and 'reluctant',⁶⁷ where a 'negative judicial approach has substantially persisted'.⁶⁸ Pierce notes that only 'a paltry number of discretionary interventions' have been granted.⁶⁹ As such, the High Court's broader pattern towards discretionary interveners has 'not encouraged [their] wider participation in cases in which constitutional issues are raised'.⁷⁰ The ultimate effect has been to 'den[y] the intervener ... meaningful function'.⁷¹

Limited empirical research exists on the High Court's grants of discretionary leave towards interveners.⁷² Moreover, the methodological design of existing studies prevents more specific inferences being drawn on the Court's attitude towards Indigenous interveners and amici. Studies to date have overwhelmingly aggregated data on successful amici and intervener rates, rather than isolating data on successful interveners alone.⁷³ No research has assessed successful Indigenous amici and intervener rates as a proportion of the total number of Indigenous amici

⁶² Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 135.

⁶³ Ibid; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534–5; Sexton (n 7) 109.

⁶⁴ Parsons and Halpin (n 5) 550. See generally: Pierce (n 5) 70; Williams, 'The Amicus Curiae and Intervener' (n 5) 365.

⁶⁵ Kirby (n 6) 547–9.

⁶⁶ Clark (n 26) 89. See also Burmester (n 44) 356.

⁶⁷ Sexton (n 7) 107.

⁶⁸ Kirby (n 6) 544.

⁶⁹ Pierce (n 5) 70. See also Parsons and Halpin (n 5) 555.

⁷⁰ Enid Campbell (n 5) 263.

⁷¹ Williams, 'The Amicus Curiae and Intervener' (n 5) 365.

⁷² See above n 10.

⁷³ For example, Williams categorises both amici and interveners as 'interveners' to evaluate their overall presence in constitutional and non-constitutional cases between 1980 and 1989: Williams, 'The Amicus Curiae and Intervener' (n 5). Similarly, Pierce identifies both amici and interveners under the term 'non-party intervention'/'private intervention' to assess the average annual rates of intervention in the High Court between 1946 and 2001: Pierce (n 5).

or intervener applicants before the High Court.⁷⁴ Existing scholarship does suggest an overall year-on-year growth in the total discretionary interventions permitted before the High Court from the latter half of the 20th century.⁷⁵ However, the extent to which this increase is attributable to the rise in the number of intervener and/or amici applicants or the High Court's greater permissiveness of each mode of intervention remains unclear.

B *Indigenous Amici Curiae and Interveners before the High Court, 2012–23*

1 *Methodology*

The below discussion provides an empirically grounded analysis of the High Court's discretionary grants of leave for Indigenous interventions in constitutional litigation between January 2012 and June 2023. To do so, all constitutional cases⁷⁶ in which an Indigenous amicus or intervener application was made within the selected date range were identified, and the outcome of that application recorded. Pragmatic considerations informed the selected date range for this study to commence in 2012. Most significantly, the necessary records (including transcripts and submissions) to identify relevant constitutional cases involving Indigenous intervention applicants pre-2012 are only held in hard copy in archives and registries around Australia.⁷⁷

To identify all relevant Indigenous amici and intervener applications, every case record reported on the High Court's website⁷⁸ was reviewed to determine whether a s 78B 'Notice of a Constitutional Matter' had been filed. For cases meeting this criterion, a text search with the operators 'amic!', 'interven!', 'Aborigin!' and 'Indigen!' was conducted against the case record and its accompanying judgments and transcripts. Case transcripts were reviewed out of an abundance of caution given the Court rarely mentions unsuccessful amicus curiae or intervener applicants in judgments proper. For constitutional cases in which an Indigenous amicus curiae or intervener application was filed, the accompanying application, transcript and judgment were read, and the outcome of the application recorded as a grant or refusal of leave. For the purposes of this study, 'Indigenous amicus curiae' or 'Indigenous interveners' were defined as any individual or group seeking intervention to

⁷⁴ Most relevantly, Ruth Parsons and Darren R Halpin's study does not distinguish Indigenous amici and intervener applicants from other non-party participants: Parsons and Halpin (n 5).

⁷⁵ Pierce (n 5) 71; Williams, 'The Amicus Curiae and Intervener' (n 5) 387, 389.

⁷⁶ Proceedings involving a matter arising out of the *Australian Constitution* or involving its interpretation within the meaning of ss 78A–78B of the *Judiciary Act 1903* (Cth).

⁷⁷ Parsons and Halpin (n 5) 560. The High Court website is intermittently updated with filed documents from earlier constitutional cases. At the time of publication, the submissions and transcripts of matters heard from February 2011 were accessible on the 'Cases Decided' page: 'Cases Decided', *High Court of Australia* (Web Page) <<https://www.hcourt.gov.au/cases/cases-heard>>.

⁷⁸ 'Cases Decided', *High Court of Australia* (Web Page) <<https://www.hcourt.gov.au/cases/cases-heard>>.

represent the views of any Aboriginal and Torres Strait Islander community, or provide any relevant information to protect and/or advance Aboriginal and Torres Strait Islander rights.⁷⁹ The results of this study are examined below.

2 *Amicus Curiae: Four Applications, Two Allowances*

Between 2012 and 2023, only six Indigenous amicus curiae applications were made to the High Court,⁸⁰ of which four were made in a case involving a constitutional issue.⁸¹ Notably, all four applicants were granted leave to appear as a non-party participant in some form (ie discretionary intervener or amicus curiae), however only two applicants were granted leave to appear as amicus curiae.⁸²

In *Maloney v The Queen* ('*Maloney*'),⁸³ the High Court was required to consider whether s 168B of the *Liquor Act 1992* (Qld) in its application to Aboriginal persons on Palm Island was inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*'), and to that extent of the inconsistency, invalid under s 109 of the *Australian Constitution*.⁸⁴ The effect of sch 1R of the *Liquor Regulation 2002* (Qld) was to restrict the nature and quantity of liquor that persons could have in their possession in public areas on Palm Island — a community almost entirely comprised of Indigenous people.⁸⁵ In this matter, the National Congress of Australia's First Peoples Ltd ('National Congress') sought and was granted leave to appear as amicus curiae.⁸⁶

⁷⁹ This definition captures the AHRC, an independent statutory body initially established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), as enacted. Cf Parsons and Halpin (n 5), who categorise the AHRC as a 'quasi-government interest' given its 'existence ... depends on the continued support of the government': at 553. Given the explicit statutory functions of the AHRC in the *Australian Human Rights Commission Act 1986* (Cth) to seek the leave of the court to intervene in any proceedings involving human rights issues (s 11(1)(o)), and 'to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders' (s 46C(1)(b)), the AHRC has been considered an 'Indigenous intervener' for the purposes of this article.

⁸⁰ *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*'); *Western Australia v Brown* (2014) 253 CLR 507; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 ('*NAAJA*'); *Singh v The Queen* (2020) 381 ALR 198 (heard together with *Nguyen v The Queen* (2020) 269 CLR 299); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, S192/2021, commenced 29 November 2021) ('*Montgomery*'); *BDO v The Queen* (2023) 409 ALR 152.

⁸¹ *Maloney* (n 80); *NAAJA* (n 80); *Montgomery* (n 80).

⁸² In *Montgomery*, the AHRC applied to be heard as amicus curiae and was granted leave to appear as intervener, while the Northern Land Council sought leave to be heard as intervener or alternatively as amicus curiae, and was accepted as an intervener.

⁸³ *Maloney* (n 80).

⁸⁴ *Ibid* 176–7 [1]–[6].

⁸⁵ *Ibid* 176 [2].

⁸⁶ Transcript of Proceedings, *Maloney v The Queen* [2012] HCATrans 342.

Absent reasons for its decision,⁸⁷ the High Court's motivation for admitting the National Congress as *amicus curiae* is uncertain. However, insight may be gleaned from the National Congress' submissions. In addressing the requirement for amici to offer 'significant assistance' to the Court to be admitted, the National Congress stressed its role as 'the national representative body' for the 'political, social, cultural and environmental interests of Aboriginal and Torres Strait Islander peoples'.⁸⁸ Further, in seemingly addressing the latter elements of the amici admission test, it proposed that it could provide distinct perspective on the legal issues at hand from a 'broader range of potentially affected people'.⁸⁹ Further, it emphasised its possession of 'specialist subject matter expertise' to enable a 'larger view of the matter', including through its knowledge of international instruments as applicable to the impugned provisions of the *Racial Discrimination Act*.⁹⁰ Evidently, the Court was persuaded by one or more of these arguments.

North Australian Aboriginal Justice Agency Ltd v Northern Territory ('NAAJA') involved a constitutional challenge to div 4AA of pt VII of the *Police Administration Act* (NT).⁹¹ The plaintiffs were the North Australian Aboriginal Justice Agency, and Maria Bowden, the latter of whom had been held in custody for nearly twelve hours under div 4AA and issued a substantial infringement notice on release.⁹² Section 133AB of div 4AA empowered a member of the Northern Territory Police Force, who had arrested a person without warrant, on the basis of an offence for which an infringement notice can be issued, to hold that person in custody for up to four hours, or longer if the person is intoxicated.⁹³ The section also provided 'for the person to be released unconditionally, released and issued with an infringement notice, released on bail or brought before a justice or court for the offence for which he or she was arrested or any other offence allegedly committed by the person'.⁹⁴ The plaintiffs sought a declaration of invalidity of div 4AA on the basis that, *inter alia*, it conferred on the executive of the Northern Territory a power of detention

⁸⁷ The full exchange below between the amicus applicant and the High Court typifies recorded reasons provided by the Court for a grant of leave:

Ms MJ Richards: May it please the Court, I appear with my learned friend, Ms SM Fitzgerald, for the National Congress of Australia's First Peoples Limited, seeking leave to appear as amicus.

French CJ: Ms Richards, you will have leave on the same basis as I have indicated to Ms Eastman in relation to any oral submissions you might wish to put.

Ms Richards: May it please the Court.

⁸⁸ The National Congress of Australia's First People Ltd (n 41) 1 [6].

⁸⁹ Ibid 2 [8].

⁹⁰ Ibid 1–2 [5]–[6].

⁹¹ *NAAJA* (n 80) 579 [4].

⁹² Ibid 578–9 [3].

⁹³ Ibid 578 [2].

⁹⁴ Ibid.

which undermined or interfered with the institutional integrity of the Northern Territory courts in a manner contrary to the *Australian Constitution*.⁹⁵

In *NAAJA*, the Australian Human Rights Commission ('AHRC') sought and was granted leave to appear as amicus curiae.⁹⁶ While the Court did not provide reasons for its decision, in addressing the test for admission, the AHRC emphasised its distinct expertise to provide unique insights from international human rights jurisprudence regarding the importance of the judicial role in protecting the right to liberty.⁹⁷ Such insights, it proposed, were relevant to the Court's deliberations insofar as they were consistent with the common law concepts of judicial power, process and the institutional integrity of courts for the purpose of ch III of the *Australian Constitution*.⁹⁸

Limited inference can be drawn on the High Court's attitude towards Indigenous amici admissions in constitutional cases from its decisions in *Maloney* and *NAAJA* alone. However, the Court's approach in *Maloney* and *NAAJA* does challenge critics who have explicitly or impliedly attributed the limited appearances of amici before the High Court to the Court's reluctance to permit amicus curiae.⁹⁹ To this end, the above findings raise the prospect that the low record of successful Indigenous amici in constitutional proceedings in the studied period is at least in part attributable to the low rates of Indigenous amici applicants.

3 *Interveners: Five Applicants, Five Allowances*

Between 2012 and 2023, Indigenous interveners applied to be joined as parties in six matters before the High Court,¹⁰⁰ of which four matters involved a constitutional issue.¹⁰¹ Significantly, all but one Indigenous intervener applicant in the four constitutional cases was granted discretionary leave to appear.¹⁰²

⁹⁵ Ibid 579–80 [8].

⁹⁶ Australian Human Rights Commission, 'Proposed Submissions of the Australian Human Rights Commission Seeking Leave To Intervene (Annotated)', Submission in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*, M45/2015, 13 July 2015, 2 [9]. The AHRC sought leave for discretionary intervention or appearance as amicus curiae in the alternative.

⁹⁷ Ibid 3 [10]–[11].

⁹⁸ Ibid [20]–[51].

⁹⁹ Cf. Hopper (n 3) 85; Pierce (n 5) 70.

¹⁰⁰ *Akiba v Commonwealth* (2013) 250 CLR 209; *Karpany v Dietman* (2013) 252 CLR 507 ('*Karpany*'); *Maloney* (n 80); *Northern Territory v Griffiths* (2019) 269 CLR 1.

¹⁰¹ *Karpany* (n 100); *Maloney* (n 80); *NAAJA* (n 80); *Montgomery* (n 80).

¹⁰² The AHRC in *Maloney* (n 80); the National Native Title Council ('NNTC'), and the Northern Land Council ('NLC') in *Montgomery* (n 80); South Australian Native Title Services Ltd in *Karpany* (n 100); the AHRC sought leave as an amicus and was accepted as intervener in *Montgomery* (n 80); the AHRC in *NAAJA* sought leave as an intervener or amicus and was accepted as amicus: see above n 96 and accompanying text.

The High Court provided no substantive reasons on record for granting leave for each of the Indigenous intervener applicants. Subsequently, reliance must again be had on the interveners' submissions to draw insight into the practical application of the test guiding their admission. Notably, the Court appears to have flexibly applied the requirement for applicants to demonstrate their 'substantial affectation' of interest when seeking discretionary leave to intervene.

For example, in both of its submissions, the AHRC articulated its interest at a high level of generality. In *Maloney*, the AHRC submitted that the proceedings involved 'issues of general principle and public importance that may affect, to a significant extent, persons other than' the parties.¹⁰³ Similarly, in *Montgomery*,¹⁰⁴ the AHRC argued that their 'participation [wa]s particularly apt here given that ... the scope of any Commonwealth "power to determine who is a member of the Australian body politic", involves issues of public importance which may significantly affect individuals other than the Respondent'.¹⁰⁵

The level of affectation as articulated by the AHRC is contrasted with the two other intervener applicants in *Montgomery*. In that matter, the Court was invited to consider, inter alia, whether its earlier decision in *Love v Commonwealth* ('*Love*')¹⁰⁶ should be overturned, including the ruling that 'Aboriginal Australians' (as understood under the tripartite test in *Mabo v Queensland [No 2]*¹⁰⁷) were beyond the reach of the 'aliens power' under s 51(xix) of the *Australian Constitution*. If *Love* were not overruled, the Court was asked to consider the outer bounds of the test for an 'Aboriginal Australian' for the purpose of s 51(xix), including the relevance and scope of an individual's biological descent from Aboriginal and Torres Strait Islander persons.¹⁰⁸

In seeking intervention, the National Native Title Council ('NNTC'), 'the national peak body for Aboriginal and Torres Strait Islander organisations operating in the native title sector', submitted a 'direct and substantial interest' in the proceedings.¹⁰⁹

¹⁰³ Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave To Intervene', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 1 [3] ('AHRC's Submission in *Maloney*').

¹⁰⁴ *Montgomery* (n 80).

¹⁰⁵ Australian Human Rights Commission, 'Submissions of the Australian Human Rights Commission Seeking Leave To Appear as Amicus Curiae', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, S192/2021, 9 March 2022, 3–4 [7] ('AHRC's Submission in *Montgomery*') (citations omitted).

¹⁰⁶ (2020) 270 CLR 152 ('*Love*').

¹⁰⁷ (1992) 175 CLR 1.

¹⁰⁸ Transcript of Proceedings, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* [2021] HCATrans 201.

¹⁰⁹ National Native Title Council, 'Submissions of the National Native Title Council Seeking Leave To Intervene', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, S192/2021, 9 March 2022, 3 [6], 5 [11] ('NNTC's Submission in *Montgomery*').

This was on the basis that the High Court's decision in *Montgomery* with respect to *Love* could remove the constitutional protections for its native title-holder constituents, if they were found to be aliens under s 51(xix).¹¹⁰ Further, the NNTC stressed their interest in ensuring any development of the test characterising an 'Aboriginal Australian' should not occur without representative Indigenous voices.¹¹¹ At an equally detailed level of affectation, the Northern Land Council ('NLC') sought intervener status on the basis that the Court's determination on the importance of genetic or biological Aboriginal descent could indirectly affect how native title claims by Aboriginal Australians would be decided.¹¹²

A heightened degree of affectation was also argued in *Karpany v Dietman* ('*Karpany*').¹¹³ In that matter, separate from the constitutional issue at hand, the Court was required to consider the scope of an existing Aboriginal right (including native title rights and interests to fish in South Australia).¹¹⁴ Subsequently, South Australian Native Title Services Ltd applied for, and was granted intervener status on the basis that its native title-holder constituents would be affected by any determination regarding traditional practices to hunt and fish.¹¹⁵

In applying the latter elements of the intervener test for admission, the High Court accepted a wide array of material advanced by the applicants as 'distinct' information that the Court should have in either reaching a correct determination or preventing an error affecting the intervener's interests.¹¹⁶ Such material may be practically categorised as providing specialist expertise or representative value.

For example, in all cases in which it sought intervention, the AHRC stressed its particular skill involving human rights issues given its statutory remit. In *Maloney* and *Montgomery*, respectively, the AHRC proposed it could provide expertise in the interpretation on the impugned provisions of the *Racial Discrimination Act*,¹¹⁷ and the application of human rights instruments for Aboriginal and Torres Strait Islander peoples.¹¹⁸

¹¹⁰ Ibid 2–3 [4], 5 [10], 6 [13].

¹¹¹ Ibid 4–5 [7]–[9].

¹¹² Northern Land Council, 'Proposed Submissions of the Northern Land Council', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, S192/2021, 9 March 2022, 3 [6]–[7] ('NLC's Submission in *Montgomery*').

¹¹³ *Karpany* (n 100).

¹¹⁴ Ibid 513–15 [1]–[6].

¹¹⁵ South Australian Native Title Services, '(Proposed) Intervener's Submissions', Submission in *Karpany v Dietman*, A18/2012, 9 October 2012, 1–2 [3], [5].

¹¹⁶ *Levy* (n 23) 602–4; *Aleksov* (n 35) 562.

¹¹⁷ AHRC's Submission in *Maloney* (n 103) 1 [2]–[5].

¹¹⁸ AHRC's Submission in *Montgomery* (n 103) 3–5 [7]–[10].

With similar success, other intervener applicants emphasised their unique representative capacities to highlight the distinctiveness of their submissions otherwise unable to be presented by existing parties. In *Montgomery*, the NNTC highlighted its role as the ‘only national and coordinated voice for Aboriginal and Torres Strait Islander peoples’ interests in the native title sector’ and its ability to speak through its board on behalf of its extensive membership base regarding the challenges of a unified position on tests of Aboriginality.¹¹⁹ In a similar vein, the NLC emphasised its representative capacity as a registered Aboriginal and Torres Strait Islander body under the *Native Title Act 1993* (Cth).¹²⁰ In doing so, it submitted that it could present the viewpoint of Indigenous peoples on the potential ramifications of the inclusion of biological descent in tests of Aboriginality, for both prospective and current native title holders.¹²¹

The above results stand apart from wider criticisms regarding the Court’s purportedly restrictive or inconsistent practice towards non-party intervention generally. Instead, it may be suggested that between 2012 and 2023, the Court demonstrated a real willingness to permit Indigenous interventions in constitutional cases. This may be evidenced in its broad interpretation of the principles guiding admissions for amici and interveners, and the high Indigenous applicant success rates. These results provide tentative encouragement for increased Indigenous intervention applications in future constitutional litigation.¹²² As shown in Part III, such increased practice has the potential to provide real pragmatic and normative benefits for Indigenous applicants, the High Court and the wider Australian polity.

¹¹⁹ NNTC’s Submission in *Montgomery* (n 109) 5–6 [11]–[12].

¹²⁰ NLC’s Submission in *Montgomery* (n 112) 1 [2].

¹²¹ *Ibid* 4 [9].

¹²² Noting that such practice may be ultimately contingent on the type of constitutional case listed before the Court rather than the reluctance of intervention applicants per se. For example, Indigenous interveners are not uncommon in native title cases in the High Court, see: *Gerhardy v Brown* (1985) 159 CLR 70 (‘*Gerhardy*’) (intervener Anangu Pitjantjatjaraku); *Wik Peoples v Queensland* (1996) 187 CLR 1 (intervener Kimberley Land Council among others); *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677 (interveners Elizabeth King and Beryl Booth); *Fejo v Northern Territory* (1998) 195 CLR 96 (intervener Yorta Yorta Aboriginal Community among others); *Yanner v Eaton* (1999) 201 CLR 351 (intervener Miriuwung and Gajerrong People among others); *Commonwealth v Yarmirr* (2001) 208 CLR 1 (intervener Mirimbiak Nations Aboriginal Corporation among others); *Western Australia v Ward* (2002) 213 CLR 1 (intervener Yamatji Barna Baba Maaja Aboriginal Corporation among others).

III INTERVENTION BEFORE THE SUPREME COURT OF CANADA

Coinciding with the Supreme Court's acceptance of its law-making role in the post-*Charter* era,¹²³ Canada's well-developed system of procedural rules¹²⁴ and permissive approach to non-party intervention¹²⁵ affords rich jurisprudence from which to examine the benefits of interveners in constitutional adjudication. Combined with its model of best practice for Aboriginal rights,¹²⁶ and high rates of Aboriginal constitutional intervention,¹²⁷ a critical analysis of the Supreme Court's Aboriginal intervention¹²⁸ practice illustrates the potential utility of enhanced Indigenous interventions for the Australian context.

To this end, three distinct benefits are identified from Aboriginal amici and intervener appearances before the Supreme Court. First, Aboriginal interventions appear to have attuned the Court to Aboriginal perspectives on the operational effect of impugned laws, and in doing so clarified the constitutional facts to enhance the overall quality of adjudication. Second, Aboriginal factums have enriched judicial deliberations by providing 'social facts' which have alerted the Court to the potential detriment from constructional choices. Finally, Aboriginal interventions afford important normative benefits, by signalling judicial respect for the principle of democratic inclusion and reinforcing the dignity of Aboriginal participants in Canada's constitutional deliberations.

A Roles, Rules and Attitudes to Entry towards Non-Party Interventions before the Supreme Court of Canada

Before examining the comparative benefits of Aboriginal interventions in the Canadian practice, it is prudent to briefly distinguish the terminological, conceptual

¹²³ Brodie (n 12) 17–48; Geoffrey D Callaghan, 'Intervenors at the Supreme Court of Canada' (2020) 43(1) *Dalhousie Law Journal* 33, 48–55.

¹²⁴ Kathryn Chan and Howard Kislowicz, 'Divine Intervention: A Study of the Operation and Impact of Non-Governmental Intervenors in Canadian Religious Freedom Litigation' (Pt 1) (2019) 90(1) *Supreme Court Law Review* (2d) 1, 4–8 ('Divine Intervention (Pt 1)'); Michelle Campbell, 'Re-Inventing Intervention in the Public Interest: Breaking Down Barriers to Access' (2005) 15(2) *Journal of Environmental Law and Practice* 187, 189–91.

¹²⁵ Brodie (n 12) 47; Callaghan (n 123) 50; Magee (n 13) 206.

¹²⁶ Megan Davis and Marcia Langton, 'Constitutional Reform in Australia: Recognizing Indigenous Australians in the Absence of a Reconciliation Process', in Douglas Sanderson and Patrick Macklem (eds), *From Recognition to Reconciliation* (University of Toronto Press, 2016) 449, 449–450.

¹²⁷ Brodie (n 12) 39; Alarie and Green (n 4) 399.

¹²⁸ Consistent with the definition adopted for 'Indigenous intervenors/amici' in Part II above, 'Aboriginal interventions' have been defined in this article to include any individual or group proposing to represent the views of any Canadian Aboriginal community or provide any relevant information to protect and/or advance Canadian Aboriginal rights.

and practical dimensions of the Canadian intervention procedure from the Australian context.

Two primary types of intervention enable individuals or groups to appear in constitutional proceedings before the Supreme Court.¹²⁹ The first type, frequently dubbed ‘party interveners’,¹³⁰ seeks intervention to protect a direct¹³¹ or more general (including mere precedential or public) interest in a case.¹³² Added party interveners are entitled to the associated traditional rights and liabilities of parties.¹³³ In contrast, while the *amicus curiae*, or ‘friend of the court interveners’ may also seek to protect or advocate a partisan position,¹³⁴ they are ordinarily appointed by the Court or admitted on application, to provide information on law or fact¹³⁵ for the purpose of ensuring justice is done in the proceedings.¹³⁶ Friend of the court interveners do not receive party status, and their rights and liabilities are dictated by the Court’s discretion.¹³⁷

In practice, the distinctions between the added party and friend of the court interveners are frequently blurred, as reflected in their combined procedural rules for admission.¹³⁸ Under the *Rules of the Supreme Court of Canada* (*Supreme Court Rules*), interveners are not distinguished, and the Supreme Court will assess both types of interveners¹³⁹ on the basis of their interest in proceedings, the position they intend to take, and their reasons for believing their submission will be ‘useful to the Court and different from those’ provided by other parties.¹⁴⁰

¹²⁹ Michelle Campbell (n 124) 189–90. See John Koch, ‘Making Room: New Directions in Third Party Intervention’ (1990) 48(1) *University of Toronto Faculty of Law Review* 151, 155–8.

¹³⁰ Michelle Campbell (n 124) 189–90. This kind of intervener is also termed: an ‘added party’: at 190; a ‘public interest intervenor’: FL Morton, ‘The Political Impact of the Canadian Charter of Rights and Freedoms’ (1987) 20(1) *Canadian Journal of Political Science* 31, 43; ‘third party intervention’: Koch (n 129) 152; and an ‘interest group intervenor’: Welch (n 4) 205.

¹³¹ Shai Farber, ‘The Amicus Curiae Phenomenon: Theory, Causes and Meanings’ (2019) 29(1) *Transnational Law and Contemporary Problems* 1, 9; Sarah Hannett, ‘Third Party Intervention: In the Public Interest?’ [2003] (Spring) *Public Law* 128, 130.

¹³² Hannett (n 131) 131, 145; Farber (n 131) 9; Lorne Neudorf, ‘Intervention at the UK Supreme Court’ (2013) 2(1) *Cambridge Journal of International and Comparative Law* 16, 21; Clark (n 26) 84.

¹³³ Michelle Campbell (n 124) 190.

¹³⁴ *Ibid*; Mirsane (n 2) 682–5.

¹³⁵ *Ontario v Criminal Lawyers’ Association of Ontario* [2013] 3 SCR 3, 42 [108] (Fish J).

¹³⁶ *Morwald-Benevides v Benevides* [2019] ONCA 1023, [21]–[40] (Lauwers JA).

¹³⁷ Michelle Campbell (n 124) 190.

¹³⁸ Bryden (n 26) 496–7; Mirsane (n 2) 675–6; Williams (n 5) 400.

¹³⁹ *Rules of the Supreme Court of Canada*, SOR/2002-156, rr 55–9 (*Supreme Court Rules*).

¹⁴⁰ *Ibid* r 57(2)(b).

Moreover, even after an intervention applicant is admitted, the Supreme Court has exercised its discretionary remit to expand or contract the traditional roles and rights of amici and interveners.¹⁴¹ The resultant effect has led commentators to observe that ‘distinctions between the types can sometimes be difficult to delineate’¹⁴² and that the ‘Canadian approach’ to non-party intervention is in effect, ‘one category of intervener rather than separate categories of intervener and amicus curiae’.¹⁴³

However, whether admitted as a friend of the court or added party intervener, it is widely accepted that the Supreme Court has taken an expansive contemporary approach¹⁴⁴ to non-party interventions generally in constitutional proceedings.¹⁴⁵ One flow-on effect of this has been the increased rates of Aboriginal interventions in constitutional litigation. As Ian Brodie notes, between 1985 and 1999, of all intervention applicants had more than a 50% success rate to appear before the Supreme Court, and of the 60 applications made by Native Groups, 73% were accepted.¹⁴⁶ Benjamin Alarie and Andrew Green’s research also found that of the 1751 intervener applicants to Supreme Court appeals between 2000 and 2008, intervener applicants from Aboriginal Groups had a success rate of 93% (equating to 125 interveners granted leave).¹⁴⁷ From the range of benefits reported from increased non-party intervention,¹⁴⁸ three are examined in detail below.

B *Enhancing the Quality of Adjudication through the Clarification of Constitutional Facts*

Aboriginal interventions can enhance the quality of constitutional adjudication by providing distinct cultural perspectives which assist courts to clarify the ‘constitutional facts’ at hand. Here, ‘constitutional facts’ refer to the ‘facts upon which

¹⁴¹ For example, friend of the court interveners have on occasion been granted more expansive rights than added party interveners, and in other circumstances, been subject to liabilities ordinarily limited to litigating parties, see: Michelle Campbell (n 124) 191; Bryden (n 26) 523.

¹⁴² Michelle Campbell (n 124) 191.

¹⁴³ Williams, ‘The Amicus Curiae and Intervener’ (n 5) 400.

¹⁴⁴ Callaghan (n 123) 34–5; Levy (n 23) 651 (Kirby J); Burmester (n 44) 356–7; Andrea Durbach, ‘Interveners in High Court Litigation: A Commentary’ (Conference Paper, CIPL Annual Public Law Weekend, November 1997).

¹⁴⁵ Chan and Kislowicz, ‘Divine Intervention (Pt 2)’ (n 4) 511. See: Keyzer (n 2) 279; Clark (n 26) 83.

¹⁴⁶ Brodie (n 12) 39.

¹⁴⁷ Alarie and Green (n 4) 398–9.

¹⁴⁸ See, eg: the enhanced legitimisation of judicial decisions: see Richard Haigh, ‘The SCC’s Dilemma: What To Do with Interveners?’ [2018] (1) *Journal of Parliamentary and Political Law* 79, 88–9; and judicial democratic arguments: see Gregory Hein, ‘Interest Group Litigation and Canadian Democracy’ in Paul Howe and Peter H Russell (eds), *Judicial Power and Canadian Democracy* (McGill-Queen’s University Press, 2001) 214, 237.

constitutional validity may depend'¹⁴⁹ including those central to the construction of constitutional provisions and those justifying the exercise of executive power or general law.¹⁵⁰ This argument accords with the 'quality theory' of judicial deliberation, namely that by hearing from an intervener, the court will have brought to its attention relevant information it would otherwise lack exposure to, increasing the probability that an 'optimal' or 'accurate' decision will be reached.¹⁵¹

Invariably, there is difficulty empirically assessing whether an intervener's submissions have in fact assisted a court to reach an optimal or accurate disposition, given the fundamentally normative grounds on which such an assessment may be made.¹⁵² However, a reasonable mechanism to demonstrate the enhanced quality of constitutional adjudication from Aboriginal intervention is the qualitative influence of an intervener's factum on the ultimate constitutional facts identified by the court. Applying Kathryn Chan and Howard Kislowicz's reasoning, the underlying presumption here is that where intervener arguments or information can be identified in a court's reasons for judgment, such intervention is more likely than not to have had a persuasive influence on the quality of a court's deliberations than if the intervention had not occurred.¹⁵³

1 *Clarifying Constitutional Facts in the Construction of Constitutional Provisions*

The influence of Aboriginal submissions clarifying the constitutional facts applicable to the construction of a constitutional provision is observed in *Ktunaxa*. There, the Supreme Court was asked to consider, inter alia, whether the Ktunaxa community's constitutional right to religious freedom under s 2(a) of the *Charter* was infringed by the Government of British Columbia's development approval of a ski resort in Qat'muk.¹⁵⁴ The second limb of the test to establish a s 2(a) infringement requires a determination 'that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to *act* in accordance with that practice or belief'.¹⁵⁵ The Ktunaxa submitted that Qat'muk was a body of sacred land inhabited by the Grizzly Bear Spirit.¹⁵⁶ Consequently, it was argued that the resort development would abrogate the s 2(a) right by desecrating the land and

¹⁴⁹ Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash University Law Review* (advance), 17. See also Susan Kenny, 'Constitutional Fact Ascertainment (With Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)' (1990) 1(2) *Public Law Review* 134, 135.

¹⁵⁰ *Thomas v Mowbray* (2007) 233 CLR 307, 482 [526] (Callinan J) ('*Thomas*').

¹⁵¹ Chan and Kislowicz, 'Divine Intervention (Pt 1)' (n 124) 9; Alarie and Green (n 4) 386–7.

¹⁵² Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 514.

¹⁵³ *Ibid.*

¹⁵⁴ *Ktunaxa* (n 14) 398 [7].

¹⁵⁵ *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 279–80 [34] (Charron J) (emphasis added).

¹⁵⁶ *Ktunaxa* (n 14) 399 [11], 425 [84].

driving the Spirit from the territory, thereby preventing the Ktunaxa to access the Spirit and act in accordance with their spiritual practices.¹⁵⁷

Aboriginal interveners in support of the Ktunaxa provided nuanced arguments alerting the Court to the factual indivisibility of the Indigenous land-spiritual relationship. For example, the West Moberly and Prophet River and Katzie First Nations interveners emphasised land as not only the site of spiritual practices akin to a church or mosque, but the source in which the divine manifested.¹⁵⁸ In doing so, they distinguished traditional practices of Western faiths which conceive the divine as supernatural, in contrast to many First Nations religions, where the spiritual realm was indivisible from the physical world.¹⁵⁹

The majority was not persuaded by the Ktunaxa's argument, identifying s 2(a) protections extended only to 'the freedom to worship' as distinct from 'the spiritual focal point of worship' as sought by the Ktunaxa.¹⁶⁰ However, intervener submissions appear to have played a persuasive role in the minority's construction of the s 2(a) right. Notably, in their dissenting judgment, Moldaver and Côté JJ reiterated intervener arguments differentiating Western conceptualisations of spirituality from First Nations' religious connections to land.¹⁶¹ Their Honours observed that this identified 'feature of Indigenous religions ... [was] critical in assessing whether there ha[d] been a s 2(a) infringement'.¹⁶² Further, their Honours found that construing s 2(a) protections without an appreciation of the inextricable centrality of land to Indigenous culture 'risks foreclosing the protections of s 2(a) of the *Charter* to substantial elements of Indigenous religious traditions'.¹⁶³ This, their Honours determined, would be an abrogation of 'the true purpose of' the s 2(a) protection: to 'guard ... against state conduct that interferes with "profoundly personal beliefs"'.¹⁶⁴

¹⁵⁷ Ibid 397–8 [6], 406–7 [36], 438 [118].

¹⁵⁸ West Moberly First Nations and Prophet River First Nation, 'Factum of the Interveners, West Moberly First Nations and Prophet River First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 24 October 2016, 4–5 [19]–[21], 7 [30]; Katzie First Nation, 'Factum of the Intervener Katzie First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 25 October 2016, 2–3 [8]–[9].

¹⁵⁹ West Moberly First Nations and Prophet River First Nation, 'Factum of the Interveners, West Moberly First Nations and Prophet River First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 24 October 2016, 4–7 [16]–[30]. See also Katzie First Nation, 'Factum of the Intervener Katzie First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 25 October 2016, 2–3 [8]–[11].

¹⁶⁰ *Ktunaxa* (n 14) 418–9 [71] (McLachlin CJ and Rowe J).

¹⁶¹ Ibid (n 14) 441 [127] (Moldaver J for Moldaver and Côté JJ).

¹⁶² Ibid 441–2 [128].

¹⁶³ Ibid 443 [131].

¹⁶⁴ Ibid 442–3 [130], quoting *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 759.

2 Clarifying Constitutional Facts Relevant to the Constitutional Validity of Laws

Aboriginal interveners can also assist courts to clarify constitutional facts where the operational effect of an impugned law is central to assessing its constitutional validity. This is observed in the minority judgment of *Sharma*. Cheyenne Sharma, a member of the Saugeen First Nation, had been convicted of a first-time drug offence and subsequently sought a ‘conditional sentence’¹⁶⁵ under s 742.1 of the *Criminal Code*, RSC 1985, c C-46 (‘*Criminal Code*’).¹⁶⁶ However, s 742.1 prevented courts from imposing conditional sentences for prescribed offences (including the drugs offence for which Sharma had been convicted).¹⁶⁷ This was despite the ordinary requirement for courts under the *Criminal Code* when sentencing offenders to apply the Gladue Principles (a discrete sentencing methodology taking account of the historical and systemic factors mitigating an Aboriginal offender’s conduct), to impose a culturally appropriate sentence.¹⁶⁸ Sharma unsuccessfully challenged ss 742.1(c), (e)(ii) on grounds including constitutional invalidity with s 15 of the *Charter*, alleging that the impugned provisions deprived Aboriginal offenders convicted of certain offences of the remedial benefit of the Gladue framework.¹⁶⁹

Section 15 states that ‘[e]very individual ... has the right to the equal protection and equal benefit of the law without discrimination ... in particular, without discrimination based on race’ (among other factors).¹⁷⁰ The second element of the test to establish the invalidity of an impugned law under s 15 requires claimants to show that the law imposes a burden, or denies a benefit with the effect of reinforcing, perpetuating or exacerbating disadvantage.¹⁷¹ It is here that the influence of intervener submissions is most evident.

For example, the minority discussed the factum of the Legal Services Board of Nunavut, which observed that given the remote geographical location of the Nunavut in the Canadian arctic archipelago, preventing conditional sentences for Nunavut offenders disproportionately restricted their access to their community networks.¹⁷²

¹⁶⁵ A form of incarceration permitting sentences to be served in communities: *Criminal Code*, RSC 1985, c C-46, s 742.1 (‘*Criminal Code*’).

¹⁶⁶ *Sharma* (n 15) [5]–[7], [15].

¹⁶⁷ *Criminal Code* (n 165) ss 742.1(e), (e)(ii), as at 23 March 2022. On November 17 2022, *An Act To Amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15 commenced, which amended s 742.1(c) and repealed s 742.1(e) of the *Criminal Code*.

¹⁶⁸ *Criminal Code* (n 165) s 718.2(e).

¹⁶⁹ Cheyenne Sharma, ‘Factum of the Respondent, Cheyenne Sharma’, Submission in *R v Sharma*, 39346, 9 February 2022, 22 [54].

¹⁷⁰ *Charter* (n 18) s 15(1).

¹⁷¹ *Fraser v A-G (Canada)* [2020] 3 SCR 113, 141–2 [27] (Abella J), cited in *Sharma* (n 15) [188] (Karakatsanis J for Karakatsanis, Martin, Kasirer and Jamal JJ).

¹⁷² Legal Services Board of Nunavut, ‘Factum of the Intervener, Legal Services Board of Nunavut’, Submission in *R v Sharma*, 39346, 2 March 2022, 6 [13]–[14], discussed in *Sharma* (n 15) [240].

This, in turn, weakened their prospects for rehabilitation and the effectiveness of Nunavut community-based restorative justice measures.¹⁷³ Also cited was the Federation of Sovereign Indigenous Nations' factum, which had stressed that Aboriginal offenders dislocated from their communities were deprived of culturally and spiritually appropriate practices intended to serve "on the land" or "bush" healing' rehabilitation.¹⁷⁴

Consistent with these considerations, the minority found that ss 742.1(c), (e)(ii) had the effect of prohibiting 'an important tool, and sometimes the only tool, for judges ... to craft a fair sentence for Indigenous offenders'.¹⁷⁵ Their Honours held that where the effect of ss 742.1(c), (e)(ii) impaired courts from being able to apply the Gladue framework for the prescribed offences, it left certain offenders with 'no other realistic option but prison'.¹⁷⁶ Subsequently, the minority concluded that ss 742.1(c), (e)(ii) perpetuated Aboriginal overrepresentation, cultural loss, dislocation and community fragmentation,¹⁷⁷ reinforcing, perpetuating and exacerbating the disadvantages for an Aboriginal offender, to the ultimate effect of limiting the s 15 *Charter* right.¹⁷⁸

C Enriching the Quality of Constitutional Adjudication through the Provision of Social Facts

Aboriginal interventions can also enhance the quality of judicial deliberation through the provision of 'social facts', particularly in constitutional cases which have broad-reaching effects beyond non-Aboriginal disputants. Kylie Burns defines 'social facts' as information 'about the nature and behaviour of people and institutions and the nature of the world and society'¹⁷⁹ as drawn from 'judicial common sense' or empirical or other research.¹⁸⁰ By recognising the function of constitu-

¹⁷³ Legal Services Board of Nunavut (n 172) 6 [14].

¹⁷⁴ Federation of Sovereign Indigenous Nations, 'Factum of the Intervener Federation of Sovereign Indigenous Nations', Submission in *R v Sharma*, 39346, 1 March 2022, 8 [32], cited in *Sharma* (n 15) [240]. See also Ontario Native Women's Association, 'Factum of the Intervener, Ontario Native Women's Association', Submission in *R v Sharma*, 39346, 2 March 2022, 7–8 [19]–[20].

¹⁷⁵ *Sharma* (n 15) [241], quoting Federation of Sovereign Indigenous Nations (n 174) 1 [5].

¹⁷⁶ *Sharma* (n 15) [241].

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid* [242], [250].

¹⁷⁹ Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317, 317–18.

¹⁸⁰ *Ibid* 318–20. The term 'social facts' is not yet consistently understood or applied in Australia: Carolyn Sutherland, 'Interdisciplinarity in Judicial Decision-Making: Exploring the Role of Social Science in Australian Labour Law Cases' (2018) 42(1) *Melbourne University Law Review* 232, 247–53. Some commentators propose the term is too broad to reconcile with traditional understandings of adjudicative fact-finding: see, eg, Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Bloomsbury Publishing, 2022) 55.

tional courts in resolving ‘complex questions of legal principle and legal policy’,¹⁸¹ this argument departs from declaratory theories of the judicial role¹⁸² to highlight the desirability of constitutional adjudication sensitive to the wide-reaching social, economic, legal and political implications of constitutional questions for the public as a whole.¹⁸³

For example, Aboriginal interveners in *Boudreault* raised social facts in their factums to alert the Court to the detrimental effect of a constructional choice on Aboriginal Canadians.¹⁸⁴ In that matter, the Supreme Court considered whether the ‘victim fine surcharge’ mandated under s 737 of the *Criminal Code* infringed the constitutional prohibition against cruel and unusual punishment under s 12 of the *Charter*.¹⁸⁵ Section 737 required courts in sentencing to impose a mandatory surcharge of 30% of any fine imposed — or where no fine was imposed, \$100 for each summary conviction count and \$200 for each indictable count — in addition to any other punishment set by the court.¹⁸⁶ Failure to pay the surcharge could result in a defendant’s detention before their committal hearing, or imprisonment or debt collection if found in default.¹⁸⁷

Assessments of constitutional invalidity with s 12 engage a gross proportionality analysis.¹⁸⁸ Subsequently, the Court considered whether the application of s 737 was ‘so excessive as to outrage standards of decency’ and ‘abhorrent or intolerable’

¹⁸¹ *Levy* (n 23) 651.

¹⁸² Willheim, ‘Amici Curiae and Access to Constitutional Justice’ (n 3) 130–1; Kirby (n 6) 562–3. See generally Brian Zamulinski, ‘Rehabilitating the Declaratory Theory of the Common Law’ (2014) 2(1) *Journal of Law and Courts* 171.

¹⁸³ This argument has had limited influence in encouraging non-party interventions more generally before the High Court: see Willheim, ‘Amici Curiae and Access to Constitutional Justice’ (n 3) 130–4. It has most notably been championed by Kirby J: see, eg: *Levy* (n 23) 651; *Breckler* (n 24) 134–7 [104]–[109]; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 29–30 [77]–[81]; *Wurridjal* (n 39) 408–9 [260]–[263]. Cf practices in other jurisdictions, for example, the South African Constitutional Court, during the infancy of which Chaskalson J invited potential interveners including academics to invoke the intervener provisions and assist the Court assess the social consequences of its decisions: see Andrea Durbach, ‘Amicus Curiae — Still Stinging from the Rebuff’ (Seminar Paper, Public Interest Advocacy Centre, 8 August 1995) 8–9.

¹⁸⁴ Aboriginal Legal Services, ‘Factum of the Intervener Aboriginal Legal Services’, Submission in *R v Boudreault*, 37427, 27 March 2017 2–3 [6]–[11].

¹⁸⁵ *Boudreault* (n 16) 611–13 [1]–[6].

¹⁸⁶ *Criminal Code* (n 165) ss 737(1)–(2) as at 23 March 2022; *ibid* 613 [7].

¹⁸⁷ *Boudreault* (n 16) 633–6 [69]–[74].

¹⁸⁸ *Ibid* 624–6 [45]–[49] (Martin J for Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown and Martin JJ).

to society to be unconstitutional.¹⁸⁹ In stressing the surcharge's disproportionately detrimental effect on Aboriginal offenders unable to pay the surcharge due to financial hardship, the intervener Aboriginal Legal Service ('ALS') provided empirical research to the Court regarding the relative socio-economic disadvantage of Aboriginal Canadians.¹⁹⁰ In particular, it emphasised the considerable poverty gap between Aboriginal and non-Aboriginal Canadians, particularly Aboriginal youth, and the heightened number of Aboriginal people involved in criminal incidents flowing from colonial legacies.¹⁹¹

The Supreme Court's decision evidences sensitivity to the social facts as raised by ALS, holding that courts forced to impose the surcharge by virtue of s 737 amounted to the 'grossly disproportionate public shaming' of marginalised offenders, including the hypothetical Aboriginal offender.¹⁹² In its reasoning, it held that s 737 prevented courts from taking into account a marginalised offender's likely inability to pay the surcharge, the subsequent likelihood of repeated deprivations of their liberty before committal hearings, and the de facto indefinite criminal sanction for those never able to pay.¹⁹³ Subsequently, it found that s 737 had cruel and unusual effects on offenders including those of Aboriginal descent, in abrogation of the constitutional protection under s 12.¹⁹⁴ ALS' intervention then, demonstrates how Aboriginal interveners can provide social facts to warn courts against constructional choices with potentially unforeseen and disproportionately undesirable consequences for Aboriginal Canadians.¹⁹⁵

D Normative Benefits to First Nations Interventions: Democratic Inclusion and Participatory Value

Constitutional intervention can also have a valuable normative function, signalling judicial respect for the principle of 'democratic inclusion'¹⁹⁶ and the value of Aboriginal participation in constitutional justice as a matter of human dignity.¹⁹⁷ This argument imbues the judicial role with a 'law-making' function, thus departing from strictly formalist understandings of adjudication which confine the court's function to the resolution of justiciable matters between private disputants.¹⁹⁸ Through this lens, constitutional deliberation requires more than the mere

¹⁸⁹ Ibid 624–5 [45]–[61], quoting *R v Lloyd* [2016] 1 SCR 130, 149 [24] (McLachlin CJ for McLachlin CJ, Abella, Cromwell, Moldaver, Karakatsanis and Côté JJ).

¹⁹⁰ Aboriginal Legal Services (n 184) 2–3 [7]–[11].

¹⁹¹ Ibid.

¹⁹² *Boudreault* (n 16) 650 [110].

¹⁹³ Ibid 644–5 [94].

¹⁹⁴ Ibid.

¹⁹⁵ Bryden (n 26) 507–8; Farber (n 132) 33; Clark (n 26) 93–4; Mohan (n 26) 372.

¹⁹⁶ Omari Scott Simmons, 'Picking Friends from the Crowd: Amicus Participation as Political Symbolism' (2009) 42(1) *Connecticut Law Review* 185, 197–9.

¹⁹⁷ Bryden (n 26) 509.

¹⁹⁸ Hopper (n 3) 87, 95.

mechanical process of ‘discovering’ principles of constitutional law to resolve the discrete disputes of litigants.¹⁹⁹ Instead, courts may be understood as making law each and every time they interpret a constitution²⁰⁰ or ‘extend, qualify or re-shape a principle of law’.²⁰¹ In doing so, each constitutional dispute involves deliberating on the future operation of the *Australian Constitution* and the formulation of ‘legal principle and legal policy’²⁰² relevant to the broader community.²⁰³ This in turn, prompts a responsive judicial shaping of constitutional rights and protections with input from those affected.²⁰⁴

Permitting Aboriginal interventions provides ‘symbolic reassurance’ to the community of courts’ awareness of the impact of constitutional law-making on Aboriginal communities, and their ‘receptiveness to the norm of democratic inclusion’.²⁰⁵ Central to this norm is the premise that persons impacted by decisions in a democracy should be able to participate in courts’ lawmaking process.²⁰⁶ By virtue of their limitation on government power,²⁰⁷ constitutional laws carry significant ‘political, social, economic, security, and ecological implications’, beyond ‘the narrow interests of formal litigants’,²⁰⁸ with the ability to affect all members of the public.²⁰⁹ Subsequently, Aboriginal interventions in constitutional litigation can publicly signal that courts appreciate the wide-reaching impacts of their decisions, and ‘create ... the impression, whether actual or perceived, that groups have the opportunity to weigh in on judicial decisions that have broad social and political ramifications’.²¹⁰

In a similar vein, Aboriginal interventions can also reinforce the dignity and self-respect of those permitted to access constitutional justice through their participation

¹⁹⁹ Levy (n 23) 651; Brodie (n 12) 59.

²⁰⁰ FL Morton and Avril Allen, ‘Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada’ (2001) 34(1) *Canadian Journal of Political Science* 55, 65; Mason, ‘Future Directions in Australian Law’ (n 3) 158.

²⁰¹ Mason, ‘Future Directions in Australian Law’ (n 3) 158.

²⁰² Levy (n 23) 651.

²⁰³ Ernst Willheim, ‘An Amicus Experience in the High Court: *Wurridjal v Commonwealth*’ (2009) 20(1) *Public Law Review* 104, 105 (‘An Amicus Experience in the High Court’); Farber (n 132) 20; Bryden (n 26) 505.

²⁰⁴ Hopper (n 3) 87–8. See Williams, ‘The Amicus Curiae and Intervener’ (n 5) 394.

²⁰⁵ Simmons (n 196) 197.

²⁰⁶ Clark (n 26) 72; *ibid* 197–8.

²⁰⁷ *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (‘*Graham*’).

²⁰⁸ Farber (n 132) 58.

²⁰⁹ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 217 [113] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²¹⁰ Simmons (n 196) 198.

in constitutional litigation.²¹¹ Scholars have posited that the very willingness of courts to hear from interveners by enabling them to voice their views in constitutional proceedings can publicly signal the value that judges attach to them,²¹² and the social desirability of their input in such proceedings.²¹³ Consequently, intervention by First Nations in constitutional litigation can foster and preserve ‘dignitary values’ when permitting those taking part in constitutional deliberations to shape the legal rights and obligations affecting them.²¹⁴

There is a reasonable argument to be made that the Supreme Court’s intervention practice evidences the Court’s appreciation of the distinct normative dimension associated with Aboriginal interventions. As Geoffrey Callaghan notes, notwithstanding the relatively strict literal rules permitting intervention in constitutional proceedings before the Supreme Court, the overwhelming majority of applicants are successful.²¹⁵ For example, between 2000 and 2009, 91.4% of intervener applicants before the Supreme Court were granted intervener status,²¹⁶ and between 2009 and 2017, the applicant success rate did not fall below 80%.²¹⁷ It is improbable that every successful intervener in these cases added something ‘new and useful’ to proceedings in accordance with the Supreme Court’s rules for admission.²¹⁸ Subsequently, Callaghan proposes the more likely explanation for the Court’s practice is its acceptance of the ‘normative grounding’ of participation, particularly in circumstances where intervention was permitted notwithstanding ‘such participation [was] likely to have little to no effect over the ultimate decision’.²¹⁹

This argument also finds some support in Chan and Kislowicz’s research on constitutional matters regarding religious freedom, which found that a ‘high rate’ of interveners admitted in constitutional matters before the Supreme Court merely elaborated or ‘echo[ed]’ party arguments (ie repeating, amplifying, or offering subtle variations of party arguments).²²⁰ Other commentators have observed that interventions have been permitted in Canadian courts although they may provide weak legal,

²¹¹ See Elisa Arcioni, ‘Some Comments on Amici Curiae and “the People” of the Australian Constitution’ (2010) 22(3) *Bond Law Review* 148, 148.

²¹² Bryden (n 26) 509; Callaghan (n 123) 58–9.

²¹³ John Basten, ‘Amicus Curiae in Practice: A Response’ (Seminar Paper, Public Interest Advocacy Centre, 8 August 1995) 11; Durbach, Reinecke and Dargan (n 32) 203.

²¹⁴ Bryden (n 26) 509; See also Jerry L Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 182–201.

²¹⁵ Callaghan (n 123) 55.

²¹⁶ Alarie and Green (n 4) 395.

²¹⁷ Daniel Sheppard, ‘Just Going through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention’ (2018) 82(1) *Supreme Court Law Review* (2d) 179. See also Magee (n 13) 208.

²¹⁸ Callaghan (n 123) 55.

²¹⁹ *Ibid* 58.

²²⁰ Chan and Kislowicz, ‘Divine Intervention (Pt 2)’ (n 4) 528–9, 540.

but important moral or emotive arguments.²²¹ Given the strict procedural threshold under the *Supreme Court Rules* for interveners not to merely repeat arguments already advanced by parties or expand the scope of existing issues submitted by parties,²²² the Court's admissions practice is curious. In such circumstances, it may be posited that the Supreme Court's flexible application of the intervention procedure demonstrates its appreciation of the distinct normative value in allowing such interventions to proceed.

IV FURTHER CONSIDERATIONS FOR THE AUSTRALIAN CONTEXT

Despite the demonstrated value of Aboriginal interventions before the Supreme Court, Australia's distinct constitutional framework and divergent intervention procedure require pause when considering the merits of increased interveners in Australian constitutional adjudication.²²³ Two issues warrant particular discussion. First, unlike Canada, given Australia's deliberately narrow constitutional rights model,²²⁴ and the subsequent absence of routine adjudication over individual or Indigenous constitutional rights provisions, the appropriateness of increased Indigenous interventions may be queried. Second, in contrast to the Supreme Court's relatively settled practice, the High Court has yet to develop the necessary procedural clarity in its tests for intervention admissions to manage numerous Indigenous intervention applicants, and establish the legal basis on which social facts may be ascertained and evaluated.²²⁵

A Australia's Dearth of Individual and Indigenous Rights Clauses

The scarcity of individual or Indigenous rights protections under the *Australian Constitution* stands in stark contrast to the Canadian constitutional framework, prompting query as to the appropriateness of enhanced Indigenous intervention in the Australian context. In Canada, heightened intervention in the Supreme Court coincided with the introduction of the *Charter*,²²⁶ which deliberately ascribed

²²¹ See: Krislov (n 28) 711–12; Magee (n 13) 213–14; *ibid.*

²²² *R v McGregor* [2023] 422 CCC (3d) 415 [103]–[109] (Rowe J); Supreme Court of Canada, *Notice to the Profession November 2021: Interventions*, 15 November 2021; Supreme Court of Canada, *Notice to the Profession March 2017: Allotting Time for Oral Argument*, 2 March 2017.

²²³ See also Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13(1) *Indiana Journal of Global Legal Studies* 37, 65–7.

²²⁴ Rosalind Dixon and Gabrielle Appleby, 'Constitutional Implications in Australia: Explaining the Structure' in Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 343, 361.

²²⁵ See generally Kenny, 'Intervenors and Amici Curiae' (n 29).

²²⁶ Brodie (n 12) 55–6; Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 511.

substantive individual²²⁷ and Indigenous²²⁸ constitutional protections, alongside an expanded role for courts to interpret and enforce such protections across both levels of government.²²⁹ Relevantly, in addition to the four ‘fundamental freedoms’,²³⁰ the *Charter* inserted democratic,²³¹ mobility,²³² legal,²³³ equality,²³⁴ and language rights²³⁵ into the Canadian constitutional framework. Further, clear additional protections were provided to preserve the ‘existing aboriginal and treaty rights of the aboriginal peoples of Canada’.²³⁶ Moreover, courts of competent jurisdiction were enabled to actively engage in a constitutional ‘law making’ process when adjudicating over the *Charter*’s provisions.²³⁷

Jillian Welch observes that while pre-*Charter* constitutional litigation had focused on the “‘demarcation” between federal and provincial spheres of activity’, *Charter* litigation shifted the ‘new line between ... governments’ and personal spheres of freedom’.²³⁸ In order for courts to define and delineate the scope of each constitutional right, interventions by ‘individual[s] writ large’, including Aboriginal interveners, became a necessary feature of *Charter* litigation.²³⁹ Therefore, notwithstanding an early learning phase of inconsistent admissions practice,²⁴⁰ as Canadian courts embraced their constitutional law-making role, an accompanying rise of interventions became appropriate to bring forth the breadth of information courts required to fulfil effectively their transformed judicial function.²⁴¹

In contrast, Australia lacks equivalent substantive rights protections through a bill of rights or charter. Rosalind Dixon and Gabrielle Appleby have previously

²²⁷ Peter H Russell, ‘The Political Purposes of the Canadian Charter of Rights and Freedoms’ (1983) 61(1) *Canadian Bar Review* 30, 32–3, 43; Brodie (n 123) 24–5.

²²⁸ John Borrows, ‘Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics’ (1994) 43(1) *University of New Brunswick Law Journal* 19, 28–33; John Borrows, ‘Frozen Rights in Canada: Constitutional Interpretation and the Trickster’ (1997) 22(1) *American Indian Law Review* 37, 37–8; *Constitution Act 1982* (n 11) ss 25, 27.

²²⁹ *Charter* (n 18) s 24(1).

²³⁰ *Ibid* ss 2(a)–(d).

²³¹ *Ibid* s 3.

²³² *Ibid* s 6.

²³³ *Ibid* ss 7–14.

²³⁴ *Ibid* s 15.

²³⁵ *Ibid* ss 16–23.

²³⁶ *Ibid* s 25; *Constitution Act 1982* (n 11) s 35.

²³⁷ *Charter* (n 18) s 24(1); Peter W Hogg, ‘The Law-Making Role of the Supreme Court of Canada: Rapporteur’s Synthesis’ (2001) 80(1–2) *Canadian Bar Review* 171, 172–4, 179–80.

²³⁸ Welch (n 4) 225.

²³⁹ *Ibid*.

²⁴⁰ Callaghan (n 123) 53; Brodie (n 12) 25–74.

²⁴¹ Brodie (n 12) 53–7.

observed that Australia's narrow constitutional rights model limits the High Court's capacity to take an active role in safeguarding individual or Indigenous rights.²⁴² Express, but highly circumscribed individual constitutional protections exist in relation to the right to vote,²⁴³ the acquisition of property on just terms,²⁴⁴ trial by jury,²⁴⁵ religious freedom,²⁴⁶ and freedom from discrimination on the basis of state residency.²⁴⁷ A further implied freedom of political communication has been identified from Australia's constitutionally enshrined system of representative and responsible government.²⁴⁸ There are no constitutional rights protections specifically for Indigenous Australians in the *Australian Constitution*.²⁴⁹

The scarcity of substantive rights protections contained in the *Australian Constitution* is in part, a legacy of the federation movement,²⁵⁰ and contrasts the deliberate human rights protections enshrined under the *Charter*.²⁵¹ Among the predominant concerns of colonies in the formation of the Australian federation were their distinct geographical, historical and political affiliations to be represented through state rights vis-à-vis the federal Parliament.²⁵² 'There was no desire to assert against government generally ... [the] rights and freedoms for colonists'.²⁵³ Instead, the constitutional compact placed faith in the primacy of democratic procedures and federal power-sharing rather than judicially adjudicated rights clauses in regulating

²⁴² Dixon and Appleby (n 224) 360–1. See also Simon Evans, 'Standing to Raise Constitutional Issues: Reconsidered' (2010) 22(3) *Bond Law Review* 38, 49–52.

²⁴³ *Australian Constitution* s 41.

²⁴⁴ *Ibid* s 51(xxvi).

²⁴⁵ *Ibid* s 80.

²⁴⁶ *Ibid* s 116.

²⁴⁷ *Ibid* s 117.

²⁴⁸ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Levy* (n 23); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

²⁴⁹ Previously, the 'Aboriginal race' was explicitly referred to in s 51(xxvi) of the *Australian Constitution*, while '[A]boriginal natives' were referenced in s 127. Two significant textual amendments to the *Australian Constitution* were made following the 1967 referendum, repealing s 127 and removing the words 'aboriginal race' from s 51(xxvi): *Constitution Alteration (Aboriginals) Act 1967* (Cth); Indigenous Australians alongside persons 'of any race' continue to be implicitly referred to under ss 25 and 51(xxvi): Hilary Charlesworth and Andrea Durbach, 'Equality for Indigenous Peoples in the Australian Constitution' (2011) 15(2) *Australian Indigenous Law Review* 64, 64–5.

²⁵⁰ Morris, 'The Argument for a Constitutional Procedure' (n 20) 167–8; Chief Justice Robert French, 'The Constitution and the Protection of Human Rights' (Speech, Edith Cowan University Vice-Chancellor's Oration, 20 November 2009) 7–10.

²⁵¹ Russell (n 227) 43.

²⁵² French (n 250) 7; Morris, 'The Argument for a Constitutional Procedure' (n 20) 167.

²⁵³ French (n 250) 7.

fair future relations.²⁵⁴ As for Indigenous Australians, the *Australian Constitution*'s drafting against a backdrop of racism resulted in its text and operation running 'counter to the idea of Aboriginal Australians as equal members of the community'.²⁵⁵

Yet despite the intentional scarcity of individual and Indigenous rights protections under the *Australian Constitution*, the impact of contemporary constitutional adjudication on Indigenous Australians is unquestionable. Justice Gordon has observed extra-curially that constitutional law cannot but affect all members of the Australian polity as it 'fundamentally shapes the way that society functions by ensuring that "all power of government is limited by law"'.²⁵⁶ Against this backdrop, Shireen Morris argues that Indigenous Australians are a 'uniquely vulnerable constitutional constituency' to the abuse of their rights by Australian governments.²⁵⁷ As an extreme minority demographic, Indigenous Australians comprise just '3.8% of the total Australian population'²⁵⁸ and as such, Indigenous issues are subject to the political whims of legislation affecting Indigenous rights²⁵⁹ and the 'harsh majoritarian tendencies of minimalist ballot box participation'.²⁶⁰ Further, Indigenous Australians are unlike any other group given their distinct historical relationship with the colonising state — the effects of which, by way of extreme social and economic disadvantage, continue to exacerbate and perpetuate their disempowerment.²⁶¹

There is some suggestion that the High Court is not immune to the value of a more expansive intervention procedure in recognition of the wide-reaching effect of its constitutional adjudication. In *Wurridjal*, the majority declined two academics seeking amicus status to bring international Indigenous rights materials to the Court's attention.²⁶² However, Kirby J, with whom Crennan J agreed, was persuaded otherwise. In his Honour's reasons for decision, Kirby J observed that given 'the special role played by ... [the] Court, in expressing the law, especially in constitutional cases in a way that necessarily goes beyond the interests and submissions of the particular parties to litigation', a widening of circumstances in which amici and

²⁵⁴ Morris, 'The Argument for a Constitutional Procedure' (n 20) 167.

²⁵⁵ George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution Should Say and How the Referendum Can Be Won' (2011) 5(1) *Land, Rights, Laws: Issues of Native Title* 1, 3–4.

²⁵⁶ Gordon (n 149) 1, quoting *Graham* (n 207) 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

²⁵⁷ Morris, 'The Torment of Our Powerlessness' (n 1) 635–40.

²⁵⁸ Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, 31 August 2023).

²⁵⁹ Morris, 'The Torment of Our Powerlessness' (n 1) 638–42.

²⁶⁰ Megan Davis, 'Competing Notions of Constitutional "Recognition": Truth and Justice or Living "Off the Crumbs that Fall Off the White Australian Tables"?' (Papers on Parliament No 62, Department of the Senate, October 2014) 113, 127.

²⁶¹ Morris, 'The Torment of Our Powerlessness' (n 1) 637–8, 642–3.

²⁶² Willheim, 'An Amicus Experience in the High Court' (n 203) 104.

interveners should be admitted was warranted.²⁶³ More recently in *Love*, Gageler J highlighted the importance of Indigenous voices in the constitutional adjudication of Indigenous issues:

The limits of judicial competence are reinforced by the limits of judicial process. ... Noticeably absent from the viewpoints represented at the hearing has been the viewpoint of any Aboriginal or Torres Strait Islander body representing any of the more than 700,000 citizens of Australia who identify as Aboriginal or Torres Strait Islander. On the basis of the case as presented, I cannot presume that the political and societal ramifications of translating a communal, spiritual connection with the land and waters within the territorial limits of the Commonwealth of Australia into a legislatively ineradicable individual connection with the polity of the Commonwealth of Australia are able to be judicially appreciated.²⁶⁴

To this end, notwithstanding the divergent constitutional protections of individual and Indigenous rights intended under the Canadian and Australian constitutional frameworks, rigid adherence to earlier procedural restrictions of a bygone era is arguably inappropriate for the High Court's contemporary intervention practice.²⁶⁵ In light of the potentially broad effect of the Court's deliberations on uniquely vulnerable Indigenous rights and protections, increased Indigenous intervention in constitutional adjudication may be considered a legitimate and desirable development.

B *Procedural Opacity as an Impediment to the Effective Use of Indigenous Submissions*

Contrasting the Supreme Court's relatively settled approach to constitutional intervention, the High Court's lack of procedural clarity guiding intervention admissions may limit the Court's capacity properly to take notice of and utilise the submissions of Indigenous intervention applicants.

1 *Evaluating Distinctiveness*

As observed in Part I, the High Court's tests governing the admission of non-party intervention require applicants to provide an element of distinctness from submissions already before the Court. That is, the Court will consider whether a prospective amicus 'can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties',²⁶⁶ and whether prospective interveners 'can show that the parties ... may not present fully the submissions on a particular issue'.²⁶⁷

²⁶³ *Wurridjal* (n 39) 313 (Kirby J, Crennan J agreeing at 314).

²⁶⁴ *Love* (n 106) 211 [134].

²⁶⁵ *Levy* (n 23) 650–1 (Kirby J).

²⁶⁶ *Wurridjal* (n 39) 312–13 (French CJ).

²⁶⁷ *Levy* (n 23) 603 (Brennan CJ).

Problematically, as Kenny J has identified extra-curially, in circumstances involving multiple intervention applicants before the High Court, a real procedural advantage applies to the applicant who is first able to make submissions.²⁶⁸ This is because each subsequent applicant is increasingly less likely to be able to offer distinct information not already available to the Court from earlier applicants' submissions.²⁶⁹ However, notwithstanding the diversity of histories, experiences and cultural traditions between the myriad of Indigenous groups within Australia,²⁷⁰ Indigenous intervention applicants will undoubtedly share common information and interests in constitutional proceedings engaging human rights and Indigenous issues. In such circumstances, the existing admission procedures require the High Court to engage in the complex task of evaluating which applicants warrant admission at the expense of others.

This evaluative process is fraught with difficulty. For example, as evidenced in Part I, there is some suggestion that the High Court has viewed the representative capacities of prospective Indigenous interveners as a relevant consideration in assessing the distinctiveness element of the test for admission. However, it is unclear how the Court intends to assess the capacity of the Indigenous intervener to speak for the Indigenous interest. Moreover, as Carol Harlow notes, in the case of conflicting views between Indigenous intervener applicants, the existing admissions procedure provides no clarity as to how the Court will determine who is the 'more' accurately representative of those individuals whose views they claim to represent — such as to merit successful intervention.²⁷¹

This issue has been previously encountered in the Supreme Court. For example, in *Reference Re Secession of Quebec*,²⁷² Bruce Clark's motion to intervene on behalf of the Algonquin and Micmac groups was contested by another Algonquin group who argued that Mr Clark only represented a minor 'breakaway group of chiefs' and not the officially elected leaders.²⁷³ However, in such cases,²⁷⁴ Canada's relatively

²⁶⁸ Kenny, 'Interveners and Amici Curiae' (n 29) 165. See also Rosemary J Owens, 'Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy' (1998) 20(1) *Adelaide Law Review* 193, 196–7.

²⁶⁹ Owens (n 268) 196; Lindy Willmott, Ben White and Donna Cooper, 'Interveners or Interferers: Intervention in Decisions To Withhold and Withdraw Life-Sustaining Medical Treatment' (2005) 27(4) *Sydney Law Review* 597, 614.

²⁷⁰ See generally: Gawaian Bodkin-Andrews and Bronwyn Carlson, 'The Legacy of Racism and Indigenous Australian Identity within Education' (2016) 19(4) *Race Ethnicity and Education* 784; Minette Salmon et al, 'Defining the Indefinable: Descriptors of Aboriginal and Torres Strait Islander Peoples Cultures and Their Links to Health and Wellbeing' (Literature Review, Mayi Kuwayu and The Lowitja Institute, September 2019).

²⁷¹ Carol Harlow, 'Public Law and Popular Justice' (2002) 65(1) *Modern Law Review* 1, 4–5. See generally Bryden (n 26) 520.

²⁷² [1998] 2 SCR 217.

²⁷³ Hannett (n 132) 136.

²⁷⁴ Ibid.

permissive intervention procedure appears to have enabled the Court to balance the complexities associated with Indigenous representation whilst maintaining the informational benefit from a wide range of First Nations interveners.²⁷⁵ In practice, this means that while applicants seeking intervention with entirely repetitive submissions will be rejected, Aboriginal groups that offer even subtle variations in argument or information will ordinarily be granted leave to intervene, even if limited to written factums on discrete issues.²⁷⁶

For the High Court to similarly benefit from the informational contributions of Indigenous interventions, further refinement of the Court's admission procedures will be required. However, as Mona Arshi and Colm O'Cinneide observe, while the Canadian experience demonstrates the complexity of this exercise, it is not an impossibility.²⁷⁷ As evidenced in the Supreme Court's practice, while strict procedural rules permit the Court to prevent 'officious busybodies' and 'meddlesome interloper[s]' from appearing in proceedings, a permissive application of such procedures ensures interveners with real value to assist the Court will not be impeded from participation.²⁷⁸

2 *Evidentiary Issues: Evaluating Social versus Constitutional Facts*

Further contrasting the Supreme Court's practice, the High Court's comparatively underdeveloped procedures to evaluate social facts may impede the Court's taking account of Indigenous intervention submissions. Accordingly, despite the High Court's broad capacity to ascertain constitutional facts from interveners or amici, greater procedural clarity for how social facts may be ascertained and evaluated is desirable to properly justify the High Court's use of Indigenous intervention submissions.

As Burns observes, Australia's adversarial litigation system is underpinned by the principle that judicial reasoning is based on 'admissible (relevant and reliable) evidence and legal precedent'.²⁷⁹ However, contrasting a strict adversarial model which constrains courts from referring to materials outside those raised by parties,²⁸⁰ the High Court has consistently stated that questions of constitutional validity cannot be made to depend upon the conduct of parties to private litigation.²⁸¹ To this end, there appears to be no constitutional impediment for the High

²⁷⁵ See also: Mona Arshi and Colm O'Cinneide, 'Third-Party Interventions: The Public Interest Reaffirmed' [2004] (Spring) *Public Law* 69, 71; Chan and Kislowicz, 'Divine Intervention (Pt 1)' (n 124) 18–20.

²⁷⁶ Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 16.

²⁷⁷ Arshi and O'Cinneide (n 275) 71.

²⁷⁸ *Levy* (n 23) 651 (Kirby J); *Bryden* (n 26) 492–3.

²⁷⁹ Burns (n 179) 333.

²⁸⁰ See *Clark* (n 26) 71.

²⁸¹ *Gerhardy* (n 123) 141–2 (Brennan J); *Maloney* (n 80) 193 [45] (French CJ); *Thomas* (n 150) 481–3 [523]–[526] (Callinan J).

Court acting in its original jurisdiction to be limited to constitutional facts as proven or agreed between parties.²⁸² Even in the exercise of its appellate jurisdiction, the High Court's overriding role and function to enforce the *Australian Constitution* has historically enabled it to inform itself of constitutional facts beyond those submitted by litigants.²⁸³

Then-Solicitor-General Stephen Gageler stated that for material to be taken into account it 'would need to tend logically to show the existence' (or not) of a fact in issue, and '[a]s with any material probative of any fact, the weight to be accorded ... must be assessed in the light of that party's knowledge and ability to prove', and beyond that, it is impossible to be more prescriptive of the material from which constitutional facts may be sourced.²⁸⁴ Subsequently, as Patrick Brazil has surmised, the basic rule underpinning the High Court's determination of constitutional facts is that the Court must 'ascertain the facts as best it can' and has 'no *a priori* limits on the ways in which [it] ... may acquaint itself with the necessary information', including through information received through interveners and amici.²⁸⁵

There is, however, less clarity on the High Court's legal basis to take cognisance of social facts as provided by interveners in constitutional proceedings where such facts have not been previously proven in evidence at trial.²⁸⁶ This uncertainty may reflect the procedural reality that the High Court rarely directly engages in fact-finding, and typically relies on agreed statements of facts, or findings of facts made by lower courts.²⁸⁷ Nonetheless, when the High Court has ventured to source social facts from amici or intervener submissions, it is uncertain on what grounds it does so.²⁸⁸ For example, the doctrine of judicial notice or its legislative equivalent,²⁸⁹ may facilitate judicial use of social facts which form constitutional facts and are 'open and notorious', and those in the 'common knowledge of educated men' as collected in 'accepted writings', 'standard works' and 'serious studies and inquiries' even if they have not been proved in evidence.²⁹⁰ However, where social facts are

²⁸² Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129, 135.

²⁸³ Ibid 138.

²⁸⁴ Stephen Gageler, 'Fact and Law' (2009) 11(1) *Newcastle Law Review* 1, 25–6, 28.

²⁸⁵ Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4(1) *Federal Law Review* 65, 84; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ).

²⁸⁶ Burns (n 179) 319.

²⁸⁷ Carter (n 180) 145–6.

²⁸⁸ Burns (n 179) 319.

²⁸⁹ See, eg: *Evidence Act 1995* (Cth) s 144; *Evidence Act 2011* (ACT) s 144; *Evidence Act 1995* (NSW) s 144; *Evidence (National Uniform Legislation) Act 2011* (NT) s 144; *Evidence Act 2008* (Tas) s 144; *Evidence Act 1995* (Vic) s 144.

²⁹⁰ Christopher Tran, 'Facts and Evidence in Litigation under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT)' (2012) 36(1) *Melbourne University Law Review* 287, 297.

not in such form of common knowledge, including those that may be reasonably anticipated from culturally specific information, or experiences from Indigenous interveners or amici, it is questionable whether judicial notice can justify the Court's ascertainment of such material.

In contrast, in Canada, as constitutional and social facts have become increasingly relevant to the constitutionality of legislation,²⁹¹ the Supreme Court has made clear that 'simply categorizing an issue as "social fact" or "legislative fact" does not license the court to put aside the need to examine the trustworthiness of the "facts"'.²⁹² Instead as Christopher Tran observes, the Supreme Court's principled approach has been to prefer evidence of facts to be adduced through expert testimony that may be subject to cross-examination, or through the legislated procedure for a fresh evidence motion provided it meets the prescribed requirements.²⁹³ However, if parties seek to rely on judicial notice to have recognised any type of fact, thus dispensing with the need for formal proof,²⁹⁴ the Supreme Court will begin with the 'Morgan criteria' articulated in *R v Find* ('*Find*').²⁹⁵ That is, judicial notice may be taken of facts which are 'so notorious or generally accepted as not to be the subject of debate among reasonable persons' or 'capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy'.²⁹⁶

As the Supreme Court stated in *R v Spence* ('*Spence*'), the rigorous application of the Morgan criteria will depend on how significant the fact is to the disposition of the case. At the 'high end', 'the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria'.²⁹⁷ Conversely, at 'the low end of background facts ... the court will likely proceed ...

²⁹¹ Tran (n 290) 299–300; *R v Gladue* [1999] 1 SCR 688, 731–2 [83] (Cory and Iacobucci JJ for the Court) ('*Gladue*'); *R v Spence* [2005] 3 SCR 458, 488–9 [57] (Binnie J for the Court) ('*Spence*').

²⁹² *Spence* (n 291) 489 [58] (Binnie J for the Court). The Supreme Court adopts a similar, but not identical definition of 'social fact' adopted in this article. In *Spence*, Binnie J for the Court defined 'social fact' as 'social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case' which are 'general', and 'not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, ... [can] help to explain aspects of the evidence': at 488–9 [57]. Relevant examples of social facts as understood by the Supreme Court have included the 'systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large'. See also: *R v Wells* [2000] 1 SCR 207, 234 [53] (Iacobucci J for the Court); *Gladue* (n 291) 731–2 [83].

²⁹³ Tran (n 290) 300–1.

²⁹⁴ Dana Phillips, '*Ishaq v Canada*: "Social Science Facts" in Feminist Interventions' (2018) 35(1) *Windsor Yearbook of Access to Justice* 99, 110.

²⁹⁵ [2001] 1 SCR 863, 886–7 [48] (McLachlin CJ for the Court) ('*Find*'); *Spence* (n 291) 490 [61].

²⁹⁶ *Find* (n 295) 886–7 [48].

²⁹⁷ *Spence* (n 291) 490–2 [61]–[65].

on the basis that the matter is beyond serious controversy'.²⁹⁸ The ongoing consideration for the Court when taking judicial notice of facts between the high and low end of the spectrum is whether a fact

would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.²⁹⁹

This absence of a principled approach to evaluating and accepting social facts also has implications for the High Court's proper use of submissions from Indigenous amici and interveners. For example, Allison Larsen refers to the worrying practice of amici briefs in the United States containing incorrect, politically-biased factual claims, to argue that facts not subject to cross-examination or other reliability assessments could mislead courts and infect judicial reasoning with unreliable information.³⁰⁰ Even absent deliberate bias, in circumstances where interveners submit lived experiences or culturally specific views which can provide important social facts to proceedings, submissions which advance one community member's views on cultural practices as authoritative have the capacity to mislead.³⁰¹ As Matthew Fletcher notes, even '[r]easonable minds may differ on customs and traditions'.³⁰²

The High Court's further development of a principled approach to the procedures guiding the admission of interventions and evaluation of social facts is important to effectively defend the Court's notice of and reliance on information received from Indigenous interveners and amici. However, it is unlikely these concerns are critical obstacles to the admission of increased Indigenous interventions before the High Court. As Kirby J observed in *Levy*, the Court 'retains full control over its procedures' and is eminently capable of discouraging busybodies while encouraging the useful voices of desirable interveners.³⁰³ While a granular examination of the precise form and merits of such procedures is beyond the scope of this article,³⁰⁴ the Supreme Court's approach, which is discussed above, offers a potential model for the High Court's management of Indigenous interventions and submissions in constitutional litigation.

²⁹⁸ Ibid 491–2 [65].

²⁹⁹ Ibid (emphasis omitted).

³⁰⁰ Allison Orr Larsen, 'The Trouble with Amicus Facts' (2014) 100(8) *Virginia Law Review* 1757, 1762–4. See also: Phillips (n 294) 111–12; Hopper (n 3) 96–8; Farber (n 132) 51.

³⁰¹ Matthew LM Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence' (2007) 13(1) *Michigan Journal of Race and Law* 57, 92.

³⁰² Ibid.

³⁰³ *Levy* (n 23) 651.

³⁰⁴ See proposals raised in: Kenny, 'Interveners and Amici Curiae' (n 29) 169–70; Williams, 'The Amicus Curiae and Intervener' (n 5) 399–402; Enid Campbell (n 5).

V CONCLUSION

Compelling pragmatic and normative bases support increased Indigenous amici and interveners in constitutional litigation before the High Court. There is some suggestion that the High Court is not immune to this view. In Part II it was observed that few Indigenous amici and intervener applications were made in constitutional cases between January 2012 and June 2023. However, the Court has consistently and widely interpreted the rules to *admit* Indigenous amici and interveners, as evidenced in the high success rates for Indigenous intervention applicants. Such results provide tentative encouragement for bolstered Indigenous intervention applications in future constitutional cases.

Real pragmatic and normative benefits may be realised from such practice. As illustrated in Part III through the case studies of *Ktunaxa*, *Sharma* and *Boudreault*, Aboriginal interventions can enhance the quality of constitutional adjudication by assisting the Court to clarify pertinent constitutional facts in the construction of constitutional rights and alerting the Court to pertinent social facts when assessing an impugned law's constitutional validity. Additionally, Aboriginal interventions can play an important normative function, publicly signalling judicial respect for the principle of democratic inclusion and reinforcing the human dignity of those permitted to participate in constitutional proceedings.

Due sensitivity to the divergent constitutional frameworks and court procedures in Canada is apropos when contemplating the comparable benefit of increased Indigenous intervention in the Australian context. Accordingly, in Part IV, it was observed that Australia has distinct, and deliberately narrow substantive constitutional protections — in contrast to the *Charter*. However, given the broad impact of constitutional adjudication, on a uniquely vulnerable Indigenous constitutional constituency, this argument fails to provide a compelling justification to deny Indigenous intervention. Further, unlike the Supreme Court's relatively settled intervention procedures and practice, there is uncertainty in Australia as to the applicable principles guiding intervention admissions to the High Court. Namely, it is unclear how the High Court will approach the task of evaluating the representative status of Indigenous interveners and determining the legal basis on which social facts may be ascertained and utilised. The development of a principled approach to intervention admissions to clarify such uncertainties is desirable. However, in light of the High Court's ultimate ability to control its procedures, these issues are unlikely to be critical practical impediments to an increased Indigenous intervention practice. Subsequently, it is concluded that real benefits await from increased Indigenous voices in Australian constitutional litigation — if only the High Court is willing to hear from them.

ELECTRONIC SIGNATURES AND LAWYERS: POTENTIAL NOT REACHED?

ABSTRACT

Electronic signatures ('e-signatures') have been an integral part of commercial transactions for decades. Despite the benefits e-signatures offer and the fact that they can represent a vehicle for achieving lawyers' utilitarian and value-expressive perspectives, their adoption in the course of legal transactions has been slow. Factors that underpin lawyers' reticent attitudes to adopt e-signatures are still — albeit less so as time passes — embedded in their psyche and reflect the regulatory and usage barriers to their adoption.

This article hence analyses lawyers' incentives to rely on e-signatures but also the barriers which prevent lawyers from using them to their full potential. The theoretical observations are informed by findings of a broader empirical study probing lawyers' approaches toward the adoption of innovative practices in the legal profession. The overall analysis illustrates that, while there has been a shift in the way lawyers perceive e-signatures, the potential for their use is far from being realised and more needs to be done with respect to the regulatory and usage barriers that may hinder lawyers' reliance on these signatures.

I INTRODUCTION

The development of commercial transactions over decades has facilitated the introduction of legal frameworks for digital technology including electronic signatures ('e-signatures').¹ This is not surprising given that modern technology introduced

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¹ Agnessa O Inshakova, Alexander I Goncharov and Daniil A Salikov, 'Electronic-Digital Smart Contracts: Modernization of Legal Tools for Foreign Economic Activity' in Elena G Popkova and Bruno S Sergi (eds), *The 21st Century from the Positions of Modern Science: Intellectual, Digital and Innovative Aspects* (Springer, 2020) 3, 4.

tools which enable e-signatures to perform the same role as the wet ink alternatives.² Yet, despite this feature and the fact that the application of e-signatures may appeal to lawyers' utilitarian³ and value-expressive perspectives,⁴ their adoption into the legal profession has been slow. A range of reasons such as regulatory barriers (lack of uniformity) or practical barriers (cybersecurity issues) as well as the resistance toward losing certain ceremonial aspects associated with signing contracts have worked to prevent lawyers from fully embracing e-signatures.

Despite the technological innovations lawyers have adopted to streamline their legal processes and refine their practices,⁵ it could be argued that the occurrence of the COVID-19 pandemic has encouraged or even pushed lawyers to revise their attitudes toward e-signatures. This shift has also been supported and facilitated by the introduction of temporary⁶ and, in certain instances, permanent⁷ exemptions, which lifted some of the regulatory barriers that may have prevented lawyers from embracing e-signatures. As a result, at present, e-signatures are more frequently used by lawyers although issues in their application across various legal transactions persist and prevent the full potential of their use being reached.

This article, accordingly, considers the laws which govern e-signatures to highlight the motivations and barriers that may affect lawyers' attitudes to the use of these signatures and their impact on the adoption of this mechanism. Part II will describe the methodology used by the authors to assess the views of lawyers about this mechanism. It will then provide a brief overview of the project that led to this article and the legal framework underscoring the application of e-signatures. This Part also examines the benefits of e-signatures and investigates the motives which drive lawyers to adopt them in practice. Part III further discusses the legislation

² Stephen Mason, *Electronic Signatures in Law* (University of London Press, 4th ed, 2016) 181.

³ As will be discussed further in the paper, utilitarian perspectives place the focus on the importance of achieving desired goals and positive outcomes for lawyers themselves, their clients and their law firm: Harlan B Miller, 'On Utilitarianism and Utilitarian Attitudes' [1990] (Summer) *Between the Species* 128, 128.

⁴ E-signatures may resonate with lawyers' value-expressive perspectives which allow individuals to remain authentic to their core personal values and self-image. See Daniel Katz, 'The Functional Approach to the Study of Attitudes' (1960) 24(2) *Public Opinion Quarterly* 163, 192.

⁵ Michael Legg, 'New Skills for New Lawyers: Responding to Technology and Practice Developments' in Kevin Lindgren, François Kunc and Michael Coper (eds), *The Future of Australian Legal Education: A Collection by the Australian Academy of Law and Thomson Reuters' The Australian Law Journal* (Thomson Reuters, 2018).

⁶ See, eg, *COVID-19 Emergency Response Act 2020* (ACT), as at 28 December 2022. A list of temporary changes to electronic signatures can be found later on in this article, particularly in Part III, Tables 1 and 2.

⁷ See, eg: *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW); *Electronic Transactions Amendment (Remote Witnessing) Act (No 33) 2021* (NSW). A list of permanent changes to electronic signatures can be found in Part III, Tables 1 and 2.

surrounding e-signatures to put into perspective some of the regulatory barriers that may exist, while Part IV outlines the practical barriers pertinent to the application of this mechanism. Parts III and IV also propose solutions in terms of how these challenges could be tackled and eventually overcome. The overall analysis in the article is informed by the parallel observations regarding the utilitarian and value-expressive values that lawyers, and certainly our interviewees, consider vis-à-vis the application of e-signatures in practice. Part V provides concluding observations and highlights that, while there has been a shift in the way lawyers perceive e-signatures, more needs to be done to deal with regulatory and usage barriers that may hinder lawyers' reliance on these signatures.

II ELECTRONIC SIGNATURES, THE LEGAL FRAMEWORK AND LAWYERS

The applicability and use of e-signatures in Australia is currently the subject of statutory regulation. The first legal instrument enacted to regulate electronic transactions including e-signatures was the *Electronic Transactions Act 1999* (Cth) (*ET Act*). By agreement with the federal government, each state and territory have enacted legislation substantially mirroring the *ET Act*'s guiding principles.⁸ This legislative approach comprising federal and state laws, coupled with their inherent variations as well as numerous amendments of temporary and permanent character has caused havoc in the way lawyers intend to adopt e-signatures in practice. Hence, it not surprising that during the interviews, lawyers have expressed different feelings regarding their application.

Before delving into a detailed analysis of lawyers' approaches to e-signatures, it is important to initially outline the methodology used by the authors to collect the data. This Part will subsequently discuss the legal principles surrounding the use of e-signatures. The focus will be then placed on discussing the findings regarding the appeal of e-signatures to lawyers as highlighted by both the literature and the empirical research conducted by the authors. This includes, inter alia, the improvement of operational efficiency, client experiences as well as supporting the new business models and sustainability. The following Parts discuss in greater detail each of these aspects by way of incorporating the feedback from our interviews.⁹

A Study and Methodology

It should be mentioned at the outset that the findings that inform this article are not located in a research study that specifically addressed the use and applicability of e-signatures but rather in broader empirical research conducted by the authors on

⁸ *Electronic Transactions Act 2001* (ACT); *Electronic Transactions Act 2000* (No 8) (NSW); *Electronic Transactions (Northern Territory) Act 2000* (NT); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Commerce Act 2000* (SA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions Act 2011* (WA).

⁹ See Part II(B)–(D) and Parts III–V.

innovative practices in the legal profession.¹⁰ As the study was considering legal innovation within the legal profession, interviews were conducted with practice leaders in 24 law firms, who branded themselves as having embraced innovative practices and had either advertised these practices or won industry innovation awards. The discussions were directed to assessing the way they approach and implement the innovative practices as well as the challenges they have faced.

Each interview lasted approximately one hour. The interview questions were semi-structured and broad in nature to allow the interviewees to raise both positive and negative feelings attached to the use of technology and the adoption of other innovative working methods that might change the way legal services are provided. Accordingly, it was striking that when we started our interviews in 2021 and raised the question about barriers to innovation, the first two interviewees highlighted their frustration regarding the use of e-signatures.¹¹ While both interviewees¹² were supportive of e-signatures and highlighted their importance as a tool for innovation, they also discussed the challenges they encountered when incorporating these signatures within their legal practices.

Subsequently, as part of the questions on the barriers to innovation, we delved more into the topic of e-signatures when the topic was raised by 17 of our 24 interviewees. The questions probed lawyers' views vis-à-vis the positive and negative aspects of adoption of e-signatures, the clarity of the existing rules associated with their use and the approaches to surmounting the challenges regarding their application in practice.¹³ The findings regarding e-signatures were then divided into two thematic aspects which are incorporated in this paper: (1) the benefits of e-signatures; and (2) barriers that prevent these signatures from being used with a focus on regulatory and usage barriers.

In terms of the size of the law firms represented, e-signatures were referred to by 8 of 10 interviewees working at large firms, all 5 interviewees working in medium-sized law firms, and 4 of the 9 interviewees in small law firms. While the sample is small, it nevertheless indicates issues with the application of e-signatures which perhaps work to make this mechanism a barrier rather than a vehicle for innovation.

Apart from this, it could be argued that there are two additional limitations pertinent to this study. The first one is linked to the fact that the research study targeted early adopters of technology, hence, its findings highlight a mindset supportive of change and may not reflect the attitude of more risk-averse lawyers. Second, an argument might be made that conducting the interviews during the pandemic could potentially have contributed to reflect a shift in the way e-signatures were viewed by our

¹⁰ Ethical approval number: UNSW HC200941 (10 December 2020).

¹¹ Interviewees 5 and 7.

¹² Interviewees 1 and 2.

¹³ References by the interviewees to e-signatures in the interviews have been analysed and the remainder of the article discusses the similarities and differences of the perspectives and views of the interviewees on this topic.

interviewees from commodity to necessity in jurisdictions where lockdown was in place. Yet, as discussed further in the study,¹⁴ the fact that in the post-pandemic period many jurisdictions have continued to rely on permanent legalisation regarding the use of e-signatures — which is also embraced by lawyers — perhaps speaks against the validity of such a presumption.

B *The Legal Framework: Promotion of Technological Neutrality*

As foreshadowed above, the use and application of e-signatures in Australia is regulated by the *ET Act* and the state and territory enacted legislation. The move to regulate the use of e-signatures was not surprising and followed international development in this sphere.¹⁵ Similar to the international legislation upon which it was modelled,¹⁶ the *ET Act*'s main objective was to facilitate the use of electronic transactions¹⁷ by removing the legal obstacles (requirements such as written form and wet ink signatures) that might prevent a person from relying on e-signatures to satisfy their legal obligations.¹⁸ To achieve this, Parliament embraced the principle of technology neutrality¹⁹ and consequently the law does not discriminate between the different forms of technology.²⁰ Accordingly, the *ET Act* does not provide a black-letter definition of 'electronic signature'²¹ nor specifies the form it needs to

¹⁴ See Part IV below.

¹⁵ See, eg, *Model Law on the Electronic Commerce* GA Res 51/162, UN Doc A/RES/51/162 (16 December 1996, adopted 12 June 1996). This Model Law has had influence on the Australian legislative regime: see Explanatory Memorandum, *Electronic Transactions Bill 1999* (Cth) 26 ('Explanatory Memorandum').

¹⁶ As highlighted in the Explanatory Memorandum (n 15) '[t]he Expert Group recommended that the Commonwealth should enact legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996, with some modifications': at 1.

¹⁷ *Electronic Transactions Act 1999* (Cth) ss 3(b)–(c) ('*ET Act*').

¹⁸ Explanatory Memorandum (n 15) 2.

¹⁹ A review of the literature highlights that technology neutrality may have different meanings. For the purpose of this article, technology neutrality is used to refer to a set of regulatory principles that may apply regardless of the technology used, see: Winston J Maxwell and Marc Bourreau, 'Technology Neutrality in Internet, Telecoms and Data Protection Regulation' (2015) 21(1) *Computer and Telecommunications Law Review* 1, 1; Explanatory Memorandum (n 15) 1–2.

²⁰ Explanatory Memorandum (n 15) 1–2.

²¹ Unlike the *ET Act* (n 17), some jurisdictions including the United States ('US') provide a specific definition for e-signature. For example, the federal legislation under the *Electronic Signatures in Global and National Commerce Act*, 15 USC § 7001, § 7006(5) (2000) defines 'electronic signature' as 'an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record'. The *Uniform Electronic Transactions Act 1999* (US) introduced a similar definition in s 2(8) which is now used as a model for defining e-signature under the legislation of 49 US states and two US territories. Precise definitions are also missing in the commentary on the topic. Instead of attempting a precise definition, some commentators simply

take to be valid. The mandatory criteria for proving the validity of an e-signature in electronic communications are minimal and mainly target proof of three things: (1) identity;²² (2) reliability;²³ and (3) consent of the other party to accept the electronic commerce.²⁴ More precisely, a person has to use a method to identify themselves and indicate their intention ‘in respect of the information communicated’.²⁵ This broad view supports the stance that it is not the form that gives the legal effect to the signature but rather the intention of the parties behind it to enter into a transaction. Insofar as the form is concerned, the signature will be acceptable as long as it is reliable and appropriate in light of all circumstances.²⁶ This broad approach ensures that technology does not evolve beyond the law or enter into a ‘regulatory void’²⁷ or fall into regulatory disconnection.

outline the fact that “[t]he term “electronic signature” has no universally accepted meaning and is variously defined in different statutes”: see Mark Sneddon, ‘Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact of the Statute Book’ (1998) 21(2) *University of New South Wales Law Journal* 334, 337. Among the definitions that do surface, e-signature is defined as ‘a method by which a person or entity commits to a legal obligation electronically, in the absence of a physical, written, wet ink signature’: see Tony Joyner and Steph Walker, ‘COVID-19: Pressure Points: Electronic Signatures in a Time of Social Distancing (Australia)’, *Lexology* (Web Page, 23 April 2020) <<https://www.lexology.com/library/detail.aspx?g=9aab06cc-1a35-4fd5-aad3-daf07f9c7ac1>>.

²² *ET Act* (n 17) s 10(1)(a).

²³ *Ibid* s 10(1)(b)(i). For a discussion on reliability including issues with the concepts see, eg: *United Nations Convention on the Use of Electronic Communications in International Contracts*, opened for signature 23 November 2005, 2898 UNTS 50525 (entered into force 1 March 2013) (‘ECC’); Explanatory Memorandum (n 15) 26–7; Aashish Srivastava, *Electronic Signatures for B2B Contracts: Evidence from Australia* (Springer, 2013) 122–3 (‘*Electronic Signatures for B2B Contracts*’). However, there is an alternative to this in case s 10(1)(b)(i) is not practical. In that instance, the parties can rely on the alternative test included in s 10(1)(b)(ii) proven in fact. It should be noted that the original provisions in the *ET Act* (and corresponding state and territory legislation) did not mention ‘intention’ but dealt with ‘approval’. The amendment of this provision to include the ‘proven in fact’ safety valve came as a result of the introduction of the *ECC*. Although Australia has not formally ratified the *ECC*, all states and territories and the Commonwealth have changed their legislation to comply with its provisions.

²⁴ *ET Act* (n 17) s 10(1)(d). As the *Corporations Act 2001* (Cth) (‘*Corporations Act*’) is exempt from the *ET Act*, new amendments to the provisions regarding the use of electronic deeds have excluded consent as a requirement. See below discussion on deeds signed by company at Part III.

²⁵ *ET Act* (n 17) s 10(1)(a).

²⁶ *Ibid* s 10(1)(b)(i).

²⁷ Lyria Bennett Moses, ‘How to Think about Law, Regulation and Technology: Problems with “Technology” as a Regulatory Target’ (2013) 5(1) *Law, Innovation and Technology* 1, 7.

The legislative approach conforms with the broad interpretation that Australian courts had put forward when considering what constitutes a signature. This has been confirmed in *Torrac Investments Pty Ltd v Australian National Airlines Commission*²⁸ where Queensland's Supreme Court accepted that a printed name on a telex²⁹ fulfils the requirement of a signature.³⁰ Similarly, in *eBay International AG v Creative Festival Entertainment Pty Ltd*,³¹ the Court found that pressing the 'I agree' button in an electronic contract was sufficient to meet the requirements of valid e-signature. Hence, instead of limiting the validity of the signatures generated by certain types of technology, the *ET Act* and its variants³² place the focus on the functionality of the signature.³³

Observed from lawyers' perspectives, our interviews highlighted that the fact that the law promotes technological neutrality has been beneficial. It has, inter alia, allowed lawyers to adopt the most suitable e-signature in the provision of their legal services³⁴ including a degree of experimentation with one interviewee noting that they are currently building a 'full-blown digital signature system' through blockchain.³⁵ Furthermore, it has provided those lawyers an opportunity to achieve different values and benefits, as will be highlighted in the next part of this article.

C Lawyers' Incentives to Rely on E-Signatures

In the course of our interviews, 17 interviewees who referred to e-signatures highlighted that they have embraced e-signatures in different forms because of their benefits. The majority viewed that the technological neutrality associated with e-signatures allowed them to adopt the most suitable system to achieve their utilitarian and value-expressive perspectives. The former perspectives target achievement of positive outcomes and avoid negative consequences. Hence, interviewees with a utilitarian perspective discussed the usefulness of e-signatures in achieving certain goals to which lawyers may aspire, such as improving operational efficiency and

²⁸ (Supreme Court of Queensland, Derrington J, 20 August 1984) 15 (*Torrac Investments*).

²⁹ A telex is a communication service that provides printed messages transmitted through teletypewriters from one location to another.

³⁰ *Torrac Investments* (n 28) 15. As to the flexibility of the judiciary regarding this matter, see also: *Molodysky v Vema Australia Pty Ltd* (1988) 4 BPR 9552; *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 162.

³¹ (2006) 170 FCR 450.

³² See above n 8.

³³ Aldrin De Zilva, 'Electronic Transactions Legislation: An Australian Perspective' (2003) 37(4) *International Lawyer* 1009, 1014.

³⁴ That is particularly important given that not every client has the same level of technological proficiency. Whilst tech-savvy clients can easily apply their digital signature to all legal transactions, the capabilities of technologically disadvantaged clients might be confined to typing their name into an email but exclude the use of digital platforms as a method of signing their document.

³⁵ Interviewee 7.

promoting new legal business models.³⁶ On the other hand, interviewees with value-expressive perspectives centred achieving individual values and self-conception such as promoting sustainability.³⁷ Another reason raised by the interviewees was enhancing clients' experience and this was referred to by both utilitarian and value-expressive leaning lawyers.

1 *Improving Operational Efficiency*

The process of relying on wet ink signatures may be slow and burdensome due to the ceremonial component associated with their use.³⁸ It, inter alia, involves the complexity of organising the meetings and bringing the parties involved into a place where the necessary formalities need to be completed before the document is signed.³⁹

As a result, the use of electronic vis-à-vis wet ink signatures was viewed by interviewees with utilitarian perspectives as increasing operational efficiency and the utility of a law firm as the majority of tasks can be completed quickly online without the need to match availability between clients and lawyers.⁴⁰ Accordingly, moving away from the ceremonial element of wet ink signatures was not viewed as a loss. The benefits of this timesaving component of e-signature were confirmed by our interviewees, with one noting that implementing e-signing has reduced turnaround time for witnessing documents from days or weeks to minutes.⁴¹

This advantage is also reflected within the literature with one legal commentator who surveyed United States ('US') law firms noting that the use of e-signatures can speed up the process of sending and receiving signed documents by 'seven times when compared to the wet-signing alternative'.⁴² It may also save, on average, eight

³⁶ Interviewees 3, 4, 6, 7, 9, 13, 14, 15, 16, 18, 19 and 24; Miller (n 3) 128.

³⁷ Interviewees 10, 17, 20, 21 and 23. Their behaviour is hence guided by those values rather than a cost-benefit analysis that might appeal more to utilitarian views: see generally Gregory R Maio and James M Olson, 'What Is a "Value-Expressive" Attitude?' in Gregory R Maio and James M Olson (eds), *Why We Evaluate: Functions of Attitudes* (Lawrence Erlbaum, 2000) 249.

³⁸ Information Security Committee, 'Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Secure Electronic Commerce', *American Bar Association* (Web Page, 1 August 1996) 5 <http://apps.americanbar.org/dch/thedl.cfm?filename=/ST230002/otherlinks_files/dsg.pdf>, archived at <<https://perma.cc/C4CB-22T5>>.

³⁹ Timothy Perry, 'Electronic Signatures: A Guide for Lawyers', *Thomson Reuters* (Blog Post, 24 January 2018) <<https://insight.thomsonreuters.com.au/legal/posts/electronic-signatures-guide>>.

⁴⁰ Interviewees 3, 4, 6, 7, 9, 13, 14, 15, 16, 18, 19 and 24.

⁴¹ Interviewee 15.

⁴² Yuri Eliezer, 'Enhancing Your Practice Efficiency with E-Signatures' (2017) 43(2) *Law Practice* 50, 53.

hours of administrative work devoted to the signing of documents per legal administrator per month.⁴³

Furthermore, the interviewees whose attitude was more founded in a value-expressive perspective also observed that the flexibility and speed provided by the technology matched their core values that centred on catering to the needs of their time-poor and vulnerable clients.⁴⁴

2 *Improving Client Experience*

E-signatures may also play a small role in improving clients' experience — a consideration that may be appealing from both utilitarian and value-expressive perspectives especially in a saturated legal market — as they may allow law firms to distinguish themselves from their competitors. Their use may help lawyers offer a client service which is more focused on the individual interaction between lawyer and client whereby the focus on client experience is promoted, representing a sum of 'all the client's touch points with' the law firm.⁴⁵ This is possible as this form of signature may benefit the clients in several ways.

First, e-signatures may benefit the client by lowering legal costs. In law firms that rely on time-cost billing, streamlining the process of signing a document into a simple use of software lowers the cost to clients⁴⁶ as it removes the need for human involvement in organising meetings, setting a time for signing to take place. This is especially the case in instances where legal documents involve multiple parties. Second, e-signatures help meet clients' expectations. A great number of clients are technologically advanced and already employ e-signatures in their day-to-day activities.⁴⁷ Consequently, the law firm would be meeting client expectations of efficient service through the use of basic and secure technological tools. Illustrative in this context is the observation of an interviewee who noted that they have always 'seen the benefits of using technology not just for efficiency, but to connect with

⁴³ Ibid.

⁴⁴ Interviewees 10, 17, 20, 21 and 23.

⁴⁵ Jacqueline Fearnley, 'How to Deliver an Outstanding Client Experience in Law', *Legal Vision* (Blog Post, 28 February 2020) <<https://legalvision.com.au/tools-engagement-create-deliver-outstanding-client-experience-law/>>.

⁴⁶ Interviewees 10 and 15. See also Allens et al, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, Parliament of Australia, *Modernising Documentation Execution* (25 November 2021) 12 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Joint%20submission%20of%20Allens%2C%20Ashurst%2C%20King%20%26%20Wood%20Mallesons%20and%20Norton%20Rose%20Fulbright.pdf>>.

⁴⁷ Lawyers Oliver Shtein, Priti Joshi and Lucinda Borgob observed that the question of whether or not the document can be signed electronically is often asked by their clients: Oliver Shtein, Priti Josh and Lucinda Borgob, 'Can I Sign This Document Electronically?', *Bartier Perry* (Blog Post, 12 December 2018) <<https://www.bartier.com.au/insights/articles/can-i-sign-this-document-electronically>>.

[their] clients and meet their needs'.⁴⁸ Another interviewee stated that they 'use a lot of technology to make [their] lives and [their] clients' lives easier'.⁴⁹ Third, e-signatures provide flexibility to clients by reducing the expense and removing the need to commute to the law firm's office.⁵⁰ The mere fact that e-signatures give clients the ability to sign the documents instantaneously from their homes or offices can, in parallel, also reduce the stress on lawyers associated with receiving the signed copies on time.⁵¹

3 *Supporting the Promotion of New Legal Business Models*

Technological innovations have provided law firms with the opportunity to adopt different business models with new value propositions for both lawyers and clients.⁵² From a lawyer's perspective, this may support the creation of an agile workplace through the promotion of flexible work arrangements, a distributed workforce or even the creation of virtual law firms. As one interviewee noted:

I think that yes, we are paperless, and we use e-signatures. And, again, this helps our people. Because having all of our files online means, you know, we have lots of fantastic mums who have three, four, five-year olds. I have an eight-year-old and a five-year-old at home. It is really great. When I pick up my backpack at the end of the day and I take my Surface Pro home with me and it [sic] got everything on it, it just gives me peace and comfort of mind of knowing that if I am, if I am running a bit late, the next morning — as I go to take the kids to school — that I can get up early and log on and do some things on files, rather than being chained to the desk.⁵³

The use of e-signatures also plays a small role in this context as it supports the establishment of a paperless environment where transactions can take place without the need for offices or face-to-face meetings with clients and where lawyers and clients may sign their documents electronically. Additionally, for some law firms, e-signatures constitute a vehicle to eschewing geographical boundaries and opening new cross-jurisdictional markets where they can reach and service clients in other states and territories.⁵⁴

⁴⁸ Interviewee 2.

⁴⁹ Interviewee 20.

⁵⁰ Daniel C Katzman, 'Are E-Signatures E-nough?' (2021) 109(3) *Illinois Bar Journal* 28, 49; Philippe Doyle Gray, 'New Legislation is Super-Charging Paperless Legislation' (2022) 86 (March) *Law Society Journal* 78, 79.

⁵¹ Gray (n 50) 79.

⁵² See, eg, Marina Nehme and Felicity Bell, *The Future of Legal Service Delivery: Sources of Innovation in the Legal Profession* (Report, 2021).

⁵³ Interviewee 11.

⁵⁴ Interviewees 11 and 14; Lauren Joy Jones and Ashley Pearson, 'The Use of Technology by Gold Coast Legal Practitioners' (2020) 2(1) *Law, Technology and Humans* 57, 68.

4 *Supporting Sustainability*

The prolific use of paper in law firms is a concerning aspect from a business, client and community perspective. Absent any domestic statistics, the data that surfaces in the comparative literature illustrates that an average US lawyer uses around one tonne of paper,⁵⁵ and disposes around 150 kilograms of waste paper per year.⁵⁶ Both the production and the disposal of paper consume a large amount of energy and generate significant greenhouse gas emissions.⁵⁷ As such, supporting sustainability may suit a utilitarian perspective as it lowers the running cost of the law firm. However, as the protection of the environment is being viewed more and more as an ethical issue,⁵⁸ it is not surprising that this practice is being reconsidered.⁵⁹ There is a growing awareness amongst Australian law firms of the importance of building and supporting a sustainable future.⁶⁰ As one interviewee stated:

A lot of these platforms like electronic briefing of barristers and DocuSign work toward the elimination of the cost and the waste associated with paper. That aligns with our overall sustainability agenda and what we're trying to do in that space.⁶¹

This is not unique to the sample of lawyers we interviewed, with several law firms flagging their green credentials. For instance, Herbert Smith Freehills has noted on its website that

[a]s an international professional services business we are concerned about the impact of climate change both on a local and global scale. We work to reduce our environmental impacts by adopting sustainable business and we are committed to deliver challenging carbon reduction targets.⁶²

DLA Piper issues a sustainability report to provide their stakeholders with an account of how the firm is addressing sustainability, environment, social and governance

⁵⁵ R Steven DeGeorge, 'The Greening of a Law Firm' (1990) 17(3) *Barrister* 19, 19.

⁵⁶ Nicole C Kibert, 'Greening Your Law Firm' (2012) 86(10) *Florida Bar Journal* 53, 55.

⁵⁷ Michael J Nasi, 'Greening the Bar through Sustainability Initiatives' (2009) 72(4) *Texas Bar Journal* 262, 263.

⁵⁸ Tom Lininger, 'Green Ethics for Lawyers' (2016) 57(1) *Boston College Law Review* 61, 61.

⁵⁹ See State Bar of California, *State Bar of California Lawyers Eco-Pledge and Law Office Sustainability Policy* (Public Comment, 7 November 2011) <http://www.calbar.ca.gov/portals/0/documents/publiccomment/2008/Lawyers-Eco-Pledge-Attachment%203_07-11-08.pdf> ('*Lawyers Eco-Pledge*').

⁶⁰ See generally 'AusLSA Members', *Australian Legal Sector Alliance* (Web Page) <<https://www.legalsectoralliance.com.au/AusLSA-members>>.

⁶¹ Interviewee 15.

⁶² 'Sustainability: Protecting the Environment and Tackling Climate Change', *Herbert Smith Freehills* (Web Page) <<https://www.herbertsmithfreehills.com/pro-bono-and-citizenship/sustainability>>.

issues.⁶³ Law firms have also joined legal sustainability networks.⁶⁴ Consequently, there is a trend nationally and internationally for law firms to reconsider the social and environmental impacts when using natural resources while achieving their business goals.⁶⁵

Socially responsible law firms, hence, strive to address sustainability issues by developing sustainable business practices, based on a specific action plan. For instance, several of our interviewees observed that their law firms have reviewed or are reviewing their reliance on paper as they view this as central toward achieving sustainability.⁶⁶ Consequently, law firms are working on cutting the use of paper or are moving to a paperless environment.⁶⁷ In fact, eight interviewees noted that they have moved to a completely paperless environment,⁶⁸ with one noting the importance of this as it reflects that the values of the law firm are focused toward supporting a sustainable green future.⁶⁹ The use of e-signature facilitates, of course, supports this move. For instance, Clayton Utz has posted on its website that they aim to reduce paper consumption by encouraging their people to ‘view, sign and share documents electronically’.⁷⁰

D Barriers Undermining the Incentives to Rely on Electronic Signatures

Despite the benefits that e-signatures offer and the desire of the 17 interviewees to completely embrace their use, the interviewees also expressed different feelings when navigating the use of e-signature. The data indicates that apart from the four interviewees who expressed satisfaction, four interviewees expressed annoyance, while nine interviewees expressed frustration regarding their use.

When querying these different perspectives, it was apparent that while the interviewees wanted to use unreservedly e-signatures in their legal practice, they have faced difficulties in their application due to legal and practical barriers, prompting even them to approach e-signatures with caution. This is a concerning fact given that the challenges faced by our interviewees, who are early adopters of technology, may prevent lawyers who are not keen on changing the way they operate from adopting

⁶³ See ‘Sustainability Reporting’, *DLA Piper* (Web Page, 3 October 2023) <<https://www.dlapiper.com/en-gb/about-us/sustainability/sustainability-reporting>>.

⁶⁴ ‘AusLSA Members’ (n 60); ‘The Legal Sustainability Alliance: The Only Not-For-Profit Sustainability Networks Run by Law Firms for Law Firms’, *Legal Sustainability Alliance* (Web Page) <<https://legalsustainabilityalliance.com/>>.

⁶⁵ *Lawyers Eco-Pledge* (n 59).

⁶⁶ For example, interviewees 11, 13, 15, 18, 20.

⁶⁷ For example, developing a green action plan can comprise creating a green procurement policy, employing the three R’s — Reduce, Reuse, Recycle — changing the relationship with paper, and maximising the office space, etc: see Kibert (n 56) 57.

⁶⁸ Interviewees 2, 8, 10, 11, 13, 15, 17 and 20.

⁶⁹ Interviewee 15.

⁷⁰ ‘Environmental Sustainability’, *Clayton Utz* (Web Page) <<https://www.claytonutz.com/about/community/environmental-sustainability>>.

e-signatures. The following discussion analyses in greater detail the impact of both the regulatory (Part III) and practical barriers (Part IV) on lawyers and proposes some approaches on how to surmount them.

III ELECTRONIC SIGNATURES, LAWYERS AND REGULATORY BARRIERS

While the *ET Act* serves as the primary legal instrument that governs the use of e-signatures, as noted previously, it is not the only source applicable in this context. An additional set of federal legislation, as well as state and territory statutes also apply in this context.⁷¹ Despite the technological neutrality of the law, the lack of uniformity in the legislative approach has caused havoc in the way lawyers intend to adopt e-signatures and led to what a range of interviewees have referred to as a regulatory barrier in their application.

A Regulatory Barriers to Electronic Signatures: Lack of Uniformity

The interviewees who referred to such a barrier pointed out three key problematic legislative areas: (1) documents to be personally served and witnessed such as deeds; (2) wills; and (3) powers of attorney.

The reason why e-signatures until recently were not applicable to these types of documents is because they essentially gain their validity from their solemn form.⁷² This form mandates the signatory to attach the signature to a physical copy of the document in the presence of a witness. However, as one of the interviewees mentioned, these concerns are obsolete in the 21st century and the legislative framework needs to move away from the limitation imposed by the law.⁷³ This point seemingly became validated with the onset of the pandemic. The requirements for social distancing, self-isolation and travel restrictions made signing on a paper copy and physical witnessing challenging⁷⁴ if not impossible. As will be highlighted below, the federal and state/territory governments sought to remedy this issue by each introducing ‘instant’ measures to assist the parties in meeting legal obligations. As a result, the situation with the laws that govern these types of solemn documents became ‘dramatically inconsistent’, causing confusion for lawyers and clients and adding also a regulatory burden for regulators.⁷⁵

⁷¹ See Part II.

⁷² See generally *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, 367–8 (*‘Manton’*).

⁷³ Interviewee 24.

⁷⁴ Law Society of New South Wales, *Implications of the Electronic Witnessing Provisions: Part 2B of the Electronic Transactions Act 2000 (NSW) and Its Impact on the Practice of Property, Wills and Estates Practitioners* (Paper, December 2021) <<https://www.lawsociety.com.au/sites/default/files/2021-12/Implications%20of%20Electronic%20Witnessing%20Provisions.pdf>>.

⁷⁵ Philippa Ryan and Veronica L Taylor, ‘Executing Documents in a Digital Economy: Rethinking Statutory Declarations and Deeds in Australia’ (Research Paper, Parliamentary Library, Parliament of Australia, September 2021) 7.

1 Deeds

Deeds can be generally defined as a binding promise or commitment to do something.⁷⁶ They are viewed as one of the most solemn types of documents,⁷⁷ and are usually required when there is no need for consideration or consideration will be difficult to prove.⁷⁸ Examples where deeds are used include: (1) one-way communication of confidential information; (2) financial guarantees; (3) indemnities; and (4) amendments to existing contracts.⁷⁹ As the element of consideration is not mandatory for these documents, the parties' intention to be bound by the deed will depend more on whether the parties have observed the formalities in the process of its execution.⁸⁰ For that reason, deeds must comply with more specific requirements at general law than contracts.⁸¹ These requirements mandate that the deed is written, signed and witnessed by another party who is not party to the deed.⁸²

Some of our interviewees⁸³ questioned the barriers for electronic execution of deeds in a number of Australian jurisdictions given that the formal deeds requirements were established to meet the needs of those who were entering into transactions more than two centuries ago.⁸⁴

⁷⁶ *Laszczuk v Bendigo and Adelaide Bank Ltd* (2020) 61 VR 1, 11 [38] ('*Laszczuk*').

⁷⁷ See *Manton* (n 72) 367–8 where Young J described deeds as 'the most solemn act that a person can perform with respect to a particular property or contract'.

⁷⁸ A valid deed will still require offer, certainty and acceptance of the terms of the agreement, as well as intention of the parties to be legally bound.

⁷⁹ Lauren McKee, 'What is the Difference between an Agreement and a Deed?', *LegalVision* (Blog Post, 3 November 2022) <<https://legalvision.com.au/difference-between-agreement-and-a-deed/>>.

⁸⁰ In *Morley v Boothby* (1825) 3 Bing 108; 130 ER 455, 456 Best CJ outlined that '[t]he common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it'.

⁸¹ *Laszczuk* (n 76) 11 [38].

⁸² *Goddard v Denton* (1584) 2 Co Rep 4b; 76 ER 396, 398: 'there are but three things of the essence and substance of a deed, that is to say, writing in paper or parchment, sealing and delivery' (citations omitted) ('*Goddard's Case*'). See, eg, *Property Law Act 1969* (WA) s 9. The statutes of the different states and territories have modified in a number of instances the common law position which required that the deed is written on parchment, vellum or paper, sealed with a seal placed on the document and physically delivered to the other party. It has been observed in the past that '[p]art of that security [of deeds] comes from the way in which it is created': Ryan and Taylor (n 75) 41.

⁸³ Interviewees 5, 16 and 24.

⁸⁴ As to the historical developments prompting the establishment of the formal deeds' requirements see generally Graham McBain, 'Abolishing Deeds, Specialties and Seals: Part I' (2006) 20(1) *Commercial Law Quarterly* 15, 19–25. See also *Goddard's Case* (n 82) 398.

Thus, it is not surprising that there are calls for legislative changes to these requirements so that the accent is on the fact that the ‘deed was made, and that it was delivered, regardless of the form of its delivery’.⁸⁵ Some jurisdictions have, in the past, responded to these initiatives. For instance, even before the pandemic, Victoria removed the requirement for the signature of the deed to be witnessed.⁸⁶ South Australia and Tasmania introduced provisions that delivery is not necessary in each case,⁸⁷ while the laws of Western Australia specify that ‘[f]ormal delivery [is] ... not necessary in any case’.⁸⁸ These individual approaches implemented by jurisdictions changed the manner in which deeds were generated.⁸⁹ The COVID-19 pandemic has further illustrated the need to change the way deeds are dealt with and this has occurred through some of the legislative amendments that have been enacted as a result.

(a) *Deeds Signed by Companies*

As a result of lawyers lobbying, a perfect example of a positive change in the way e-signature is relied on can be found in the context of deeds signed by companies. Corporations are exempt from the application of the *ET Act*.⁹⁰ Consequently, up until 2020, s 127 of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) precluded companies from signing deeds electronically.⁹¹ Furthermore, if e-signature was used, the protections under s 129 which are available to parties signing contracts with a company could not be relied on as those protections are dependent on compliance with s 127.⁹² As such, the safest way for a contract to be signed was using wet ink signatures.

However, as a result of the pandemic, temporary amendments to this legislation were needed and initially introduced under the *Corporations (Coronavirus Economic*

⁸⁵ Adrian McCullagh, Peter Little and William Caelli, ‘Electronic Signatures: Understand the Past to Develop the Future’ (1998) 21(2) *University of New South Wales Law Journal* 452, 462. In their joint submission to the Deregulation Taskforce, four big law firms Allens, Ashurst, King & Wood Mallesons and Norton Rose Fulbright outlined that deeds are ‘overdue for general reform’: Allens et al (n 46) 2. These firms further argued that contracts and deeds enjoy the same level of importance so the ways in which they are executed should be the same: at 2.

⁸⁶ *Property Law Act 1958* (Vic) s 73; Diccon Loxton, ‘Not Worth the Paper They’re Not Written On? Executing Documents (Including Deeds) under Electronic Documentation Platforms: Part B’ (2017) 91(3) *Australian Law Journal* 205, 212.

⁸⁷ See: *Law of Property Act 1936* (SA) s 41(3); *Conveyancing and Law Property Act 1884* (Tas) s 63(3).

⁸⁸ *Property Law Act 1969* (WA) s 9(3); Loxton (n 86) 212–13.

⁸⁹ Loxton (n 86) 212–13.

⁹⁰ *Electronic Transactions Regulations 2020* (Cth) reg 6 sch 1 cl 1 items 23, 24.

⁹¹ See, eg, *Bendigo and Adelaide Bank Limited v Russo* [2019] NSWSC 661, [91]: ‘it is still the case that a deed must be written on parchment or paper’.

⁹² See *Corporations Act* (n 24) ss 129(5), (6) as at 25 January 2022. Section 129 provides a number of assumptions that an outsider may make when dealing with a company.

Response) Determination (No 3) 2020 (Cth).⁹³ These amendments relaxed the requirements under s 127 of the *Corporations Act* and allowed documents, including deeds, to be signed and executed electronically but only for a limited period of time. Legal practitioners were very receptive of the changes introduced with the temporary amendments.⁹⁴ One of the interviewees remarked that

[o]ne of the good aspects of COVID was that the government put in place temporary COVID measures which actually allowed corporations — or removed some of the great uncertainty for corporations — to execute documents electronically and that really gave us a lot of impetus because many or most of our clients are corporations. ... So, that looked really, really promising but alas, the COVID measures were only temporary and they expired.⁹⁵

The positive effects and opportunities offered by the electronic signing of documents prompted legal practitioners to take an active part in lobbying⁹⁶ and consulting the governmental bodies that considered the need for a permanent reform of the law in this area.⁹⁷ More specifically, along with industry stakeholders,⁹⁸ lawyers supplied their proposals to the government with respect to the potential reforms of ss 126 or 127 of the *Corporations Act*⁹⁹ and they supported the move toward an e-signature

⁹³ See *Corporations (Coronavirus Economic Response) Determination (No 3) 2020* (Cth) s 6. The *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) sch 1 pt 3 cl 34 extended their application until March 2022 due to the continuing impact of the pandemic.

⁹⁴ See John Keeves, 'Treasury Laws Amendment (2021 Measures No 1) Act 2021: Now in Force', *Johnson Winter Slattery* (Blog Post, August 2021) <<https://jws.com.au/en/insights/articles/2021-articles/tlab-1-passes-senate-with-amendments>>: '[t]his is a welcome and overdue reform'.

⁹⁵ Interviewee 19.

⁹⁶ Diccon Loxton, 'Signing Documents Remotely', *Allens* (Web Page, 3 March 2022) <<https://www.allens.com.au/insights-news/insights/2021/08/signing-documents-remotely-a-regulatory-timeline/#anchor12>>.

⁹⁷ 'As a part of the Government's Digital Business Plan in the 2020–21 Budget, the Government consulted on making the temporary relief permanent': Revised Explanatory Memorandum, Corporations Amendment (Meetings and Documents) Bill 2021 (Cth) 4 ('Revised Explanatory Memorandum'). The consultation process is summarised at 42–5.

⁹⁸ Revised Explanatory Memorandum (n 97) 44. This document outlined that apart from the Law Council of Australia, other institutions including the Australian Banking Association, Australian Institute of Company Directors, Australasian Investor Relations Association, Business Council of Australia and Governance Institute of Australia took an active role in the consultation and made submissions: at 45.

⁹⁹ These submissions were addressed to the Deregulation Taskforce within the Department of the Prime Minister and Cabinet who was entitled to enforce the Government's Deregulation Agenda. For a discussion of the options put forward, see: Revised Explanatory Memorandum (n 97) 32, 48–9; Law Council of Australia, Submission to Deregulation Taskforce, Department of the Prime Minister and

in the context of deeds in corporate law.¹⁰⁰ The calculations made as a part of the consultation process demonstrated that if the legislator opts for the use of e-signatures, then the regulatory savings from companies being able to sign and send documents electronically might lead up to \$430 million per year over the course of 10 years.¹⁰¹

All this lobbying resulted in the introduction of the Corporations Amendment (Meetings and Documents) Bill 2021 (Cth).¹⁰² The new Bill inserted legislative notes to sub-ss (1), (2A) and (3) of s 127 of the *Corporations Act* to amend the text and to make it clear that company documents, including deeds, can be executed ‘in flexible and technology neutral manners’.¹⁰³ The Bill received royal assent on 22 February 2022, meaning that from 1 April 2022, companies were no longer required to sign, seal and deliver their deeds in paper form but could execute them electronically. The method of signing a contract is now inclusive of electronic forms.¹⁰⁴ This further mirrors to a large extent s 10 of the *ET Act*. However, one key difference is that there is no mention of consent under ss 110, 110A of the *Corporations Act*.¹⁰⁵ These changes to the *Corporations Act* were greatly welcomed by corporate law firms that had been keen to adopt e-signatures when dealing with corporations but had been hesitant in the past to do so.

(b) *Deeds Signed by Individuals*

Some of our interviewees flagged that the lack of harmonisation between the laws attached to deeds in the different states and territories was a regulatory barrier that had led them in the past to either shy away from the use of e-signatures or stop them from practising in these areas.¹⁰⁶ This perspective is not new but is also reflected in the Law Council of Australia’s submission on this topic where it outlined that

the various and inconsistent formal (and in some cases archaic) state-by-state requirements mean that electronic document execution of deeds across jurisdictions is at worst impossible, and at best fraught with danger.¹⁰⁷

Cabinet, *Modernising Document Execution* (8 October 2021) <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Law%20Council%20of%20Australia.pdf>> (‘Law Council of Australia Submission’).

¹⁰⁰ Revised Explanatory Memorandum (n 97) 28–9.

¹⁰¹ For further information on how this amount is calculated and where the savings come from, see *ibid* 38, 40.

¹⁰² *Ibid* 47.

¹⁰³ *Ibid* 5; Corporations Amendment (Meetings and Documents) Bill 2021 (Cth) sch 1 cls 6–10.

¹⁰⁴ *Corporations Amendment (Meetings and Documents) Act 2022* (Cth); *Corporations Act* (n 24) ss 110(1), 110A. It is noted at s 110A(1) that a ‘document (including a deed) may be executed by or on behalf of a company without the use of paper, parchment or vellum: see subsections 126(6) and 127(3A)’.

¹⁰⁵ Consent provisions are included under *ET Act* (n 17) s 10(1)(d). See also *Corporations Act* (n 24) ss 110, 110A.

¹⁰⁶ Interviewees 8 and 16.

¹⁰⁷ Law Council of Australia Submission (n 99) 7 [18].

As a result of these risks, lawyers at some of the big law firms reported that they were advising clients to avoid using deeds where possible.¹⁰⁸ Further, in their lobbying for change, lawyers have questioned the necessity and purpose of preserving the solemnity of the deeds in a post-pandemic world. The Law Council of Australia hence recommended that the execution of deeds should be facilitated with the use of e-signatures and audio-visual link ('AVL') witnessing.¹⁰⁹ The Law Council of Australia went even further to recommend that witnessing is dispensed 'where technology can provide sufficiently robust evidence of due execution'.¹¹⁰

Today, despite all the lobbying that has taken place, the legislative landscape still remains divided between opposition to and support for e-signatures.¹¹¹ For example, South Australia¹¹² and Western Australia,¹¹³ are among the jurisdictions which have continued to apply their existing prohibition on e-signatures in the text of their respective legislation.¹¹⁴ This means the deed cannot be executed electronically. Given that the pandemic has not led to months of lockdown in these jurisdictions, reforms of the legislation in this area of e-signatures have been slow.

Other jurisdictions in Australia have a different attitude. For instance, even prior to the pandemic, New South Wales had passed legislation amending the *Conveyancing Act 1919* (NSW) in 2018 to allow deeds to be made and signed electronically.¹¹⁵

¹⁰⁸ Allens et al (n 46) 6.

¹⁰⁹ Law Council of Australia Submission (n 99) 9–10.

¹¹⁰ Ibid 10 [36]. In making this recommendation, the Law Council of Australia pointed to Queensland and Victoria where the absence of witnessing requirements 'does not appear to have created significant problems in this regard': at 10 [35]. A similar recommendation was made in Clayton Utz, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, *Modernising Document Execution* (8 October 2021) 2 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Clayton%20Utz.pdf>>.

¹¹¹ Australasian Cyber Law Institute Electronic Wills and Online Witnessing Committee, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, *Modernising Document Execution* (14 October 2021) 11 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Australasian%20Cyber%20Law%20Institute%20-%20Electronic%20Wills%20and%20Online%20Witnessing%20Committee.pdf>> ('ACLEWOWC Submission'); Loxton (n 86) 224.

¹¹² *Law of Property Act 1936* (SA) s 41. Without express provision regarding the application of the signature, s 7 of the *Electronic Communication Act 2000* (SA) does not apply to deeds in this context as deeds fall under the exclusion in reg 5(1)(a) of the *Electronic Communications Regulations 2017* (SA).

¹¹³ *Property Law Act 1969* (WA) s 9. Without express provision regarding the application of the signature, s 8 of the *Electronic Transactions Act 2011* (WA) does not apply to deeds in this context as deeds fall under the exemptions in reg 3(1)(b) of the *Electronic Transactions Regulations 2012* (WA).

¹¹⁴ Similar prohibitions are also in place in the Australian Capital Territory, the Northern Territory and Tasmania where the common law principles regarding the execution of deeds as modified by statute still apply and as such the statutory provisions require a clear acceptance of electronic signatures. See, for example, the discussion on this in Nicholas Seddon, *Seddon on Deeds* (Federation Press, 2015) 97–101.

¹¹⁵ *Conveyancing Act 1919* (NSW) ss 38, 38A.

Yet, despite the fact that the witnessing of deeds was a mandatory requirement at the time in New South Wales, the legislator did not incorporate provisions for remote witnessing within the law.¹¹⁶ The pandemic, however, highlighted the need for change in this regard. This gap was filled with the enactment of the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) which allows for documents, including deeds, to be witnessed by way of AVL.¹¹⁷ This temporary legislative amendment, which was set to expire on 1 January 2022, has been made permanent through the recent enactment of the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW). Similarly, as a result of the pandemic, other jurisdictions such as Queensland¹¹⁸ and Victoria¹¹⁹ have also introduced legislation of a permanent character, allowing parties to sign their deeds electronically by removing the requirement for these documents to be signed, sealed, delivered and also witnessed.¹²⁰

2 Wills

Another area highlighted by some of our interviewees as problematic with respect to the application of e-signatures was wills. As with deeds, the challenges here arise due to the requirements one needs to observe with respect to the solemn form and the discrepancy in the state and territory laws in the use of e-signatures. As discussed below, prior to COVID-19, the formal requirements which make a will legally binding target evidence of a signature by the testator in the physical presence of at least two witnesses whose signatures are affixed on the same copy of the document.¹²¹ Consequently, in the past, it has been observed that the ‘formalities of a will or of a power of attorney help to create certainty regarding a future state’.¹²² Scholarly observations on the topic indicate that formalities have a therapeutic role given that rituals can often help manage anxiety and other emotions pertinent to

¹¹⁶ Ibid.

¹¹⁷ An audio visual link (‘AVL’) is defined as ‘technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing’: *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) sch 1 cl 2.

¹¹⁸ See *Justice and Other Legislation Amendment Act 2021* (Qld) pt 8, amending *Property Law Act 1974* (Qld).

¹¹⁹ See *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) s 67. According to the Explanatory Memorandum,

[n]ew section 12(4) clarifies that new section 12(1) does not otherwise interfere with other laws of Victoria including common law and equity, such as the law of misrepresentation, unconscionability, undue influence or duress. Parties and witnesses are still bound by these doctrines and are still required to meet the common law or equitable duties that may arise in witnessing a transaction.

Explanatory Memorandum, *Justice Legislation Amendment (System Enhancements and Other Matters) Bill 2021* (Vic) 40.

¹²⁰ See, eg, *Justice and Other Legislation Amendment Act 2021* (Qld) s 51, amending the *Property Law Act 1974* (Qld).

¹²¹ See, eg, *Succession Act 2006* (NSW) s 6.

¹²² Ryan and Taylor (n 75) 11.

the security of the documents.¹²³ Insofar as witnessing is concerned, the ritual ‘is intended to reinforce the shared social norms of honesty by requiring the person signing (and the witness) to do this publicly’.¹²⁴ The solemn form of wills also creates a range of problems for the lawyers who need to store the copies of those documents often for a very long period of time. To that end, lawyers have advocated that there should be a national wills bank which stores digital copies of these documents.¹²⁵

Even the onset of the pandemic did not result in the introduction of uniform legislation in this area. While some jurisdictions such as the Australian Capital Territory,¹²⁶ New South Wales,¹²⁷ and Victoria¹²⁸ made changes to their existing legislation offering flexibility in using e-signatures for wills, other jurisdictions such as the Northern Territory,¹²⁹ Queensland,¹³⁰ South Australia,¹³¹ Tasmania,¹³² and Western Australia¹³³ remain reticent in this regard without judicial approval.

¹²³ Ibid. See also Mark Glover, ‘The Therapeutic Function of Testamentary Formality’ (2012) 61(1) *University of Kansas Law Review* 139.

¹²⁴ Ryan and Taylor (n 75) 11.

¹²⁵ ACLIEWOWC Submission (n 111) 24.

¹²⁶ *COVID-19 Emergency Response Act 2020* (ACT) s 4, as at 28 September 2022. This provision expired on 29 December 2022.

¹²⁷ *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW); *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW); *Electronic Transactions Act 2000* (NSW) s 14F(a) (definition of ‘document’).

¹²⁸ *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 12.

¹²⁹ See *Wills Act 2000* (NT) s 8. However, the Court may dispense with formal requirements: at s 10.

¹³⁰ In Queensland the provisions allowing for remote witnessing of wills via AVL under pt 2 of the *Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Regulation 2020* (Qld) were repealed on 1 July 2021, meaning that these documents now must have wet ink signatures witnessed by physically present witnesses according to s 10 of the *Succession Act 1981* (Qld). Yet, according to ss 18(1)–(2) of the *Succession Act 1981* (Qld), the requirements regarding the execution, alteration or revocation of a will, whether targeting the whole document or part of a document which ‘forms a will, an alteration of a will, or a full or partial revocation of a will, of [a] deceased person’ may be dispensed with ‘if the court is satisfied that the person intended the document or part to form the person’s will, an alteration to the person’s will or a full or partial revocation of the person’s will’. In making this decision, ‘the court may, in addition to the document or part, have regard to: — (a) any evidence relating to the way in which the document or part was executed; and (b) any evidence of the person’s testamentary intentions, including evidence of statements made by the person’: at s 18(3). See, eg, *Re Nichol* [2017] QSC 220.

¹³¹ *Wills Act 1936* (SA) s 8. However, the Supreme Court of South Australia may dispense with the formal requirements pursuant to s 12 of this Act.

¹³² *Wills Act 2008* (Tas) s 8. However, the Supreme Court of Tasmania may dispense with the formal requirements pursuant to s 10 of this Act.

¹³³ See *Wills Act 1970* (WA) s 8. However, the Supreme Court of Western Australia may dispense with the formal requirements pursuant to s 32 of this Act.

Table 1: E-Signatures for Wills

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of wills
Status of the amendments — Permanent		
New South Wales	<i>Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020</i> (NSW); and <i>Electronic Transactions Amendment (Remote Witnessing) Act 2021</i> (NSW)	Pursuant to these amendments, which are now incorporated into the <i>Electronic Transactions Act 2000</i> (NSW), a will¹³⁴ can be electronically signed and witnessed if all of the requirements of the remote witnessing procedure are followed. This requires the witness to: • observe the testator signing the document ‘in real time’;¹³⁵ • ‘attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document’;¹³⁶ • be ‘reasonably satisfied’ that the document they sign is the same document that the testator signed;¹³⁷ and • endorse the document with a statement specifying how the document was witnessed,¹³⁸ and that the document was witnessed in accordance with the law.¹³⁹

¹³⁴ While this table is focused on wills, the provisions also apply to a range of other documents including a power of attorney or an enduring power of attorney, a deed or agreement, an enduring guardianship appointment, an affidavit, including an annexure or exhibit to the affidavit and a statutory declaration.

¹³⁵ *Electronic Transactions Act 2000* (NSW) s 14G(2)(a).

¹³⁶ *Ibid* s 14G(2)(b).

¹³⁷ *Ibid* s 14G(2)(c).

¹³⁸ *Ibid* s 14G(2)(d)(i).

¹³⁹ *Ibid* s 14G(2)(d)(ii).

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of wills
Victoria	<i>Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021</i> (Vic) ¹⁴⁰	Pursuant to these provisions which amended the <i>Wills Act 1997</i> (Vic): • it is mandatory that all parties are present at the time the testator signs the will, either physically or via AVL;¹⁴¹ • in the case where the testator signs the will in the presence of a witness who is present remotely, one of the witnesses must be a special witness;¹⁴² • all witnesses (attending physically or via AVL) must be able to see clearly the signature of the will by the testator,¹⁴³ or the substitute signatory that signs the will on their behalf;¹⁴⁴ • once the testator or the substitute signatory signs the will, they need to transmit it to the witnesses attending by AVL who must then affix their signatures;¹⁴⁵ • the special witness is the last person to sign the will,¹⁴⁶ given that the law imposes an obligation on them to determine if the will is signed in accordance with the remote execution procedure requirements; and¹⁴⁷ • all of these actions need to be carried out on the same day and all parties need to be within Victoria.¹⁴⁸

¹⁴⁰ Section 81 of the *Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021* (Vic) amended the *Wills Act 1997* (Vic) by inserting ss 8A and 8D.

¹⁴¹ *Wills Act 1997* (Vic) s 8A(4)(a).

¹⁴² *Ibid* s 8A(2).

¹⁴³ *Ibid* s 8A(4)(a).

¹⁴⁴ *Ibid* s 8A(4)(b).

¹⁴⁵ *Ibid* s 8A(7).

¹⁴⁶ *Ibid* s 8A(6).

¹⁴⁷ *Ibid* s 8A(7)(d).

¹⁴⁸ *Ibid* s 8A(3).

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of wills
Status of the amendments — Temporary		
Australian Capital Territory	<i>COVID-19 Emergency Response Act 2020</i> (ACT) ¹⁴⁹	Under this <i>Act</i> , a witness was required to: • observe the signing in ‘real time’;¹⁵⁰ • confirm that the signature was witnessed by signing the same document or a copy of the document signed by the testator;¹⁵¹ • be ‘reasonably satisfied’ that the document the witness signed is the same document, or a copy of the document, signed by the testator;¹⁵² and • endorse the document with a statement specifying the method used to witness the signature and that the witnessing was in accordance with the <i>Act</i>.¹⁵³

Yet the fact that legislative amendments enabled the process of remote execution does not mean that it became immune to challenges. Its complexity surfaced in *Re Curtis*.¹⁵⁴ In this case the Supreme Court of Victoria found that a will was not properly executed given that the testator’s laptop and hand were not visible on the screen during the process of remote execution via AVL.¹⁵⁵ As observed by the Court:

In the context of an electronic signature, ‘clearly seeing’ the signature ‘being made’ requires the witnesses to observe the testator operating the computer or device to apply the signature, and the signature appearing on the electronic document as they do so. This may be achieved by the testator sharing their screen whilst they appear on the audio-visual link. Alternatively, in circumstances like the present, it may require adjusting the angle of the camera on the device from which the audio-visual link is being operated to allow the witnesses to see the testator, their actions and the document. It is only by seeing the testator operating the computer or device to apply the signature and the signature appearing on the electronic document that the witnesses can be truly satisfied that it is the testator who has applied the electronic signature.¹⁵⁶

¹⁴⁹ This Act introduced temporary arrangements during the COVID-19 pandemic and expired on 29 September 2023.

¹⁵⁰ *COVID-19 Emergency Response Act 2020* (ACT) s 4(3)(a), as at 28 December 2022.

¹⁵¹ *Ibid* s 4(3)(b).

¹⁵² *Ibid* s 4(3)(c).

¹⁵³ *Ibid* s 4(3)(d).

¹⁵⁴ (2022) 68 VR 40 (*‘Re Curtis’*).

¹⁵⁵ According to s 8A(4) of the *Wills Act 1997* (Vic), remote execution requires that the will is signed in the presence of witnesses who must be able to see ‘clearly’ the testator’s signature being made by AVL.

¹⁵⁶ *Re Curtis* (n 154) 66 [116].

This decision arguably provides the needed guidance to practitioners who are utilising the remote execution procedure under the *Wills Act 1997* (Vic), as will be noted later on in this article.

3 Powers of Attorney

Further to deeds and wills, another document pointed out by some of our interviewees as problematic in this context was powers of attorney given that they cannot be signed electronically in a range of jurisdictions.¹⁵⁷ This exclusion is perhaps understandable as this legal document grants a person, or trustee organisation, the legal authority to act for or to manage a person's assets and make financial and legal decisions on their behalf.¹⁵⁸

The relevant legislation in the Northern Territory,¹⁵⁹ South Australia,¹⁶⁰ Tasmania,¹⁶¹ and Western Australia¹⁶² does not allow documents attesting creation or revocation of a power of attorney to be signed or executed electronically. At the outset of the pandemic, the Australian Capital Territory introduced temporary laws that enabled powers of attorney to be signed electronically and witnessed by AVL in the presence of a special witness.¹⁶³ Similar stances were adopted by New South Wales,¹⁶⁴ Queensland,¹⁶⁵ and Victoria,¹⁶⁶ with a difference being that the amendments in these jurisdictions are not temporary but permanent. This is summarised below in Table 2.

¹⁵⁷ See: *Powers of Attorney and Agency Act 1984* (SA) ss 5–6; *Powers of Attorney Act 2000* (Tas) s 9; *Guardianship and Administration Act 1990* (WA) s 104.

¹⁵⁸ See 'What is a Power of Attorney?', *NSW Trustee and Guardian* (Web Page) <<https://www.tag.nsw.gov.au/wills/make-power-attorney/what-power-attorney>>.

¹⁵⁹ *Electronic Transactions (Northern Territory) Regulations 2001* (NT) reg 3(1).

¹⁶⁰ *Powers of Attorney and Agency Act 1984* (SA) s 6.

¹⁶¹ *Electronic Transactions Regulations 2011* (Tas) s 4; *Powers of Attorney Act 2000* (Tas) s 9.

¹⁶² *Guardianship and Administration Act 1990* (WA) s 104.

¹⁶³ *COVID-19 Emergency Response Act 2020* (ACT) reg 4, as at 28 December 2022.

¹⁶⁴ *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW).

¹⁶⁵ *Justice and Other Legislation Amendment Act 2021* (Qld) pt 7.

¹⁶⁶ *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 12.

Table 2: E-Signatures for Powers of Attorney

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of powers of attorney
Status of the amendments — Permanent		
New South Wales	<i>Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020</i> (NSW); and <i>Electronic Transactions Amendment (Remote Witnessing) Act 2021</i> (NSW).	The procedure for e-signature and remote witnessing of powers of attorney and enduring powers of attorney by the principal is the same as the one for wills (see above Table 1 for specifications). ¹⁶⁷
Victoria	<i>Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021</i> (Vic) ¹⁶⁸	The procedure for e-signature and remote witnessing of powers of attorney by the principal is the same as the one for wills (see above Table 1 for specifications). ¹⁶⁹
Queensland	<i>Justice and Other Legislation Amendment Act 2021</i> (Qld) ¹⁷⁰	Powers of attorney may be in the form of an electronic document and electronically signed as long as an accepted method for electronically signing is followed. ¹⁷¹ A method is considered accepted if it is: ¹⁷² (a) a method prescribed under section 24G; or (b) if no method is prescribed, and subject to a regulation prescribing under section 24G a method that is not an accepted method for electronically signing a general power of attorney, a method that — (i) identifies the signatory for the document and the signatory's intention in relation to the contents of the document; and

¹⁶⁷ *Electronic Transactions Act 2000* (NSW) s 14G.

¹⁶⁸ Section 90 of the *Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021* (Vic) amended the *Powers of Attorney Act 2014* (Vic) by inserting ss 5A–5D.

¹⁶⁹ *Powers of Attorney Act 2014* (Vic) ss 5A–5D.

¹⁷⁰ Section 46 of the *Justice and Other Legislation Amendment Act 2021* (Qld) amended the *Powers of Attorney Act 1998* (Qld) by inserting ch 2 pt 3A which regulates the method of e-signature of powers of attorney.

¹⁷¹ *Powers of Attorney Act 1998* (Qld) s 24F.

¹⁷² *Ibid* s 24A.

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of powers of attorney
		(ii) is either — (A) as reliable as appropriate for the purpose for which the document is signed, having regard to all the circumstances, including any relevant agreement; or (B) proven in fact to have fulfilled the functions described in subparagraph (i), by itself or together with further evidence.
Status of the amendments – Temporary		
Australian Capital Territory	<i>COVID-19 Emergency Response Act 2020 (ACT)</i>	The procedure for e-signature and remote witnessing of powers of attorney and enduring powers of attorney by the principal is the same as the one for wills (see above Table 1 for specifications). ¹⁷³

B Implications of the Lack of Uniform Law

While at first glance, regulatory barriers to e-signatures are not apparent due to the electronic neutrality of the law, 13 interviewees, despite being supportive of the use of e-signatures, had negative feelings attached to their use. These feelings were centred around the lack of harmonisation of the law of e-signatures in the area of deeds, wills and powers of attorney. This lack of harmonisation is summarised in the below table.

¹⁷³ *COVID-19 Emergency Response Act 2020 (ACT)* s 4(3)(a), as at 28 December 2022. See above Table 1.

Table 3: Summary of Pre-Temporary and Post-COVID Positions

Documents	Pre-COVID Position	COVID Impact — Temporary Measures	Post COVID Position — Permanent Arrangements
Deeds	With the exception of New South Wales whose legislation allowed for e-signature of deeds, ¹⁷⁴ the formal requirements implemented in all Australian jurisdictions prohibited e-signature of deeds by individuals. Additionally, there was no option for the signature to be witnessed via AVL.	The Commonwealth ¹⁷⁵ and some states and territories ¹⁷⁶ introduced temporary amendments to allow for e-signatures, split execution and remote witnessing of these documents.	At a federal level, e-signature and split execution of documents has become a permanent option. ¹⁷⁷ New South Wales, ¹⁷⁸ Victoria, ¹⁷⁹ and Queensland ¹⁸⁰ allow the signature and execution of their deeds electronically (no requirement for witnessing of the signature). There has been no change for the remaining states and territories. ¹⁸¹

¹⁷⁴ *Conveyancing Act 1919* (NSW) ss 38, 38A.

¹⁷⁵ *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) sch 1 amending *Corporations Act* (n 24) s 127.

¹⁷⁶ Temporary legislation was introduced in New South Wales through the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) sch 1 which amended the *Electronic Transactions Regulation 2017* (NSW) by inserting sch 1 (titled 'Response to COVID-19 pandemic'). In Queensland, temporary measures for the electronic signing of legal documents were introduced under the *Justice Legislation (COVID-19 Emergency Response — Documents and Oaths) Regulation 2020* (Qld). Both jurisdictions now have permanent legislation. Permanent legislation was also introduced in Victoria: see *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) s 67, amending *Electronic Transactions (Victoria) Act 2000* (Vic).

¹⁷⁷ The *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) sch 1 (titled 'Signing and executing documents') amended the *Corporations Act* (n 24) by inserting pt 1.2AA ss 110, 110A, 110B, 126, 127, 129(5)–(6).

¹⁷⁸ The *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) sch 1 amended the *Electronic Transactions Act 2000* (NSW) ss 14F, 14H–14L. The *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) sch 2 amended the *Oaths Act 1900* (NSW) ss 18, 26.

¹⁷⁹ *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) is comprehensive legislation that amends various Victorian statutes including the *Electronic Transactions Act 2000* (Vic), *Oaths and Affirmations Act 2018* (Vic), *Wills Act 1997* (Vic) and the *Powers of Attorney Act 2014* (Vic).

¹⁸⁰ The *Justice and Other Legislation Amendment Act 2021* (Qld) is comprehensive legislation that amends various Queensland statutes including the *Oaths Act 1867* (Qld), *Powers of Attorney Act 1998* (Qld) and the *Property Law Act 1974* (Qld).

¹⁸¹ See: *Civil Law (Property) Act 2006* (ACT) ch 2 pt 2.3 div 2.3.1; *Law of Property Act 1936* (SA) s 41; *Conveyancing and Law of Property Act 1884* (Tas) s 63; *Property Law Act 1969* (WA) s 9.

Wills	There existed a general prohibition on the use of e-signatures in Australia.	Few states introduced temporary measures. ¹⁸²	Except for New South Wales ¹⁸³ and Victoria, ¹⁸⁴ the other jurisdictions do not have permanent arrangements for the signing and execution of wills electronically. ¹⁸⁵
Powers of Attorney	The formal requirements implemented under the laws of all Australian jurisdictions prohibited electronic execution of powers of attorney.	Few states introduced temporary measures. ¹⁸⁶	Except for New South Wales, ¹⁸⁷ Queensland, ¹⁸⁸ and Victoria, ¹⁸⁹ the other jurisdictions ¹⁹⁰ do not have any permanent legislation that is applicable in the context of e-signature of powers of attorney.

Consequently, law firms who wish to operate nationally in these areas have to comply with requirements under multiple regimes to enforce valid e-signatures for their documents. The patchwork of regimes has proved particularly burdensome and frustrating for these lawyers.¹⁹¹ One interviewee reflected this reality, stating that, although improvements have occurred as a result of COVID, '[i]t's still a lot to

¹⁸² Queensland used to rely on temporary legislation under the *Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Amendment Regulation 2020* (Qld), which has since been repealed.

¹⁸³ See above n 178.

¹⁸⁴ *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 12 made numerous amendments to the *Wills Act 1997* (Vic).

¹⁸⁵ See: *Wills Act 1936* (SA) s 8; *Wills Act 2008* (Tas) s 8; *Wills Act 1970* (WA) s 8. As noted previously the court may dispense with formalities under certain circumstances. See, eg: *Wills Act 2000* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 1936* (SA) s 12; *Wills Act 2008* (Tas) s 10; *Wills Act 1970* (WA) s 32.

¹⁸⁶ See above n 182.

¹⁸⁷ See above n 178.

¹⁸⁸ The *Justice and Other Legislation Amendment Act 2021* (Qld) pt 7 amended the *Powers of Attorney Act 1998* (Qld) ss 12, 44 and inserted a new ch 2 pt 3A and ch 9 pt 5.

¹⁸⁹ *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 13 amended the *Powers of Attorney Act 2014* (Vic). See in particular *Powers of Attorney Act 2014* (Vic) ss 5A–5D.

¹⁹⁰ See: *Powers of Attorney Act 1980* (NT) s 6; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) s 9; *Guardianship and Administration Act 1990* (WA) s 104.

¹⁹¹ See: LodgeX Legal, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, *Modernising Document Execution* (8 October 2021) 2 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/LodgeX%20Legal.pdf>>; Allens et al (n 46) 4; Clayton Utz (n 110) 1.

work through ... obviously there's still not a consistency of approach'.¹⁹² Another interviewee noted that '[d]igital signing needs an extreme overhaul in this country. It is getting closer as a result of COVID, but it is still quite ad hoc'.¹⁹³ Further, two interviewees noted that they do not extend their legal services to deeds, wills and powers of attorney as it is just too hard to juggle in law firms that are providing services to different jurisdictions.¹⁹⁴

C Surmounting the Regulatory Barriers: Uniformity as a Way Forward?

Accordingly, to deal with this justifiable frustration, a regulatory change is needed to align the positions in the different states and territories. For instance, national e-signature legislation that applies to all types of legal documents should be introduced. In an age of globalisation where legal transactions extend beyond jurisdictional lines, state-confined approaches (and their attendant divergences) are no longer appropriate to govern this aspect of law.¹⁹⁵ Uniformly applicable laws could provide a single regime for e-signatures for all transactions. Such an instrument could increase the clarity and predictability of the rules, enabling more efficient enforcement beyond jurisdictional lines.

Whether an initiative for harmonisation will be pursued, or whether a consensus will be reached on a national level, remains uncertain for now. Legal practitioners are, however, strongly supporting it.¹⁹⁶ Implementing a uniform instrument is not an easy process, not only because such efforts are 'often seen as an affront to sovereignty but also because of differences of opinion about what the various provisions of the harmonized laws mean and how those laws should be applied and enforced'.¹⁹⁷ However, it is important to remember that such a change will play a big role in removing the regulatory barriers to the use of e-signatures and consequently greater application of e-signatures. Perhaps, in the interim, to enable lawyers to further embrace the use of this mechanism, education and guidance is needed from employers, the law society of each state and territory, and regulators. The same will help to elucidate the similarities between electronic and wet ink signatures, and address practical, especially usage, barriers preventing the adoption of e-signatures by lawyers.

¹⁹² Interviewee 15.

¹⁹³ Interviewee 5.

¹⁹⁴ Interviewees 8 and 9.

¹⁹⁵ Law Council of Australia Submission (n 99) 14.

¹⁹⁶ See, eg: LodgeX Legal (n 191) 5; Clayton Utz (n 110) 1.

¹⁹⁷ Sharon K Sandeen, 'Through the Looking Glass: Trade Secret Harmonization as a Reflection of US Law' (2019) 25(2) *Boston University Journal of Science and Technology Law* 451, 452.

IV ELECTRONIC SIGNATURES, LAWYERS AND PRACTICAL BARRIERS

In addition to the regulatory barriers, our interviews highlighted that in some instances lawyers' perceptions towards e-signatures and embracing change were the reasons why law firms have shied away from its use until recently. Those law firms found that they not only needed to surmount regulatory barriers but also remedy lawyers' existing and sometimes entrenched prejudices toward e-signatures. For instance, one interviewee summarised the issue in the following manner:

We understand that adoption, the regulatory part is one thing, but then adoption and the way people pick up and run with these tools is another thing. So, we understand that there is maybe a usage barrier there, but I think that has more to do with behaviours and people willing to change versus an actual regulatory barrier.¹⁹⁸

A *Conservative Perceptions and Risk-Averse Attitudes as a Barrier*

One barrier to adopting e-signatures reflects the usage issue attached to e-signature and the way lawyers may perceive such usage.¹⁹⁹ Peoples' attitudes may be influenced by:²⁰⁰

- direct vs indirect experiences;
- good vs bad outcomes; and
- approach vs avoidance behaviours.

For a long time, lawyers have been hesitant to embrace technological changes because of negative direct or indirect experience, bad outcomes, or simply to avoid the unknown. The latter is especially true due to lawyers' conservative perceptions and risk-averse attitudes regarding the use of technology.²⁰¹ For instance, one interviewee noted that in terms of using new technology:

[In law firms], you've got 20 per cent laggards who are never going to change; you've got 10 per cent early adopters, who are out there ahead of the pack; then you've got 70 per cent in the middle. What we need to do in my job is to convert that 70 per cent, and then the 70 per cent will convert the 20 per cent. I just need to ignore the 20 per cent. I need the 70 per cent.²⁰²

¹⁹⁸ Interviewee 4.

¹⁹⁹ See Geoffrey Haddock and Gregory Maio, 'Attitudes' in Miles Hewstone, Wolfgang Stroebe and Klaus Jonas (eds), *An Introduction to Social Psychology* (Blackwell, 5th ed, 2012) 171, 177.

²⁰⁰ Gregory Maio, Geoffrey Haddock and Bas Verplanken, *The Psychology of Attitudes and Attitude Change* (SAGE, 3rd ed, 2019) 192.

²⁰¹ Agnieszka McPeak, 'Disruptive Technology and the Ethical Lawyer' (2019) 50(3) *University of Toledo Law Review* 457, 471.

²⁰² Interviewee 16.

Accordingly, shifting behaviour can be a challenge. The pandemic, however, has pushed and forced people, including those 20% ‘laggards’, to be exposed to different technologies such as e-signatures. As another interviewee noted:

COVID’s been extremely helpful for an innovator. ... One of the silver linings of COVID, the pandemic and the remote working, particularly from last March and April, is the increase of reliance on technologies [that lawyers were not comfortable with due to the attitude] if it ain’t broke, don’t fix it. So, [this attitude] does make it challenging [to alter behaviour].²⁰³

*B Surmounting the Conservative Perceptions and Risk-Averse Attitudes:
The Pandemic and Education as a Remedy?*

It could be, therefore, argued that the pandemic has helped deal with instances where lawyers did not consider or ignored the benefits of e-signatures.²⁰⁴ This is the case as the pandemic ensured that lawyers are exposed to a range of technology and must rely on e-signatures. This direct experience had a positive role in shaping lawyers’ perception, especially in New South Wales and Victoria where lockdowns were imposed for extended periods of time and the rules for social distancing and isolation made the physical signing of documents inconvenient and often impossible. The gravity of the situation prompted lawyers to re-evaluate the use of e-signatures, urging those who were previously reticent to embrace their use to see them gradually as an essential tool for the effectuation of legal transactions.²⁰⁵

Perceptions have hence changed during the pandemic, prompting lawyers to view e-signatures no longer as a commodity but a necessity.²⁰⁶ For example, one interviewee noted that ‘[n]o firms were using e-signatures before COVID-19 hit. Things have changed now’.²⁰⁷

²⁰³ Interviewee 19.

²⁰⁴ As to the psychological factors which may underpin lawyers’ attitudes regarding e-signatures prior to the pandemic, see Daryl J Bem, ‘Self-Perception Theory’ (1972) 6(1) *Advances in Experimental Social Psychology* 1, 2.

²⁰⁵ The use of e-signatures intensified with the start of the pandemic. See: Nadia Rawlings, ‘Signing Electronically Explained’, *Bennett & Philp Lawyers* (Blog Post, 7 April 2021) <<https://www.bennettphilp.com.au/blog/signing-electronically-explained>>; Peter Sise, ‘The Legal Ramifications of a Falsely Applied Electronic Signature’, *Clayton Utz* (Blog Post, 1 October 2020) <<https://www.claytonutz.com/knowledge/2020/october/the-legal-ramifications-of-a-falsely-applied-electronic-signature>>.

²⁰⁶ Eight of the participants in the study noted that their offices are completely paperless: interviewees 2, 8, 10, 11, 13, 15, 17 and 20. For pre-pandemic perceptions of e-signatures, see generally: Aashish Srivastava, ‘Legal Understanding and Issues with Electronic Signatures: An Empirical Study of Large Businesses’ (2008) 35(1) *Rutgers Computer and Technology Law Journal* 42, 42–59 (‘Legal Understanding and Issues with Electronic Signatures’); Aashish Srivastava, ‘Businesses’ Perception of Electronic Signatures: An Australian Study’ (2009) 6(1) *Digital Evidence and Electronic Signature Law Review* 46.

²⁰⁷ Interviewee 16.

Further, to ensure a positive experience for perhaps more risk-averse lawyers in respect of the use of technology, education is needed. For instance, one interviewee distinctly highlighted this need by noting:

I mean because of the changes that were made to allow e-signatures throughout the COVID period, we used Adobe sign. As part of that we did have extensive education processes throughout at the start of [COVID] in terms of, okay we are now obviously going to be signing more documents electronically, what does that mean? What are the products that we can use? When you need to be wary, when do we need to be, you know, be careful? What do we see is acceptable? And there was a lot of thought put in by the partners who are experts in that area to understand what we were comfortable to do as a firm and then what was the technology to support that.²⁰⁸

It is important for these questions to be seriously considered by law firms so that lawyers appreciate the benefit of e-signatures. This education would add to the supportive law firm environment which may help shape lawyers' experiences and make them more positive.²⁰⁹ This will also help lawyers shift their perception toward e-signatures.²¹⁰

However, as lawyers are generally risk-averse,²¹¹ risk attached to e-signatures as highlighted in the *Re Curtis* case discussed in Part III²¹² needs to be considered. This point was reflected by one interviewee who noted that '[e]verybody was too cautious, being too risk-averse saying, we don't know whether [the use of] e-signature's going to be enforceable or safe. So we don't want to use it'.²¹³

C Security Concerns

Some concerns that are often associated with e-signatures relate to the ability of these signatures to emulate the same level of security and functional equivalence of handwritten signatures in terms of the identity of the signer and integrity of the message as well as compliance with other substantive laws, especially in the context of legal transactions.²¹⁴ One of the factors which may hinder lawyers' belief in their ability to use these signatures is the neutrality of the *ET Act* itself as there is little guidance on what to use in the legislative setting.

²⁰⁸ Interviewee 15.

²⁰⁹ Maio, Haddock and Verplanken (n 200) 173.

²¹⁰ Shelly Chaiken and Mark W Baldwin, 'Affective-Cognitive Consistency and the Effect of Salient Behavioral Information on the Self-Perception of Attitudes' (1981) 41(1) *Journal of Personality and Social Psychology* 1.

²¹¹ Julie Schaeffer, 'Lawyers Are Generally Risk-Averse' [2015] (January/February/March) *American Builders Quarterly* <https://www.gibbsgiden.com/pdf/ABQ56_Gibbs%20Giden_ePrint.pdf>.

²¹² *Re Curtis* (n 154).

²¹³ Interviewee 16.

²¹⁴ Yee Fen Lim, 'Digital Signature, Certification Authorities and the Law' (2002) 9(3) *Murdoch University Electronic Journal of Law* 25.

This is compounded by the fact that, for a long time, there was a belief that wet ink signatures reflect ‘the attributes of both signer authentication and document authentication’.²¹⁵ For example, with the handwritten signature, the identity of the signer can be easily determined if the parties are physically present and they witness the moment of signing the document. But even if that is not the case, say the parties were not present and the identity of the signer is challenged, any issues can easily be resolved with the assistance of a handwriting analyst.²¹⁶ This analysis determines if the signature can be attributed to the signer via comparison of the challenged signature with a sample of the signatory’s signature signed naturally in other circumstances.²¹⁷ Given the difficulty of replicating the signatures of others,²¹⁸ it can be argued that it will be unlikely that another person can reproduce a signature identical to the signer’s.²¹⁹

E-signatures, on the other hand, are not generally accompanied by any personal physical act of signing.²²⁰ A question that hence arises is how the identity of the person who signed the document can be established. The mere fact that the legislation validates legal documents signed by typing a name into an email,²²¹ or putting a mark by the signer, increases the possibility that some of those documents are signed by one who acts under a false identity.²²² If this scenario eventuates, the

²¹⁵ Edward D Kania, ‘The ABA’s Digital Signature Guidelines: An Imperfect Solution to Digital Signatures on the Internet’ (1999) 7(2) *CommLaw Conspectus: Journal of Communications Law and Policy* 297, 299.

²¹⁶ Srivastava, *Electronic Signatures for B2B Contracts* (n 23) 111–13. Currently, there are a number of technological tools that might be used for a verification of the authenticity of the signature and texts. For example, there has been some suggestions that US secret service bodies use a special ‘software program called Forensic Information System for Handwriting (FISH) that enables document examiners to scan and digitize text writings such as threatening correspondence’ and identify their authenticity: Mason (n 2) 12.

²¹⁷ Mason (n 2) 12.

²¹⁸ Kalama M Lui-Kwan, ‘Recent Developments in Digital Signature Legislation and Electronic Commerce’ (1999) 14(1) *Berkeley Technology Law Journal* 463, 469.

²¹⁹ Handwritten signatures are arguably more secure than the standard forms of electronic signature but less secure than more advanced digital signatures which prove almost impossible to forge. See, eg, Pankaj Kumar and Saurabh Kumar Sharma, ‘An Empirical Evaluation of Various Digital Signature Scheme in Wireless Sensor Network’ (2022) 39(4) *IETE Technical Review* 974.

²²⁰ Stephen Mason, for example, observes that ‘[w]ith electronic signatures, the person does not physically sign anything, but causes software to sign electronically using an untrustworthy machine’ which in turn evokes ‘a weaker sense of the involvement of the person in the process of signing’: Mason (n 2) 9, citing Eileen Y Chou, ‘Paperless and Soulless: E-Signatures Diminish the Signer’s Presence and Decrease Acceptance’ (2015) 6(3) *Social Psychological and Personality Science* 343, 343.

²²¹ See *Stuart v Hishon* [2013] NSWSC 766.

²²² Greg Casamento and Patrick Hatfield, ‘The Essential Elements of an Effective Electronic Signature Process’ (2009) 6(1) *Digital Evidence and Electronic Signature Law Review* 83, 84. According to one study, the challenges associated with the identity

person who has received such a document would not be able to enforce it against the party with whom they thought they were entering into a transaction.²²³ These scenarios prove specifically challenging for lawyers who often electronically send documents to their clients, rely on their written confirmation, or act on their behalf when undertaking legal action. If a document was signed by an imposter (say via an email) any enforcement activity might have detrimental consequences both for the lawyer and the client.

Similarly, the use of e-signatures can prove challenging not only when verifying the identity of the signer but also when verifying the authenticity of the content of the document that needs to be signed — the so-called repudiation risk.²²⁴ With electronic communications, it is always possible for a message to be altered (intentionally or not) between the time it leaves the sender's system and when it is received by the recipient.²²⁵ After all, a message sent electronically may pass through multiple devices and computer systems, each owned and operated by different technology providers. There is a risk that '[a]t every stage in this process the message is vulnerable to alteration'.²²⁶ Hence, even though e-signatures might have an audit trail to verify the message integrity and 'the signer's identity, [that] trail may not always be secure'.²²⁷ The repudiation risk does not necessarily exist with handwritten signatures or can be avoided because the integrity of the message can easily be verified by way of comparing the original document with the document in question.²²⁸ Therefore, it appears that the principle of technology neutrality, though beneficial for lawyers, can also create some challenges vis-à-vis the level of cyber-security perception of the communicated content.²²⁹

of the party that signed the contract or the other party's potential claim that 'he never signed it and that somebody else hacked into the system and maliciously affixed his electronic signature' was one of the main reasons to disfavour the use of e-signatures: Srivastava, 'Legal Understanding and Issues with Electronic Signatures' (n 206) 54.

²²³ Casamento and Hatfield (n 222) 84.

²²⁴ "'Document authentication" requires that the signature identify the data the signatory accepted so one may not alter the data after the signature has occurred': Kania (n 215) 299. See also Casamento and Hatfield (n 222) 84.

²²⁵ C Bradford Biddle, 'Misplaced Priorities: The Utah Digital Signature Act and Liability Allocation in a Public Key Infrastructure' (1996) 33(3) *San Diego Law Review* 1143, 1146.

²²⁶ *Ibid.*

²²⁷ Hana Lee, 'E Signing in the Time of Coronavirus', *Forty Four Degrees Lawyers and Consultants* (Blog Post, 13 March 2020) <<https://www.fortyfourdegrees.com.au/e-signing-in-the-time-of-coronavirus>>.

²²⁸ However, it is important to acknowledge that documents may be intercepted physically and substituted.

²²⁹ See Jonathan E Stern, 'The Electronic Signatures in Global and National Commerce Act' (2001) 16(1) *Berkeley Technology Law Journal* 391, 411.

D *Surmounting the Security Concerns*

When exploring lawyers' cognitive responses to addressing the security concerns regarding e-signatures, it is instructive to rely on the Elaboration Likelihood Model of Persuasion.²³⁰ This model postulates that people are motivated to 'form correct attitudes (ie, those that will prove useful in functioning in one's environment) as a result of exposure to a persuasive communication, but there are a variety of ways in which a reasonable position may be adopted'.²³¹

For instance, lawyers may benefit from exposure to the fact that their security concerns linked to signer identification and non-repudiation may be tackled by way of using more sophisticated technology in the form of a digital signature.²³² This would include a more secure subset of e-signatures which are tied to the document and difficult to forge.²³³

Furthermore, digital signatures may be even more secure than handwritten signatures as, while both have mechanisms to prove that the signer has read the document and affixed the signature to indicate the approval of its content, digital signatures can highlight that the document has not been altered.²³⁴ In a physical document, alteration in terms of substitution of pages may take place. Digital signatures authenticate these components by using a certificate-based digital ID usually by asymmetric encryption, which consists of a pair of public and private keys.²³⁵ The initial step in the process of signing the document digitally is the creation of a hash value or a message digest.²³⁶ The hash value is the result of a mathematical calculation (an algorithm also called a 'hash function') which transforms the document into a unique array of numbers and letters.²³⁷ The message digest is encrypted by the sender's private key and added to the document which outputs the private key of the sender. At the point when the addressee receives the document, they can apply the

²³⁰ See Richard E Petty and John T Cacioppo, *Communication and Persuasion: Central and Peripheral Routes to Attitude Change* (Springer-Verlag, 1986) ch 1.

²³¹ Richard E Petty et al, 'Source and Message Factors in Persuasion: A Reply to Stiff's Critique of the Elaboration Likelihood Model' (1987) 54(3) *Communication Monographs* 233, 233.

²³² Biddle (n 225) 1146–7.

²³³ The security of digital signature has been acknowledged for some time. See, eg, Tiffany A Mendez, 'Adopting the Digital Signature Guidelines in Implementing Public Key Infrastructure for Federal Procurement of Electronic Commerce' (2000) 29(2) *Public Contract Law Journal* 285, 287. For a more recent reference on methods to make the digital signature more secure, see Kumar and Sharma (n 219).

²³⁴ Paul R Katz and Aron Schwartz, 'Electronic Documents and Digital Signaturing: Changing the Way Business Is Conducted and Contracts Are Formed' (1996) 14(2) *IPL Newsletter* 3, 4. See also Hua-Lei Yin et al, 'Experimental Quantum Secure Network with Digital Signatures and Encryption' (2023) 10(4) *National Science Review* 228.

²³⁵ Lee (n 227); Lim (n 214).

²³⁶ Lim (n 214).

²³⁷ Ibid; Biddle (n 225) 1148–50.

sender's public key to check its integrity through the same hash algorithm used by the sender.²³⁸ If the document has not been altered or tempered, the algorithm will remain the same.²³⁹ Once lawyers are aware of this, the below perception of one of the interviewees in our study would become the norm:

In fact, the concept of a [handwritten] signature itself is pretty meaningless in the electronic age. So the technology clearly exists to make that completely seamless, that everyone can have a digital signature that can be universally applied with verification with the concept of witnessing. Because of that, [handwritten signature] is pretty archaic in fact. So, we could do away with a lot of that old school hard copy thinking and replace it with something way better.²⁴⁰

This awareness of the similarities between digital and handwritten signatures may be raised through a range of stakeholders: law firms (employers), the law society of each state and territory, and regulators. As the message is endorsed by relevant authorities, lawyers would be more likely to alter their negative beliefs about e-signatures.²⁴¹ The message should be broader than just education about the safety attached to digital signatures or other forms of signatures and present incentives for attitude change to deal with practical, especially usage, barriers.

V CONCLUSION

The above analysis elucidates a conclusion that the current legislative framework under the *ET Act* gives a very broad meaning to the concept of e-signature.²⁴² In effect, 'any medium that is capable of linking a legal entity with a document (electronic or paper or other)' could be an acceptable form of signature.²⁴³ This broad

²³⁸ Lim (n 214). Regarding the public key submission see further the *Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services* GA Res 77/101, UN Doc A/RES/77/101 (7 December 2022, adopted 7 July 2022) ('*Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services*').

²³⁹ BP Aalberts and S van der Hof, 'Digital Signature Blindness Analysis of Legislative Approaches to Electronic Authentication' (2000) 7(1) *EDI Law Review* 1, 6. This will especially be the case with the use of public key substitution. See for example a discussion on cryptographic techniques and algorithms: Dilip Kumar Sharma et al, 'A Review on Various Cryptographic Techniques & Algorithms' (2022) 51(1) *Materials Today: Proceedings* 104. See also *Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services* (n 238).

²⁴⁰ Interviewee 24.

²⁴¹ Joseph R Priester and Richard E Petty, 'The Influence of Spokesperson Trustworthiness on Message Elaboration, Attitude Strength, and Advertising Effectiveness' (2003) 13(4) *Journal of Consumer Psychology* 408, 418–19.

²⁴² See *ET Act* (n 17) s 10.

²⁴³ John D Gregory, 'Must E-Signatures Be Reliable?' (2013) 10(1) *Digital Evidence and Electronic Signature Law Review* 67, 68.

stance has provided lawyers with an opportunity since 2000 to embrace the type of e-signatures that they consider appropriate for their needs. As a result, the innovation-oriented lawyers have greatly appreciated this possibility and taken the benefit of applying it to improve operational efficiency, improve clients' experience, support the promotion of new legal business models, and support sustainability.

However, the observations made by lawyers in the present study indicate that despite their desire to embrace innovation and cutting-edge technology, many have approached e-signature with caution due to regulatory and usage barriers. The gravity of the situation surfaced during the pandemic. The move to online working environments pushed lawyers who were risk-averse to embrace e-signatures, making what once was a commodity to become a necessity. This meant that accommodation needed to be made by law firms and new regulation was necessary to allow for legal transactions to continue, especially in the jurisdictions that were under severe lockdowns.

Against such a background, many jurisdictions took individual approaches to tackle regulatory barriers and introduced instant measures to this end. It remains, however, questionable as to whether this patchwork of regimes facilitated the use of e-signatures or perhaps introduced further confusion. As the Law Council of Australia noted, the 'various and inconsistent formal ... state-by-state requirements mean that electronic document execution ... across jurisdictions is at worst impossible, and at best fraught with danger'.²⁴⁴

This article hence argues for uniform legislation in this area that could increase clarity and predictability of the rules, enabling more efficient enforcement beyond jurisdictional lines. The legislative intervention needs to be combined with education and further support from employers, the law society of each state and territory, and regulators to elucidate the similarities between electronic and wet ink signatures, and address practical, especially usage, barriers preventing the adoption of e-signatures. Uniform legislation and greater education will play a significant role in removing the current barriers to the use of e-signatures and consequently enable lawyers to fully embrace their application. Without these initiatives and further action, the potential of the use of e-signatures will not be reached.

²⁴⁴ Law Council of Australia Submission (n 99) 7.

NARRATIVES OF FORCE, RESISTANCE AND MISTAKEN BELIEF IN CONSENT IN SOUTH AUSTRALIAN RAPE CASES

ABSTRACT

This article explores the persistence of narratives of force and resistance in rape trials, informed by a thematic analysis of South Australian District Court and Supreme Court judgments delivered between 2012 and 2023. Reforms to South Australian criminal law in 2008 ostensibly sought to remove reference to elements of force and resistance from the legal definition of rape. However, force and resistance narratives continue to be used by prosecution and defence counsel to prove a lack of consent or to create reasonable doubt that an accused person was aware of non-consent. These narratives are not only tolerated but endorsed by the judiciary. This article argues that the use and endorsement of force and resistance narratives in this regard is problematic as it fails to reflect the reality of most rapes, ensures that scrutiny remains on victims' actions and permits accused persons to 'mistake' a victim's fear as consent. Overall, this article reflects the limits of the current law in securing justice outcomes for victims and recommends that South Australia considers comprehensive reforms to improve how its justice system responds to rape.

I INTRODUCTION

Historically, the crime of rape required proof of physical force and resistance.¹ Empirical evidence, however, has exposed the limits of this legal requirement, as most rapes do not involve violent force or forceful resistance.² Feminist legal reforms reflective of this have sought to ameliorate reliance

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¹ See, eg, Cyril J Smith, 'History of Rape and Rape Laws' (1974) 60(4) *Women Lawyers Journal* 188, 189–91; Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Routledge, 2005) 27–8 ('*Is It Rape?*').

² Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Report, 2017) 6–7; Nina Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (Report, NB Research, 2013) 18–19. See also: Antonia Quadara, Bianca Fileborn and Deb Parkinson, 'The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault' (Issues Paper No 15,

on force and resistance as evidence of rape by removing their express reference from legal definitions and introducing a consent standard based upon free and voluntary agreement. However, research from other Australian jurisdictions³ shows that, notwithstanding such reforms, the law continues to permit evidence of force and resistance as proof of non-consent and an accused person's awareness of this, the onus of proof in effect remaining on the victim⁴ to corroborate her⁵ rape through her resistance.

Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2013) 26–8; Mary Carr et al, 'Debunking Three Rape Myths' (2014) 10(4) *Journal of Forensic Nursing* 217, 223.

- ³ See, eg: Helen Mary Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012); Anastasia Powell et al, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456; Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296; Annie Cossins, 'Why Her Behaviour Is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(2) *University of New South Wales Law Journal* 462; Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases' (2019) 31(1) *Current Issues in Criminal Justice* 24; Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1; Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334; Ashlee Gore, 'It's All or Nothing: Consent, Reasonable Belief, and the Continuum of Sexual Violence in Judicial Logic' (2021) 30(4) *Social and Legal Studies* 522; Jonathan Crowe, Rachael Burgin and Holli Edwards, 'Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law' (2023) 50(1) *University of Western Australia Law Review* 284.
- ⁴ The term 'victim' is used to reflect the fact that women generally do not lie about being raped and even when a court finds an accused not criminally responsible the victim still experiences victimisation. Studies estimate approximately 2–10% of sexual crime allegations are false: David Lisak et al, 'False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases' (2010) 16(12) *Violence Against Women* 1318. See also Liz Wall and Cindy Tarczon, 'True or False? The Contested Terrain of False Allegations' (Research Summary, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, November 2013).
- ⁵ This article uses female pronouns when referring to victims and masculine pronouns when referring to accused persons. This is not to deny that men can be victims of rape or that women can be perpetrators, nor to perpetuate myths of female victimisation and male aggression. Rather, it is to properly reflect the fact that women are far more likely to be victims of rape (84% of reported sexual assaults in Australia (2022)) and that most rapists are men (93% of reported sexual assaults in Australia (2021–22)): Australian Bureau of Statistics, *Recorded Crime — Victims* (Catalogue No 4510.0, 29 June 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>>; Australian Bureau of Statistics, 'Recorded Crime: Offenders, 2021–22' (Catalogue No 4519.0, 09 February 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/2021-22#data-downloads>>.

This article explores the extent to which prosecution and defence counsel mobilise myths of force and resistance in South Australian rape trials. Further, it observes how the judiciary responds to the use of force and resistance narratives and argues that the judicial condoning of these myths reinforces harmful stereotypes of rape victims. This article is not, however, concerned with analysing how the use of, or judicial reference to, force and resistance myths impact guilty verdicts. Instead, it aims to criticise the law's failure to reflect feminist concerns. It additionally seeks to provide an empirical basis for South Australia to improve its justice responses for rape victims.⁶

The engagement of force and resistance narratives at trial by both the prosecution and defence leaves intact the myth that a victim will resist unless and until she is overpowered by force.⁷ Repeated use of this myth can potentially influence the respective decisions of other victims, police or prosecutors to report, investigate or prosecute.⁸ It can also have negative implications for primary victims. The justice needs of victims can extend beyond a successful verdict and encompass the totality of a victim's experience in the criminal justice system, including the need to be heard, believed and have control over her story.⁹ A contest, for example, over whether a victim's resistance was 'adequate', may place the onus upon victims to prove their own rapes, potentially shaming victims whose responses do not conform to 'expectations' or ideals.¹⁰ Thus, the deployment of force and resistance myths in trials may re-traumatise and re-victimise victims.¹¹

⁶ See also: Kathleen Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' (Issues Paper No 12, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2011); Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending: Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, RMIT University, May 2014).

⁷ Julia Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23, 31 ('Re-Framing the Rape Trial').

⁸ Mary White Stewart, Shirley A Dobbin and Sophia I Gatowski, "'Real Rapes" and "Real Victims": The Shared Reliance on Common Cultural Definitions of Rape' (1996) 4(2) *Feminist Legal Studies* 159, 159; Jacqueline M Wheatcroft, Graham F Wagstaff and Annmarie Moran, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) *Victims and Offenders* 265, 272–5. See Rebecca Campbell et al, 'Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers' (2001) 16(12) *Journal of Interpersonal Violence* 1239, 1240–1.

⁹ See, eg: Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 574; Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No 27, Australian Institute of Family Studies, April 2014) 21–3.

¹⁰ Susan Estrich, 'Rape' (1986) 95(6) *Yale Law Journal* 1087, 1098; Mary P Koss, 'Blame, Shame, and Community: Justice Responses to Violence against Women' (2000) 55(11) *American Psychologist* 1332, 1345–6; Stewart, Dobbin and Gatowski (n 8) 161. See also Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 34–5.

¹¹ See, eg, Herman (n 9) 582.

Reliance on such narratives remains problematic even when a case is successfully decided for the prosecution as it reinforces the effectiveness of relying upon such myths and legitimises their use by defence counsels.¹² This article, therefore, fits within the broader body of feminist research exploring the ways the criminal justice system can re-victimise the victims it ostensibly seeks to protect, with what some have described as akin to a secondary rape.¹³

Before analysing the case law in detail, Part II considers the trajectory of force and resistance narratives in historical definitions of rape to provide context for their contemporary endurance before briefly explaining the legal elements of the crime in South Australia. Parts III and IV thereafter will explore how narratives of force and resistance emerged in the case law, particularly their utilisation in either negating or establishing a mistaken belief in consent. Overall, this article evidences feminist concerns regarding the legal reliance upon and endorsement of force and resistance narratives and argues that South Australia's laws continue to constrain justice outcomes for victims of rape.

A Methodology

The cases discussed in this article were identified by searching the South Australian reported cases in the LexisNexis,¹⁴ WestLaw¹⁵ and Australasian Legal Information Institute (AustLII)¹⁶ databases for references to ss 46, 47 and 48 of the *Criminal Law Consolidation Act 1935* (SA) ('CLCA') and keywords such as 'rape' and 'consent'. The search was limited to adult rape cases decided between 2012 and 2023 to limit the sample size and to consider the most recent application of the relevant sections. The sampling framework drew from both judge-only trials and appellate decisions. The reasoning for this was twofold. First, District and Supreme Court decisions are publicly available on the databases, while there is no record of judgment for jury trials. Secondly, drawing from trial and appellate judgments provided a larger sampling pool. This search method returned a dataset of 48 cases. A full list of the cases is contained in Appendix A.

¹² Quilter, 'Re-Framing the Rape Trial' (n 7) 31. See also Wendy Larcombe, 'The "Ideal" Victim v Successful Rape Complainants: Not What You Might Expect' (2002) 10(2) *Feminist Legal Studies* 131, 132. But see Ellen Daly, *Rape, Gender and Class: Intersections in Courtroom Narratives* (Palgrave Macmillan, 2022) 20–1.

¹³ Morrison Torrey, 'When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions' (1991) 24(4) *UC Davis Law Review* 1013, 1030; Campbell et al (n 8) 1240–1.

¹⁴ 'LexisNexis Australia', *LexisNexis* (Web Page) <<https://www.lexisnexis.com.au/en>>.

¹⁵ 'Westlaw', *Westlaw* (Web Page) <<https://austlii.thomsonreuters.com>>.

¹⁶ 'Australasian Legal Information Institute', *Australasian Legal Information Institute* (Web Page) <<http://www.austlii.edu.au/>>.

After the sample group was gathered, cases were coded and analysed using thematic and systematic content analysis. Systematic content analysis in legal research is a technique whereby a wide set of judicial texts are read to find patterns and common themes.¹⁷ Systematic content analysis does not ‘explicitly aim to evaluate the legal correctness of judicial opinions’.¹⁸ Rather, it seeks to systematically and objectively document patterns or trends in cases.¹⁹ Likewise, a thematic analysis aims to identify, analyse, organise and describe patterns within a dataset to locate specific themes.²⁰ Given the focus on force and resistance narratives, cases were read and coded using keywords such as ‘resistance’, ‘force’, ‘injuries’, and ‘violence’.

Force and resistance narratives were raised in 37 of the 48 cases. Fourteen cases were chosen as warranting detailed discussion in this article. Eleven of the 14 cases selected were from judge-only trials. They were chosen because they contained detailed summaries of counsel submissions and significant judicial comments regarding force and resistance narratives. Three appeal decisions were chosen because they concerned a mistaken belief in consent, provided sufficient insight into issues at trial, and featured judicial discussion regarding force and resistance. Of the remaining cases, many offered only partial insight into trial issues or concerned appellate procedural issues. A decision was also made to omit some cases for brevity.

II RAPE LAWS HISTORICALLY: FROM A PROPERTY CRIME TO CONSENT

This Part explores the trajectory of rape’s criminalisation within the Western legal tradition — from a property crime to its current consent-based definition — to explain the perseverance of force and resistance myths in contemporary rape trials. Understanding the historical reasons for rape’s criminalisation will contextualise the continual reliance on expectations of force and resistance in rape trials.

¹⁷ Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96(1) *California Law Review* 63, 64. See also: Or Brook, ‘Politics of Coding: On Systematic Content Analysis of Legal Text’ in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar, 2022) 109, 120–1. See generally Deborah Finfgeld-Connett, ‘Use of Content Analysis To Conduct Knowledge-Building and Theory-Generating Qualitative Systematic Reviews’ (2014) 14(3) *Qualitative Research* 341.

¹⁸ Hall and Wright (n 17) 88.

¹⁹ Ibid 66, 88.

²⁰ Jennifer Morey Hawkins, ‘Thematic Analysis’ in Mike Allen (ed), *The SAGE Encyclopedia of Communication Research Methods* (SAGE Publications, 2018) 1756; Lorelli S Nowell et al, ‘Thematic Analysis: Striving To Meet the Trustworthiness Criteria’ (2017) 16(1) *International Journal of Qualitative Methods* 1, 2.

Susan Brownmiller provided the first extensive feminist account of rape's history, arguing that rape was initially criminalised to protect male property interests in women.²¹ According to Brownmiller, the physical and imagined threat of rape has, for history, kept women in a state of fear.²² The price of male protection from this threat was the imposition of virginity, chastity and fidelity, a woman's adherence to which became valuations of her virtue.²³ By binding a woman's worth to her chastity, she was reduced to the sexual property of men.²⁴ Laws around rape emerged to punish those who harmed another man's property.²⁵ Rape laws therefore mandated an element of force to prove the victim was 'taken away' from her lawful male owner.²⁶ Active resistance was necessary to show not only that she was taken forcefully but to demonstrate that she had tried in the utmost to protect her chastity.²⁷

English common law continued to reflect this idea of women as property. The requirements of force and resistance were absorbed within the 17th-century definition

²¹ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Random House, 1975) 18–22. The literature reviewed in this Part is from Western, white feminists in the Global North. While women's status as property under the patriarchy is largely accepted within the white feminist, anti-rape movement, it has been criticised by Black feminists for its failure to address the history of rape as experienced by women of colour. Rather, in its reckoning of rape's history, the feminist movement has defaulted to the experience and interests of white women and applied that experience unilaterally. It was Black feminists who showed how the history of colonialism, imperialism and slavery intersected with patriarchal norms and expectations with respect to sex to further oppress and de-humanise Black women: see: Angela Y Davis, 'Rape, Racism and the Capitalist Setting' (1981) 12(6) *Black Scholar* 39; Deborah K King, 'Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology' (1988) 14(1) *Signs: Journal of Women in Culture and Society* 42; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241; Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1(1) *Australian Feminist Law Journal* 27; bell hooks, *Ain't I a Woman: Black Women and Feminism* (Routledge, rev ed, 2015).

²² Brownmiller (n 21) 15.

²³ Susan Griffin, 'Rape: The All-American Crime' (1971) 10(3) *Ramparts* 26, 30; Brownmiller (n 21) 17; McGregor, *Is It Rape?* (n 1) 29. See also Barbara Toner, *The Facts of Rape* (Hutchinson, 1977) 86.

²⁴ Griffin (n 23) 30; McGregor, *Is It Rape?* (n 1) 3.

²⁵ Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England, 1770–1845* (Pandora, 1987) 24; McGregor, *Is It Rape?* (n 1) 3; Julia Quilter, 'From Raptus to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2(1) *Law and History* 89, 101 ('From Raptus to Rape').

²⁶ See Quilter, 'From Raptus to Rape' (n 25) 97.

²⁷ McGregor, *Is It Rape?* (n 1) 29; Sara Buck Doude, 'History of Rape' in Frances P Bernat and Kelly Frailing (eds), *The Encyclopedia of Women and Crime* (John Wiley & Sons, 2019) 1, 3. See: Griffin (n 23) 32; Anne M Coughlin, 'Sex and Guilt' (1998) 84(1) *Virginia Law Review* 1, 8.

of rape as ‘carnal knowledge of a woman forcibly and against her will’.²⁸ Force was equated with the level of physical violence necessary to overcome a woman’s active resistance.²⁹ Evidence of injuries, torn clothing or cries for help corroborated her resistance.³⁰ Not only did such evidence demonstrate the breaking of a woman’s will, but it placated the courts (and society) that she was not complicit in her violation and, therefore, worthy of protection.³¹

The offence of rape in Australian criminal law retained its English origins and it was only in the 1970s that rape laws in Australia began to shift towards a statutory definition based on consent, with South Australia being one of the first jurisdictions to reform its laws.³² Rape is now defined in South Australia as sexual intercourse without consent.³³ Consent is further defined as free and voluntary agreement.³⁴ The adoption by the Australian jurisdictions of a statutory definition of consent was intended to move beyond the historical focus on a victim’s resistance and instead emphasise the sexual autonomy of the parties to agree to have sex freely.³⁵

The *CLCA* also includes a list of vitiating factors where consent is deemed to be negated.³⁶ For example, a person is taken not to consent freely and voluntarily if they agree because of ‘the application of force or an express or implied threat of the application of force’.³⁷ The legislative intention for the inclusion of circumstances where consent is vitiated was to recognise that ‘sexual offending often occurs in situations where there is unlikely to be any physical sign of violence’.³⁸ Amendments were made to the *Evidence Act 1929* (SA) (*‘Evidence Act’*) to reflect this, and trial judges must now direct a jury when necessary that a person is not to be regarded

²⁸ William Blackstone, *Commentaries on the Laws of England: Of Public Wrongs*, ed Ruth Paley (Oxford University Press, 2016) bk 4, 139 [209]; Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736) vol 1, 628.

²⁹ Estrich (n 10) 1105; Garthine Walker, ‘Rereading Rape and Sexual Violence in Early Modern England’ (1998) 10(1) *Gender and History* 1, 8; McGregor, *Is It Rape?* (n 1) 29. See also Griffin (n 23) 32.

³⁰ Quilter, ‘From *Raptus* to Rape’ (n 25) 98; Doude (n 27) 2.

³¹ McGregor, *Is It Rape?* (n 1) 29; Doude (n 27) 2.

³² Gail Mason, ‘Reforming the Law of Rape: Incursions into the Masculinist Sanctum’ in Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives of Law in Australia* (Oxford University Press, 1995) 51, discussing Moira Carmody, ‘A Historical Look at Attitudes to Rape’ in Jan Breckenridge and Moira Carmody (eds), *Women, Violence and Social Control* (Allen & Unwin, 1992) 7–17. See, eg, *Criminal Law Consolidation Act Amendment Act 1976* (SA).

³³ *Criminal Law Consolidation Act 1935* (SA) s 48 (*‘CLCA’*).

³⁴ *Ibid* s 46(2).

³⁵ Julia Quilter, ‘Getting Consent “Right”: Sexual Assault Law Reform in New South Wales’ (2020) 46(2) *Australian Feminist Law Journal* 225, 227.

³⁶ *CLCA* (n 33) s 46(3).

³⁷ *Ibid* s 46(3)(a)(i).

³⁸ South Australia, *Parliamentary Debates*, Legislative Council, 26 February 2008, 1756 (Paul Holloway).

as having consented merely because they did not say or do anything to indicate non-consent, protest or physically resist, or sustain physical injuries.³⁹

The crime of rape requires proof of a mental element. In South Australia, for example, the prosecution must prove that the accused acted with knowledge of or was reckless as to non-consent.⁴⁰ Knowledge is a subjective test.⁴¹ It requires proof beyond reasonable doubt that an accused knows the victim was not consenting. Recklessness has three alternative meanings in the *CLCA*: (1) an accused is aware of the possibility of non-consent or the withdrawal of consent and decides to proceed regardless of that possibility;⁴² (2) an accused is aware of the possibility of non-consent or the withdrawal of consent and fails to take reasonable steps to determine consent or its withdrawal;⁴³ or (3) an accused gives no thought as to consent or whether consent has been withdrawn.⁴⁴

The mental element of the offence may be negated where an accused mistakenly but honestly believes the victim is consenting.⁴⁵ That is, even where the prosecution can prove non-consent, an honest belief that consent was nonetheless present may negate criminal responsibility when such a belief is inconsistent with the requisite state of mind necessary to prove rape. At common law, a mistaken belief needs only to be honestly held, it does not need to be reasonable.⁴⁶ While the common law has been modified by statute in all other Australian jurisdictions to encompass a test of reasonableness,⁴⁷ s 47 of the *CLCA* does not impose such a test.

While the South Australian government initially canvassed the introduction of an objective test,⁴⁸ it was emphatically rejected⁴⁹ after consultations indicated support for retaining the subjective, common law approach.⁵⁰ Accordingly, the common law

³⁹ *Evidence Act 1929* (SA) s 34N(1)(a)(i)–(iii) (*‘Evidence Act’*).

⁴⁰ *CLCA* (n 33) s 48(1)–(2).

⁴¹ Mary Heath and Kellie Toole, ‘Sexual Offences’ in David Caruso et al, *South Australian Criminal Law and Procedure* (LexisNexis Butterworths, 2nd ed, 2016) 263, 279 [7.39].

⁴² *CLCA* (n 33) s 47(a).

⁴³ *Ibid* s 47(b).

⁴⁴ *Ibid* s 47(c).

⁴⁵ *DPP v Morgan* [1976] AC 182.

⁴⁶ *Ibid* 202–3 (Lord Cross).

⁴⁷ *Crimes Act 1900* (ACT) ss 67(4)–(5); *Crimes Act 1900* (NSW) s 61HK; *Criminal Code Act 1983* (NT) ss 32, 43AW; *Criminal Code Act 1899* (Qld) s 24; *Criminal Code Act 1924* (Tas) s 14A(1); *Crimes Act 1958* (Vic) ss 36A, 38(1)(c); *Criminal Code Act Compilation Act 1913* (WA) s 24.

⁴⁸ See South Australia, *Parliamentary Debates*, Legislative Council, 1 April 2008, 2170 (Robert Lawson).

⁴⁹ *Ibid* 2170–1 (Paul Holloway).

⁵⁰ South Australia, *Parliamentary Debates*, House of Assembly, 12 February 2008, 1894–5 (Isobel Redmond).

position that an accused must be acquitted if he can show that he had a genuine but mistaken belief in consent, notwithstanding the objective unreasonableness of that belief, was codified.⁵¹ Thus, despite some academic conjecture,⁵² South Australia is the only state or territory in Australia that maintains the common law test of an honest but mistaken belief in consent.

The following Parts observe how myths of force and resistance emerge within the case law. Part III focuses on prosecutorial constructions of force and resistance myths as evidence of both non-consent and to negate reliance by an accused on a mistaken belief in consent. Part IV will explore how accused persons may rely upon the absence of force and/or resistance to create the factual foundation for their mistaken belief in consent. Both Parts analyse how judicial treatment of force and resistance myths may reinforce harmful stereotypes regarding rape and its victims.

III PROSECUTORIAL NARRATIVES OF FORCE AND RESISTANCE

To establish a lack of consent and pre-empt reliance on a mistaken belief in consent, prosecutors may emphasise evidence of resistance as proof that the victim's non-consent was communicated to the accused.⁵³ For example, in the cases of *R v K, JS* ('*K, JS*'),⁵⁴ and *R v Coutts* ('*Coutts*'),⁵⁵ prosecutors relied upon the victim's active resistance to establish the physical elements of the crime beyond reasonable doubt and to prove that the accused could not have been unaware of the possibility of her non-consent.⁵⁶

In *K, JS*,⁵⁷ for example, the prosecution case at first instance was that, in the face of abuse and threats of violence, the victim verbally made her lack of consent clear by repeatedly saying 'please stop', 'don't hurt me' and 'I don't want to do this'.⁵⁸ Her evidence was that she continued to cry and verbally protest but took her clothes off when asked as she was afraid of escalating violence.⁵⁹ When the accused pushed her onto the bed and forced his body weight on her, she tried to push him away and close her legs, but he was too strong and forced his penis into her vagina.⁶⁰ The victim's

⁵¹ See South Australia, *Parliamentary Debates*, Legislative Council, 1 April 2008, 2171 (Paul Holloway).

⁵² See, eg, Andrew Hemming, 'In Search of a Model Provision for Rape in Australia' (2019) 38(1) *University of Tasmania Law Review* 72, 90.

⁵³ See Lani Anne Remick, 'Read Her Lips: An Argument for a Verbal Consent Standard in Rape' (1993) 141(3) *University of Pennsylvania Law Review* 1103, 1111.

⁵⁴ *R v K, JS* [2013] SADC 177 ('*K, JS*').

⁵⁵ *R v Coutts* [2013] SASFC 143 ('*Coutts*').

⁵⁶ See generally Estrich (n 10) 1099.

⁵⁷ This decision was overturned on appeal: *R v Kinnear* [2014] SASFC 30.

⁵⁸ *K, JS* (n 54) [35]–[36].

⁵⁹ *Ibid* [36].

⁶⁰ *Ibid*.

evidence was supported by testimony from her father, who found the victim the next day, as well as by an initial complaint to a registrar.⁶¹

Justice Bampton was satisfied that the victim ‘made it clear by her words and her actions that she did not consent’ and that her acquiescence thereafter (by taking her clothes off) was due to her fear that the accused would apply more force if she did not comply.⁶² Therefore, it was not open for the accused to rely upon a mistaken belief in consent.⁶³ Thus, despite the law not requiring physical or verbal manifestations of resistance, without the victim communicating her non-consent, the accused may have been able to rely upon a lack of resistance as grounding a mistaken belief in consent.

Likewise, the prosecution in *Coutts* relied upon the victim’s evidence of resistance to support her allegations of rape. In *Coutts*, the accused was charged with multiple counts of rape over four months against his partner. The counts ‘were often accompanied by acts of violence’.⁶⁴ The victim’s evidence was that, on each count, she told him she did not want to participate, cried or screamed in pain, requested that he stop or pushed him away.⁶⁵ Given the ongoing nature of the sexual violence, the victim secretly recorded counts 6, 7 and 8 on her phone, which captured the ‘violent and abusive’ events.⁶⁶

The accused was found guilty of eight counts of rape and one of assault.⁶⁷ On appeal, he argued that the trial judge had misrepresented to the jury that the critical issue at trial was non-consent.⁶⁸ Rather, the accused argued that even if the prosecution could prove non-consent beyond a reasonable doubt, the issue was whether he was honestly mistaken as to consent.⁶⁹ The Court of Criminal Appeal of South Australia dismissed this argument, stating that if the jury accepted the victim’s evidence regarding the nature of the events, as verified by her recordings, ‘then there could be no question of belief in consent’.⁷⁰ That is, if the jury accepted the victim’s evidence of his violence and her resistance, and they were satisfied beyond reasonable doubt that it was not consensual, then it must convict because ‘it must have been obvious that she was not consenting and the accused must clearly have been aware that she was not consenting’.⁷¹ The use of the word ‘obvious’ in this case

⁶¹ Ibid [96].

⁶² Ibid.

⁶³ Ibid.

⁶⁴ *Coutts* (n 55) [17], [20].

⁶⁵ Ibid [32]–[38].

⁶⁶ Ibid [20], [36]–[37].

⁶⁷ Ibid [17].

⁶⁸ Ibid [31].

⁶⁹ Ibid.

⁷⁰ Ibid [37] (Vanstone J, Sulan and Blue JJ agreeing at [1]).

⁷¹ Ibid [40], quoting the trial judge.

and ‘clear’⁷² in *K, JS* imply that the onus is on victims to patently demonstrate their resistance, as without this, it is more arduous for the prosecution to prove not only the physical elements of rape but also that an accused was aware he was committing a crime.

These cases demonstrate how expectations of active resistance remain ‘an unacknowledged yardstick for courts when evaluating evidence of force and consent’.⁷³ Judicial expectations of active resistance continue to receive support in 2023, where Judge Tracey, in the case of *R v Esposito* (*Esposito*),⁷⁴ found the accused not guilty because she could not ‘be satisfied beyond reasonable doubt that [the victim] told the accused she was not having sex with him’.⁷⁵ Judicial comments such as this endorse legal and societal myths that ‘legitimate’ victims will resist rape. This endorsement by the judiciary justifies prosecutorial and defence deference to force and resistance narratives, which can hinder other victims’ decisions to report and/or proceed to trial. Additionally, the focus on and expectation of resistance requires the victim to, in essence, prove her rape. This ensures legal and societal scrutiny remain on her actions and behaviour rather than on the accused’s alleged culpability, effectively placing the victim on trial and potentially contributing to her secondary victimisation.⁷⁶

Where there is limited or insufficient evidence of resistance, however, the prosecution may instead focus on the accused’s acts of violence to explain why a victim did not resist, as well as prevent the accused from relying upon her lack of resistance to ground his mistaken belief in consent. For example, in the cases of *R v Thorpe* (*Thorpe*)⁷⁷ and *R v L, J* (*L, J*),⁷⁸ the prosecution used each accused’s history of violence to ‘excuse’ the absence of resistance and prove his awareness of non-consent beyond a reasonable doubt. While judicial recognition of circumstances whereby victims cannot resist may prove useful in individual cases — for example, when they are ‘inured to violence and mistreatment ... [causing them] to react in a way that a person from a more normal domestic relationship would not’⁷⁹ — it reinforces the

⁷² *K, JS* (n 54) [92], [96].

⁷³ Remick (n 53) 1113.

⁷⁴ *R v Esposito* [2023] SADC 64 (*Esposito*).

⁷⁵ *Ibid* [102], [108], [110].

⁷⁶ Torrey (n 13) 1030; Coughlin (n 27) 16; Bluett-Boyd and Fileborn (n 9) 12. See also: Wheatcroft, Wagstaff and Moran (n 8); Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, 2018).

⁷⁷ *R v Thorpe* [2016] SADC 25 (*Thorpe*).

⁷⁸ *R v L, J* [2018] SADC 143 (*L, J*).

⁷⁹ *Ibid* [168]. See also Louise Ellison and Vanessa E Munro, ‘Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) *International Journal of Evidence and Proof* 299, 315 (*‘Better the Devil You Know?’*).

myth that the ‘normal’ response to rape is to resist.⁸⁰ Therefore, women in ‘normal domestic relationships’ may have fewer excuses not to follow these expectations.

In the case of *L, J*, the accused was charged with six counts of assault, rape, and sexual manipulation.⁸¹ The victim gave evidence of a sexual relationship framed by the accused’s jealousy, abuse and violence.⁸² The counts of rape, she said, were initiated by his threats and were physically violent.⁸³ During examination-in-chief, the victim said she submitted to the sexual acts because she was forced to.⁸⁴ While the accused admitted he was violent towards the victim, he denied the counts of rape and said she ‘liked it “rough”’.⁸⁵ Before the trial, the prosecution sought to tender evidence of the accused’s uncharged acts of violence against the victim to, *inter alia*, ‘explain why she submitted to the accused in relation to the sexual offences’.⁸⁶ Judge Millstead allowed the evidence of ongoing, prior violence because ‘[her] failure ... to resist him on the charged occasions c[ould] only be properly understood in the light of the history of abusive conduct to which she was subjected’.⁸⁷ This suggests, therefore, that if the charged offences were the only (admissible) allegations of violence, the victim’s evidence of non-consent may have been dismissed as unreliable, and it was only the accumulation of violent acts that supported her testimony, thereby ‘justifying’ her lack of resistance.

Overall, Judge Millstead accepted the victim’s evidence in this case.⁸⁸ Given the accused’s threats and violence, his Honour was satisfied that the accused must have known of her lack of consent or was, at the very least, recklessly indifferent to it.⁸⁹ It is difficult, however, to envisage a situation where an accused could threaten and physically assault someone and not be at the very least conscious that she may not be consenting, suggesting that the threshold to prove knowledge is a substantial one. This is discussed further in Part IV.

Similarly, in the case of *Thorpe*, the victim and accused’s relationship was defined by frequent incidents of violence and threats.⁹⁰ With respect to the charged offences, the victim gave evidence that the accused broke into her house, was acting aggressively, threatened her with a knife and pestered her for sex.⁹¹ She gave evidence

⁸⁰ Cf Fiona Mason and Zoe Lodrick, ‘Psychological Consequences of Sexual Assault’ (2013) 27(1) *Best Practice and Research Clinical Obstetrics and Gynaecology* 27.

⁸¹ *L, J* (n 78) [1].

⁸² *Ibid* [9]–[10].

⁸³ *Ibid* [67]–[68], [74]–[76].

⁸⁴ *Ibid* [76].

⁸⁵ *Ibid* [68], [105]–[107].

⁸⁶ *Ibid* [138].

⁸⁷ *Ibid* [146].

⁸⁸ *Ibid* [159]–[161].

⁸⁹ *Ibid* [170].

⁹⁰ *Thorpe* (n 77) [33].

⁹¹ *Ibid* [50]–[53], [58], [60].

of repeated verbal resistance, but as she was terrified of being killed or stabbed, she ‘essentially capitulated’.⁹² Her evidence was that, ‘to calm him down I just submitted to him ... I did not want to be doing [it], I couldn’t see another way out’.⁹³

The accused testified of multiple acts of anger and violence towards the victim, including threats to kill her or inflict self-harm.⁹⁴ He had previously been charged with offences of property damage, assault and breaching an intervention order.⁹⁵ He admitted that on the day of the incident, he ‘pestered [the victim] a little bit, maybe even begged her a little bit, for sex’.⁹⁶ When she declined, he got angry, struck her car and threatened to kill himself.⁹⁷ However, when he went into the victim’s bedroom thereafter, he said she followed him, closed the door and turned off the light.⁹⁸ He said he took this to mean that she wanted to have sex.⁹⁹

Overall, Judge Stretton was satisfied that the victim’s lack of consent was evidenced by her repeated refusals in light of his threats and her tears throughout.¹⁰⁰ His Honour was likewise satisfied that the accused knew the victim ‘was complying *only* because he had threatened to kill her and was continuing to threaten her’.¹⁰¹ If the accused had not threatened the victim, Judge Stretton’s comment implies that he may have been able to rely upon myths of seduction and token resistance to justify his belief in consent.

Seduction myths regard men as sexual aggressors and women as passive participants, where the latter will offer token resistance to sex to maintain their roles as sexual gatekeepers.¹⁰² These myths presume it reasonable for men to try to overcome

⁹² Ibid [63], [65]–[73]. Her evidence was that she continued saying ‘no’ and was crying throughout the sexual activity.

⁹³ Ibid [35]–[36].

⁹⁴ Ibid [132]–[136], [139], [142]–[143], [150]–[155].

⁹⁵ Ibid [135], [143].

⁹⁶ Ibid [166].

⁹⁷ Ibid [166]–[168], see [170].

⁹⁸ Ibid [169], [171].

⁹⁹ Ibid [171].

¹⁰⁰ Ibid [222], [224].

¹⁰¹ Ibid [222] (emphasis added), see also [224].

¹⁰² Lois Pineau, ‘Date Rape: A Feminist Analysis’ (1989) 8(2) *Law and Philosophy* 217, 224, 228; McGregor, *Is It Rape?* (n 1) 207; Louise Ellison and Vanessa E Munro, ‘Of “Normal Sex” and “Real Rape”’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation’ (2009) 18(3) *Social and Legal Studies* 291, 295 (‘Of “Normal Sex” and “Real Rape”’); Katie M Edwards et al, ‘Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change’ (2011) 65(11–12) *Sex Roles* 761, 765; Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2nd ed, 2018) 99; Burgin (n 3) 301. See also Charlene L Muehlenhard and Marcia L McCoy, ‘Double Standard/Double Bind: The Sexual Double Standard and Women’s Communication about Sex’ (1991) 15(3) *Psychology of Women Quarterly* 447, 449.

a woman's initial reluctance, and in the absence of subsequent, resolute resistance, her consent may reasonably be inferred from her inaction or submission.¹⁰³ That is, the victim can say 'no' (although not a requirement to prove non-consent), and an accused may rely upon his powers of 'seduction' to satisfy himself that she did, in fact, consent.¹⁰⁴ The problem is that women may suffer what men term 'seduction' as rape.¹⁰⁵ Judge Stretton's comments in *Thorpe* that it was only the threat of overt violence which explained the victim's acquiescence, therefore, suggests that the line between seduction and rape is pegged at the accused's violence rather than at a woman's desires, as it was his violence in this case which turned his attempts at seduction from an excusable mistake to rape under the law.

The case of *R v Tennant* ('*Tennant*')¹⁰⁶ provides a further example whereby the prosecution framed its case around an accused's violence to mitigate the latter's reliance on a mistaken belief in consent. In this case, the accused was charged with one count of aggravated assault and two counts of rape.¹⁰⁷ The victim gave evidence of two days of violence, rape and imprisonment in the accused's house before she freed herself and approached police.¹⁰⁸ Her evidence was that she constantly said 'no', screamed at the accused, struggled to escape, told him she had her period and physically resisted.¹⁰⁹ Evidence of her physical injuries was confirmed by police recordings as well as through forensic medical evidence.¹¹⁰ The defence conceded that the physical elements of the offences were proven but disputed that the accused had the relevant state of mind.¹¹¹ His counsel submitted that 'comments made by the accused of "making love" and his actions at the time, are such as to give rise to a reasonable doubt the [sic] he knew the [victim] was not consenting'.¹¹² Defence counsel further argued that the accused's calm moods, when contrasted with the victim's evidence of his explosive behaviour during the incident, indicated a person with minimal capacity to reason when in a heightened state, thereby suggesting that he could have honestly been mistaken as to consent.¹¹³

Judge Davison stated that it may have been possible to infer from the accused's comments that he thought he was engaging in consensual intercourse.¹¹⁴ However, her Honour was ultimately satisfied that there was sufficient evidence of

¹⁰³ McGregor, *Is It Rape?* (n 1) 209; Cossins (n 3) 470–2.

¹⁰⁴ Pineau (n 102) 220–1.

¹⁰⁵ Ibid 222–5; Powell et al (n 3) 459–60.

¹⁰⁶ *R v Tennant* [2021] SADC 95 ('*Tennant*').

¹⁰⁷ Ibid [5], [7].

¹⁰⁸ Ibid [23]–[39].

¹⁰⁹ Ibid [30].

¹¹⁰ Ibid [49], [54], [59]–[63], [65]–[66].

¹¹¹ Ibid [73].

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid [83].

force¹¹⁵ and resistance¹¹⁶ to prove beyond reasonable doubt that the accused knew the victim was not consenting.¹¹⁷ The totality of the evidence of the accused's physical force and violence, coupled with the victim's physical and verbal resistance, satisfied her Honour that the accused was not confused or mistaken.¹¹⁸ However, without the supporting police, medical and forensic evidence substantiating the victim's physical injuries and emotional distress post-incident, her Honour may have been more inclined to accept the accused's belief in consent, particularly as there was no prior history of physical violence.¹¹⁹ Thus, where a victim's testimony of force and/or resistance is not supported by evidence or a history of violence, accused persons may be able to rely upon a mistaken belief based on little more than their internal state of mind. This is expanded upon in Part IV.

These cases demonstrate how prosecutors may use narratives of resistance, buttressed by evidence of physical injuries, continued abuse, or acts of violence, to establish both non-consent and an accused's awareness of this. While this may be a successful prosecution strategy, when rape laws are viewed holistically, acceptance by the judicial system of these narratives can continue to blame and shame victims when their rape does not conform to these expectations.¹²⁰ This was reflected in the comments of Kelly J in the case of *R v H, R* ('*H, R*').¹²¹ In this case, her Honour accepted the victim's evidence that she was restrained by the accused while they had sex, and this caused her extensive physical injuries.¹²² However, her Honour was 'unsure what to make of [the victim's] silence throughout the episode' given her sexual history with the accused, insinuating instead that the victim felt 'shame about the situation she found herself in' in not making her lack of consent clear.¹²³ The victim was, therefore, blamed for not responding 'assertively and decisively'¹²⁴ and thus presumed to be consenting.

Judicial statements such as those by Kelly J in *H, R*, and Judge Millsteed in *L, J*, reinforce presumptions of resistance in the absence of a history of physical violence.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid [84].

¹¹⁸ Ibid [90].

¹¹⁹ Ibid [42].

¹²⁰ Craig (n 76) 10–11. For similar findings regarding implicit judicial acceptance of rape narratives, see: Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) *Feminist Criminology* 205, 218–21; Burgin (n 3) 305–7. For a discussion on the shame and blame inherent in the adversarial trial, see Koss (n 10) 1335.

¹²¹ *R v H, R* [2017] SASC 67 ('*H, R*').

¹²² Ibid [32]–[34].

¹²³ Ibid [26], [35].

¹²⁴ Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41(4) *Akron Law Review* 865, 880.

This suggests that the absence of resistance may be explainable in circumstances of ongoing violence or abuse. However, the further a situation deviates from this, the greater the responsibility placed upon victims to show that they made an accused aware of their non-consent by resisting. This not only fails to recognise the plurality of reasons why victims may not resist or express a lack of consent (discussed below) but also is contradictory to the legally recognised principle that a person must not be deemed to have consented to sexual activity merely because they did not resist or say anything to indicate non-consent.¹²⁵

IV DEFENCE NARRATIVES OF A MISTAKEN BELIEF IN CONSENT

While the prosecution may use force and resistance myths to establish the physical elements of rape beyond a reasonable doubt, they may also be used by accused persons to create reasonable doubt that they possessed the requisite state of mind necessary for the offence. As the cases below demonstrate, a victim's passive compliance, particularly when there is no 'violence', may be sufficient to ground an accused's belief in consent, thereby creating reasonable doubt that he possessed the requisite state of mind. This permits finders of fact to find simultaneously that non-consensual intercourse occurred but that the accused was not legally culpable because he believed, due to her lack of resistance, that she was consenting.

This is seen in the case of *R v Moores* ('*Moores*'),¹²⁶ where the accused relied upon the victim's less-than-forceful resistance to support his mistaken belief in consent. In this case, the accused was charged with three counts of rape and one count of intent to cause harm.¹²⁷ He agreed that two counts of intercourse had occurred but said he had believed them to be consensual.¹²⁸ He denied the occurrence of counts 3 and 4.¹²⁹ At first instance, the accused was found guilty of counts 3 and 4 but not guilty of counts 1 and 2.¹³⁰ He appealed on the basis, inter alia, that the guilty verdicts were inconsistent with the not guilty verdicts because if the jury had accepted his evidence as truthful with respect to counts 1 and 2, then there was a reasonable possibility that he was telling the truth with respect to counts 3 and 4.¹³¹

However, the Court of Criminal Appeal found that the verdicts could be reconciled.¹³² With respect to counts 3 and 4, the evidence between the victim and accused was divergent. That is, the accused denied they occurred at all. Thus, it was

¹²⁵ *Evidence Act* (n 39) s 34N(1)(a)(i)–(ii).

¹²⁶ *R v Moores* (2017) 128 SASR 340 ('*Moores*').

¹²⁷ *Ibid* 343 [9].

¹²⁸ *Ibid* 345 [15]–[16].

¹²⁹ *Ibid* 375 [192].

¹³⁰ *Ibid* 343 [9].

¹³¹ *Ibid* 375 [191]–[192].

¹³² *Ibid* 375 [195] (Blue J, Vanstone J agreeing at 343 [7], Doyle J agreeing at 376 [199]).

open to the jury to accept that the victim was truthful on these counts.¹³³ In contrast, the critical issue with respect to counts 1 and 2 was consent. Therefore, the Court of Criminal Appeal found it was open for the jury to have accepted the victim's evidence that she did not consent to these counts but to have retained doubt 'that a lack of consent was communicated to and understood by the [accused]'.¹³⁴ This is a mistake of law as there is no requirement in South Australian law that a lack of consent be communicated to an accused. On the contrary, jury directions specifically note that a person is not to be regarded as having consented merely because they did not say or do anything to indicate non-consent.¹³⁵

In any event, the prosecution's case was that the victim resisted counts 1 and 2 by making her body rigid, manoeuvring away from the accused, pushing his penis away and telling him to stop.¹³⁶ Nonetheless, the Court found it was open for the jury to accept the possibility that the accused believed the victim was consenting, particularly as she had consented to prior acts of intercourse with him and had not communicated her lack of consent to counts 1 and 2 verbally, 'but only by bodily movements'.¹³⁷ Therefore, the accused could rely upon the victim's inadequate resistance to ground his mistaken belief in consent, blaming the victim for not communicating her non-consent sufficiently.¹³⁸ Further, he was also dispelled from the requirement to seek fresh consent for each new sexual activity.¹³⁹

Likewise, in the case of *R v Sultani*, the accused was able to rely upon the victim's 'insufficient' resistance as the basis for his mistaken belief in consent.¹⁴⁰ In this case, the victim and accused were having an affair for a period of seven months.¹⁴¹ When the relationship ended, the victim's evidence was that the accused forced her into sexual activity, repeatedly threatened to distribute sexual images of her, threatened her with a knife, to kill her, to report her visa status and to tell her husband of their affair.¹⁴² While Judge Cuthbertson agreed that the victim was subject to an ongoing threat that the accused would release photographs of her, his Honour had doubts, inter alia, as to the accused's knowledge or recklessness regarding her lack of consent.¹⁴³ In particular, the victim said she had either gone along with the sexual

¹³³ Ibid 375 [194].

¹³⁴ Ibid 375 [193]–[194].

¹³⁵ *Evidence Act* (n 39) s 34N(1)(a)(i).

¹³⁶ *Moore* (n 126) 345 [15]–[16], [18]. Her testimony was supported by her immediate reports, medical evidence and messages from the accused apologising: at 346 [21]–[24].

¹³⁷ Ibid 375 [194].

¹³⁸ See *Cossins* (n 3) 475.

¹³⁹ Cf *Pineau* (n 102) 230.

¹⁴⁰ *R v Sultani* [2019] SADC 26, [50].

¹⁴¹ Ibid [4], [9].

¹⁴² Ibid [7], [23], [26].

¹⁴³ Ibid [45], [50].

activity or pretended to be happy about it.¹⁴⁴ She said she ‘thought she had no choice but to submit’, that ‘she would ... do whatever he demanded’, and that ‘she would stay with him’.¹⁴⁵ There is no mention of whether the victim verbally or physically resisted to any further degree.

Despite the ongoing threat of the distribution of photographs, as well as threats of violence, Judge Cuthbertson found that the victim’s lack of resistance and ‘happ[iness]’ at ‘go[ing] along’ with the sexual activity was sufficient to cause doubt that the accused was aware of or reckless as to her lack of consent.¹⁴⁶ Thus, the accused could rely upon the victim’s submission in the face of threats to ‘justify’ his belief in consent. This reasoning normalises coercion within heterosexual sex¹⁴⁷ and again forces victims to prove they did not consent, repeatedly blaming and shaming victims when they do not meet this threshold.¹⁴⁸

Comments by Judge Stretton in the case of *R v Austin*¹⁴⁹ likewise suggest that if a victim does not resist at the outset, then the accused may be able to rely upon a mistaken belief in consent to negate the mental element of the crime. In this case, the accused had briefly met the victim during a party at her house.¹⁵⁰ He returned later that night, broke into her house, threatened to stab her and then raped her.¹⁵¹ The victim’s evidence was that she initially screamed and tried to push him off but stopped when she realised it was useless and became passive.¹⁵² His Honour found that, given her active resistance at the outset of the sexual activity, the accused must have known that the victim was not consenting.¹⁵³

However, at some point during the rape, when the victim stopped resisting, Judge Stretton found the accused became merely ‘recklessly indifferent to whether she was consenting, possibly thinking that she might no longer be objecting’.¹⁵⁴ His Honour made this finding ‘on the basis of [the accused’s] conduct immediately after the event, when he sat there talking to her with a degree of normality, as if things might be OK’.¹⁵⁵ This comment suggests that his Honour supposed it conceivable that a person may suddenly, during a rape, change her mind and desire sex with her rapist. This reasoning not only rests on dangerous myths that women enjoy

¹⁴⁴ Ibid [50].

¹⁴⁵ Ibid [22].

¹⁴⁶ Ibid [50].

¹⁴⁷ See Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) 168.

¹⁴⁸ Estrich (n 10) 1098–100. See also Remick (n 53) 1112.

¹⁴⁹ *R v Austin* [2012] SADC 19.

¹⁵⁰ Ibid [21].

¹⁵¹ Ibid [25]–[29].

¹⁵² Ibid [30].

¹⁵³ Ibid [117].

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

rape¹⁵⁶ but also implies that even when faced with violence, the onus remains on victims to continually express their non-consent, notwithstanding the futility or risk of escalation.

Judge Stretton's comments regarding the accused's actions post-rape as indicative of the possibility that he thought the victim was not objecting were echoed by Judge Tracey in *Esposito*. In this case, her Honour did not accept that the accused possessed the requisite state of mind because the victim had not 'told [him] she was not having sex with him'.¹⁵⁷ Rather, she noted that '[i]t did appear that the accused was genuinely surprised by the allegations and somewhat clueless as to what the fuss was about, perhaps a reflection of not having thought much about whether [the victim] was in fact consenting'.¹⁵⁸ These comments place the responsibility on victims to actively evidence their resistance while rewarding ignorance and removing culpability, unless and until an accused's use of force reaches the threshold of violence and abuse as described, for example, in *Coutts*¹⁵⁹ or *Tennant*.¹⁶⁰

The case of *R v Cleland* ('*Cleland*') is a further example whereby the alleged rape was not accompanied by physical threats or violence.¹⁶¹ Accordingly, Judge Griffin conceptualised the victim's passive acquiescence as 'implied consent'.¹⁶² The accused in this case was charged with two counts of rape.¹⁶³ The victim's evidence was that she met the accused while out with friends, and the group attended a party on the river bank.¹⁶⁴ The victim and accused walked along the river path and sat on a footbridge, talking and smoking.¹⁶⁵ She said the accused kissed her, which she said '[s]he was ok with' but conceded 'that alcohol may have played a part in that'.¹⁶⁶ She then alleged two counts of digital and penile penetration, neither of which she said she consented to.¹⁶⁷ The victim's evidence was that she verbally resisted both counts by saying 'no' and 'stop'.¹⁶⁸ She conceded that she did not initially resist in

¹⁵⁶ See: *Estrich* (n 10) 1127; *Edwards et al* (n 102) 765–6.

¹⁵⁷ *Esposito* (n 74) [108]–[109].

¹⁵⁸ *Ibid* [106].

¹⁵⁹ Where the victim was subjected to multiple acts of violent rape and physical abuse over four months, including choking to the point of losing consciousness: *Coutts* (n 55) [20], [32]–[37].

¹⁶⁰ Where the victim was in a coercive relationship culminating in her physical restraint, assault, and rape: *Tennant* (n 106) [42], [83].

¹⁶¹ *R v Cleland* [2012] SADC 42 ('*Cleland*').

¹⁶² *Ibid* [93].

¹⁶³ *Ibid* [1].

¹⁶⁴ *Ibid* [9], [11]–[13].

¹⁶⁵ *Ibid* [15], [19].

¹⁶⁶ *Ibid* [19], [39].

¹⁶⁷ *Ibid* [19]–[20].

¹⁶⁸ *Ibid*.

an angry or demanding tone, but when he persisted, her rejections became angrier and louder.¹⁶⁹

In contrast, the accused's evidence was that 'they were both willing participants' and '[the victim] also appeared to be enjoying it'.¹⁷⁰ It is unclear from the judgment the basis upon which the accused ascertained her enjoyment, but from Judge Griffin's summation of his testimony, it appears that enjoyment was assumed from either her behaviour or lack of resistance as the accused gave no affirmative evidence of her consent or pleasure.¹⁷¹ Importantly, his Honour paraphrased the accused as testifying that '[s]he did not resist, say anything to him to suggest that she did not want him to be touching her that way and he believed that what was happening was consensual'.¹⁷²

Overall, Judge Griffin was sceptical of the victim's testimony and had doubts as to the veracity of her evidence.¹⁷³ His Honour was particularly critical of the victim's failure to say no firmly or in an angry tone, particularly when: she voluntarily went with him to a secluded place; they were acting congenially; there was no overt physical violence; she was flattered he was interested in her; and she consented to kissing.¹⁷⁴ Instead, Judge Griffin found that the accused's version of events, that the physical acts were done with '[the victim's] implied consent', 'appealed to my commonsense' as a 'realistic and sensible account of how the events unfolded'.¹⁷⁵

His Honour's acceptance of the accused's account as 'common sense' reinforces the myth that women can and will actively exercise their sexual autonomy to say 'no' and, further, that if sex is truly unwanted, then forceful resistance is the 'rational' response to the threat of rape. In reality, a woman's ability to express consent or lack thereof is inherently tied to the historical system of unequal power dynamics between men and women,¹⁷⁶ which can make the ability to resist illusory and constrain the latter's capacity to make autonomous sexual choices.¹⁷⁷

¹⁶⁹ Ibid.

¹⁷⁰ Ibid [78].

¹⁷¹ Ibid [78]–[79].

¹⁷² Ibid [79].

¹⁷³ See, eg, *ibid* [39], [41].

¹⁷⁴ Ibid [39].

¹⁷⁵ Ibid [93].

¹⁷⁶ Martha Chamallas, 'Consent, Equality and the Legal Control of Sexual Conduct' (1988) 61(4) *Southern California Law Review* 777, 814; MacKinnon (n 147) 173–4; Lynne Henderson, 'Rape and Responsibility' (1992) 11(1–2) *Law and Philosophy* 127, 143; Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy' (2008) 41(4) *Akron Law Review* 923, 925; Gavey (n 102) 252.

¹⁷⁷ Kathleen C Basile, 'Rape by Acquiescence' (1999) 5(9) *Violence Against Women* 989. See also: Estrich (n 10) 1127, 1045–51, 1054; Cossins (n 3) 471; Gavey (n 102) ch 4.

Judge Griffin was also sceptical of the victim's comment that she did not resist because she 'was not a mean person'.¹⁷⁸ His Honour was also suspicious that she did not call out for help from three bystanders and found her reasoning, that she did not think men would help her in the situation, to be a fabrication.¹⁷⁹ It appears that Judge Griffin was, as a male with considerable social capital,¹⁸⁰ seemingly imagining what he would have done in the scenario.¹⁸¹ However, when one considers the social conditioning of women to be polite, to avoid embarrassing men and to negotiate their way out of violence, her failure to call out or fight back when faced with a physically stronger man and instead 'play nice' seems a reasoned response to fear and to avoid triggering an escalation of violence.¹⁸²

Further, the likely difference in physical strength between the accused and the victim, by virtue of their sex, as well as the difference in social power between men and women, can likewise constrain one's ability to resist.¹⁸³ For example, where a person has greater social power in society, their version of events is more likely to be believed by those in power.¹⁸⁴ When the victim's failure to call out is considered in this light, it offers a credible explanation as to why she did not alert bystanders as she (justifiably) feared not being believed by other men.¹⁸⁵ Additionally, the accused

¹⁷⁸ Cleland (n 161) [39].

¹⁷⁹ Ibid [41].

¹⁸⁰ See Gavey (n 102) 200 n 10, 250–2 for a discussion of what Gavey terms 'masculine capital'.

¹⁸¹ There is no 'normal' reaction to sexual victimisation: Mason and Lodrick (n 80) 31; Cameron Boyd, 'The Impacts of Sexual Assault on Women' (ACSSA Resource Sheet, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, April 2011) 1.

¹⁸² Brownmiller (n 21) 256; MacKinnon (n 147) 179; Remick (n 53) 1118; Paula S Nurius et al, 'Women's Situational Coping with Acquaintance Sexual Assault: Applying an Appraisal-Based Model' (2004) 10(5) *Violence Against Women* 450, 453; Melanie Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22(2) *Canadian Journal of Women and the Law* 397, 420; Nicole E Conroy, Ambika Krishnakumar and Janel M Leone, 'Reexamining Issues of Conceptualization and Willing Consent: The Hidden Role of Coercion in Experiences of Sexual Acquiescence' (2015) 30(11) *Journal of Interpersonal Violence* 1828, 1841; Gavey (n 102) 136.

¹⁸³ See: Leslie M Kerns, 'A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance' (2001) 10(2) *Columbia Journal of Gender and Law* 195, 209; Conroy, Krishnakumar and Leone (n 182) 1834.

¹⁸⁴ For a discussion of why many victims do not report their rape, see: Torrey (n 13) 1029–30; Stewart, Dobbin and Gatowski (n 8) 164–5; Bonnie Mann, 'Rape and Social Death' (2023) 24(3) *Feminist Theory* 377.

¹⁸⁵ See, eg, Judith E Krulewitz, 'Reactions to Rape Victims: Effects of Rape Circumstances, Victim's Emotional Response, and Sex of Helper' (1982) 29(6) *Journal of Counseling Psychology* 645, 647: 'men in general are more likely to take the rapist's side, share the rapist's perspective, and blame the rape victim'.

continued to persist despite her verbal resistance. Therefore, it seems illogical to continue resisting and risk further physical injury beyond the rape itself.¹⁸⁶

The reasoning in this case further ignores the ways women experience force and respond to fear and threats living under a system of male dominance and power by assuming that the threat of rape only appears when an accused is physically violent.¹⁸⁷ While the facts of *Cleland* may not, for example, appear violent or threatening as identified by men, for women, coercion against their desires is the very definition of force. The victim's evidence of unwanted undressing, being grabbed and pushed down¹⁸⁸ are acts of physical violence against her bodily integrity and sexual agency, notwithstanding the lack of an overt 'attack'.¹⁸⁹ Further, the very presence of a man, particularly a stranger, at night and in a secluded area can be an aggressive and threatening act when viewed by women living under the threat of sexual violence.¹⁹⁰ When consideration is given, therefore, to how women experience the fear and threat of rape in a culture designed by and for the benefit of men, the victim's behaviour no longer appears illogical but rather the actions of a fearful woman at risk of male aggression.

The case of *R v L-D* ('*L-D*')¹⁹¹ further illustrates how defence counsel can reconstruct a victim's response to fear as passive acquiescence and how, in the absence of forceful violence, this can be sufficient to ground an accused's mistaken belief in consent. In this case, the accused was charged with one count of rape.¹⁹² There was no dispute in the case that sexual intercourse had occurred. The issue was whether it was consensual.¹⁹³ The victim's evidence was that she repeatedly said 'no' and 'we can't do this. ... This is not what I want to do'.¹⁹⁴ In contrast, the accused's evidence

¹⁸⁶ Brian P Marx et al, 'Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors' (2008) 15(1) *Clinical Psychology: Science and Practice* 74, 79; Jennifer S Wong and Samantha Balemba, 'Resisting during Sexual Assault: A Meta-Analysis of the Effects on Injury' (2016) 28(1) *Aggression and Violent Behavior* 1, 7; Carr et al (n 2) 223.

¹⁸⁷ See Joan McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law' (1996) 2(3) *Legal Theory* 175, 178–80 ('Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes'). See also: Brownmiller (n 21) 377–8; Estrich (n 10) 1107–8; MacKinnon (n 147) 173.

¹⁸⁸ *Cleland* (n 161) [19].

¹⁸⁹ Robin L West, 'Legitimizing the Illegitimate: A Comment on "Beyond Rape"' (1993) 93(6) *Columbia Law Review* 1442, 1448. See also Estrich (n 10) 1109.

¹⁹⁰ Estrich (n 10) 1115; McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes' (n 187) 178.

¹⁹¹ *R v L-D* [2018] SADC 126 ('*L-D*').

¹⁹² *Ibid* [1].

¹⁹³ *Ibid* [103].

¹⁹⁴ *Ibid* [22], [25]–[26].

was that the victim ‘gave no verbal or physical indication that she did not want to have sexual contact with him’ and that all sexual activity was consensual.¹⁹⁵

While Judge Millsted noted the victim’s evidence that she verbally protested, his Honour stated twice that she offered little to no physical resistance¹⁹⁶ despite resistance not being necessary to prove non-consent. Instead, his Honour concluded that her failure to resist supported the accused’s belief that her actions were consensual.¹⁹⁷ His Honour further accepted that the victim kissed the accused back and ‘allowed him to touch her vagina to the point of becoming sexually aroused’.¹⁹⁸ How Judge Millsted concluded that the victim ‘allowed’ the accused to touch her is unclear and infers acquiescence or submission as tantamount to consent, reiterating myths of women as passive parties to sexual activities.¹⁹⁹ His Honour then explained that by ‘allowing’ the accused to touch her, it was reasonable to infer that the victim freely and voluntarily engaged in these activities as there was no evidence to the contrary.²⁰⁰ Regardless of the victim’s consistent evidence that she said no and pushed the accused away, consent was inferred from her inaction.²⁰¹ Again, Judge Millsted relied upon the myth that coercion is a reasonable means to dissipate a woman’s verbal resistance.²⁰² Accordingly, the accused could use the victim’s passive acquiescence in the face of his coercion to ground his belief in consent.

To explain why she did not physically resist further, the victim gave evidence that she ‘blanked out’ and lapsed into a dissociative state twice during the encounter.²⁰³ His Honour did not accept this possibility as a credible response to the accused’s unwanted advances because, amongst other things: ‘the accused had not used, or threatened to use, any form of violence ... before he kissed her’; they ‘were on friendly terms before the incident’; and such ‘relatively benign conduct’ could not cause dissociation.²⁰⁴ Thus, he dismissed the victim’s allegation of dissociation

¹⁹⁵ Ibid [3], [41].

¹⁹⁶ Ibid [113], [116].

¹⁹⁷ Ibid [116].

¹⁹⁸ Ibid [113]–[114]. Sexual arousal does not mean that consent was freely and voluntarily given. Sexual arousal can occur inconsequentially to unwanted sexual behaviour and is not evidence of consent: see Ellison and Munro, ‘Better the Devil You Know?’ (n 79) 318. See generally Amanda Denes, ‘Biology as Consent: Problematizing the Scientific Approach to Seducing Women’s Bodies’ (2011) 34(5) *Women’s Studies International Forum* 411.

¹⁹⁹ See Smart (n 10) 34. See also Chamallas (n 176) 814–15.

²⁰⁰ *L-D* (n 191) [114].

²⁰¹ Ibid [116].

²⁰² See: Pineau (n 102) 224–5; Ellison and Munro, ‘Of “Normal Sex” and “Real Rape”’ (n 102) 296.

²⁰³ *L-D* (n 191) [23]–[24], [31]–[32].

²⁰⁴ Ibid [114].

because the accused was not a ‘violent’ stranger, and the victim had engaged in consensual touching prior to the rape.²⁰⁵

His Honour appeared to presume that dissociation would only ever occur in circumstances of physical aggression, threats or violence, as that is how men generally view threats to their bodily autonomy.²⁰⁶ Dissociation is ‘a sense of being cut off’ from an actual situation and results from extreme fear, allowing a victim to endure what is happening.²⁰⁷ However, the perception of the threat of danger rather than the actual threat can trigger a dissociative response.²⁰⁸ This is supported by research into tonic immobility, a common, involuntary response to rape, characterised by fear, physical immobility, unresponsiveness and, at times, dissociation.²⁰⁹ Tonic immobility may also occur outside of threats to life.²¹⁰ It can arise from the humiliation, dehumanisation or objectification experienced by rape victims,²¹¹ when a victim fears entrapment or additional physical harm, or when escape or resistance appears futile.²¹²

Judge Millstead, however, dismissed the victim’s dissociation as an irrational response to the accused kissing and touching her vagina.²¹³ This is problematic as it suggests that there is a rational response to sexual violence and that victims must respond accordingly.²¹⁴ Further, it trivialises the victim’s experience as insufficient to trigger dissociation or tonic immobility because the rape was ‘non-violent’. Such reasoning implies that more force than the force needed to have sex with a woman against her desires is required to prove rape. This is blind to how unwanted sexual touching is in and of itself force.²¹⁵ It also ignores the disbelief and dehumanisation

²⁰⁵ Ibid. Cf Avigail Moor et al, ‘Rape: A Trauma of Paralyzing Dehumanization’ (2013) 22(10) *Journal of Aggression, Maltreatment and Trauma* 1051, 1053: ‘it is not unusual for rape cases to be devoid of severe physical injury or life threat, and yet, be extremely traumatic’ due to ‘the tremendous emotional pain entailed’.

²⁰⁶ Estrich (n 10) 1105. In contrast to his Honour’s implication, see Grace Galliano et al, ‘Victim Reactions during Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates’ (1993) 8(1) *Journal of Interpersonal Violence* 109, 112. See also Mason and Lodrick (n 80) 29.

²⁰⁷ Mason and Lodrick (n 80) 29.

²⁰⁸ Ibid.

²⁰⁹ Ibid; Moor et al (n 205) 1055; Anna Möller, Hans Peter Söndergaard and Lotti Helström, ‘Tonic Immobility during Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression’ (2017) 96(8) *Acta Obstetrica et Gynecologica Scandinavica* 932, 935–6. See Marx et al (n 186) 81, 83.

²¹⁰ Marx et al (n 186) 76; Mason and Lodrick (n 80) 29.

²¹¹ Moor et al (n 205) 1054–6, 1062–3.

²¹² Marx et al (n 186) 83; Moor et al (n 205) 1065; Möller, Söndergaard and Helström (n 209) 932.

²¹³ *L-D* (n 191) [114].

²¹⁴ See, eg, Burgin (n 3) 305.

²¹⁵ McGregor, *Is It Rape?* (n 1) 114; Burgin (n 3) 307. ‘Force is present because consent is absent’: MacKinnon (n 147) 172.

victims experience when facing unwanted sexual advances and how those feelings may adversely affect one's ability to react.²¹⁶ Instead, Judge Millstead's reasoning allows an accused person to coerce consent, and when a victim does not resist to the requisite degree, he can use her passive acquiescence to create reasonable doubt that he was aware of her non-consent. Thus, the violence and dehumanisation inherent in the act of unwanted sex and the physical and psychological pain of rape, both of which can leave no physical indicia of violence, go unacknowledged.²¹⁷

Additionally, Judge Millstead assumed that when faced with fear and force, the bargaining (or physical) power between the accused and the victim was equal²¹⁸ and that when confronted with unwanted sexual advances, the latter was able to communicate her free choice voluntarily. However, this does not consider that for a woman, her vulnerability and potential fear for her physical and social safety, that is, the external and internal shame inflicted on women who make allegations of rape, may constrain her ability to act.²¹⁹ Like Judge Griffin *Cleland*, Judge Millstead in *L-D* was surprised that the victim did not wake other people in the house as he assumed the embarrassment would be less severe than the rape.²²⁰ However, this again downplays the humiliation, disbelief and shock experienced during rape that can lead to a loss of agency and inability to respond, for example, by calling out,²²¹ as well as ignores the multitude of ways women are blamed for their victimisation.²²² Instead, in both cases, the Judges looked for evidence of force and resistance to substantiate the victims' claims of non-consent and, when their Honours did not see evidence of either, concluded that their acquiescence equalled consent.

Likewise, in *R v De Wilde* ('*De Wilde*'), despite the victim's evidence that she was 'very scared and terrified', Judge Tracey, foreshadowing her Honour's comments in *Esposito*, was not satisfied 'that [the victim] gave any physical or verbal sign to the accused that she was not a willing participant in the sexual activity'.²²³ The reasoning of Judge Tracey, Judge Griffin and Judge Millstead provides men with permission to 'mistake' a woman's fear for consent. This removes the agency of any victim to determine the terms on which she wishes to engage in sexual activity

²¹⁶ Moor et al (n 205) 1054–5, 1063.

²¹⁷ Clark (n 25) 28; Quilter, 'Re-Framing the Rape Trial' (n 7) 43; Moor et al (n 205) 1053; Burgin (n 3) 310.

²¹⁸ Cf, eg: Carole Pateman, 'Women and Consent' (1980) 8(2) *Political Theory* 149, 162; MacKinnon (n 147) 174; Munro (n 176) 938.

²¹⁹ Henderson (n 176) 164; Remick (n 53) 1112–13; Paula S Nurius et al, 'Interpreting and Defensively Responding to Threat: Examining Appraisals and Coping with Acquaintance Sexual Aggression' (2000) 15(2) *Violence and Victims* 187, 202–3; Moor et al (n 205) 1054; Mann (n 184) 383.

²²⁰ *L-D* (n 191) [115].

²²¹ Moor et al (n 205) 1055, 1062–3.

²²² See, eg: Krulewitz (n 185) 646; Amy M Buddie and Arthur G Miller, 'Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims' (2001) 45(3–4) *Sex Roles* 139, 139–40; Craig (n 76) 9. See also Mann (n 184) 384–5.

²²³ *R v De Wilde* [2022] SADC 116, [55], [171] ('*De Wilde*').

by permitting accused persons to override '[the victim's] apparent wish'²²⁴ that she made her non-consent more explicit. Again, in *De Wilde*, Judge Tracey placed the onus on the victim to actively resist while excusing the accused when his actions did not meet the masculine definition of violence.²²⁵

Lastly, even when an accused uses violence, the acts of a victim who 'complies' through fear or futility may provide the foundation for a belief in consent. This is illustrated in the case of *R v S*.²²⁶ The accused in this case was charged with four counts of aggravated assault and five counts of rape against his wife, which occurred between 2009 and 2013.²²⁷ Of relevance to the appeal were counts 4 (aggravated assault) and 5 (rape), which occurred in 2012. The victim's evidence with respect to these counts was that the accused was angry with her and hit her with a wooden dowel (count 4), after which he raped her (count 5).²²⁸ At first instance, he was found guilty of count 4 and not guilty of the remaining charges, including count 5.²²⁹ The accused appealed on the basis that the guilty verdict on count 4 was inconsistent with the not guilty verdicts, particularly the jury's finding of not guilty with respect to count 5.²³⁰

The accused argued that the prosecution case depended on the credibility and reliability of the victim's evidence.²³¹ Accordingly, the fact the jury delivered a verdict of not guilty on count 5, which took place immediately after the count 4 assault, was, the accused argued, fatal to her veracity and reliability.²³² The Court of Criminal Appeal ultimately found that the guilty and not guilty verdicts could stand together because the only issue in relation to count 4 (assault) was whether the physical elements of the assault occurred, whereas, for count 5, the prosecution needed additionally to prove that the accused was reckless as to consent.²³³

The Court of Criminal Appeal reasoned that the jury may well have accepted the victim's evidence that the physical elements of counts 4 and 5 occurred beyond reasonable doubt.²³⁴ However, the Court of Criminal Appeal found that it was open for the jury to have had reasonable doubt that the accused was aware that the victim

²²⁴ Ibid [171].

²²⁵ The victim described the accused trying to kiss her as 'forceful and ... disgusting' while her Honour was not satisfied that the accused forced her to kiss him: *ibid* [52], [171].

²²⁶ *R v S* [2015] SASFC 179.

²²⁷ *Ibid* [5]–[18].

²²⁸ *Ibid* [9]–[10].

²²⁹ *Ibid* [3].

²³⁰ *Ibid* [4].

²³¹ *Ibid* [51].

²³² *Ibid*.

²³³ *Ibid* [53] (Blue J, Kelly J agreeing at [1], Stanley J agreeing at [99]).

²³⁴ *Ibid* [57], [60].

‘was not consenting as opposed to acquiescing in the intercourse’.²³⁵ The victim’s evidence was that she did not say or do anything to suggest that she did not agree to the sexual intercourse, nor did she try to push him away or otherwise resist physically or verbally.²³⁶ Instead, she went along with it as ‘[she] knew it would be finished then’.²³⁷ Further, while she said in evidence that she was crying, she admitted this was due to the assault and not intercourse.²³⁸ The Court of Criminal Appeal found these matters may have caused the jury to have had reasonable doubt that the accused ‘appreciated’ that she was not consenting, particularly in light of his evidence that he believed she was.²³⁹

The Court’s reasoning is particularly alarming with respect to the non-guilty verdict for the count 5 rape. Notwithstanding that the jury found the accused guilty of an aggravated assault immediately preceding the rape (count 4), the Court of Criminal Appeal found it was open for the jury to have reasonable doubt that the accused was aware of her non-consent. In circumstances where the accused was found guilty of assault, it seems incomprehensible that he was not at the very least cognisant of the possibility that she might not have been consenting. Further, at no stage did the Court of Criminal Appeal consider s 46(3)(a)(i) of the *CLCA*, which provides that consent cannot be given freely and voluntarily because of the application of force. Rather, the Court looked for expectations of resistance and once again reinforced the myth that male aggression is a normal part of seduction, the onus remaining on the woman to ‘fight back’ to prove non-consent.²⁴⁰

The cases discussed in this Part show how accused persons may rely upon victims’ lack of ‘sufficient’ resistance or passive acquiescence to exculpate themselves on the basis that they believed the sexual encounter to be consensual. This is particularly concerning as, first, it allows accused persons to disregard a woman’s sexual agency and presume consent is present unless and until she resists. Secondly, it places the responsibility on women to prevent their rape, notwithstanding the fear of forced sexual violation. Lastly, by allowing accused persons to rely upon a lack of resistance to create the foundation for an alleged mistake, the intention of the South Australian Parliament in seeking to eliminate the incursion of rape myths regarding resistance into informing rape trials is undermined.²⁴¹ Instead, these cases show that myths of resistance persist within contemporary legal conceptions of rape.

²³⁵ Ibid [53].

²³⁶ Ibid [55].

²³⁷ Ibid [13].

²³⁸ Ibid [55].

²³⁹ Ibid [55]–[57].

²⁴⁰ See also Pineau (n 102) 224–5.

²⁴¹ See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1468–9 (Michael Atkinson, Attorney-General).

V CONCLUSION

This article shows how narratives of force and resistance are drawn upon in rape trials despite their ostensible removal from formal, legal definitions of rape. This is evident in the emphasis on, and judicial endorsement of, victims' verbal and physical resistance as evidencing their communication of non-consent as well as in the acceptance of passive acquiescence as sufficient to create reasonable doubt that an accused was aware of her non-consent. Reliance on and endorsement of force and resistance narratives in this regard are problematic because not only do most rapes not conform to these narratives, but such myths also obligate women to justify their actions or inaction, according to masculine standards of force and resistance, at odds with how women experience the threat of rape. This puts victims on proof of their own victimisation and risks their further traumatisation through the justice system. Accordingly, the prosecution of sexual violence through the South Australian legal system as it currently stands is insufficient to support the totality of victims' justice needs. This research, therefore, forms a basis upon which to urge South Australia to review and address its justice responses to rape.

VI APPENDIX A

- R v Austin* [2012] SADC 19
R v Cleland [2012] SADC 42
R v El Rifai [2012] SASCF 98
R v S, GJ [2012] SADC 150
R v Thoring [2013] SASCF 35
R v Edson [2013] SADC 139
R v Coutts [2013] SASCF 143
R v K, JS [2013] SADC 177
R v Brady [2014] SASCF 7
R v Latifi [2014] SADC 27
R v S, P [2014] SADC 77
R v Wilson [2014] SADC 139
R v Pelly [2015] SASCF 25; (2015) 122 SASR 84
R v S [2015] SASCF 179
R v Duncan [2015] SASCF 191
R v Thorpe [2016] SADC 25
R v Green [2016] SADC 29
R v T, D [2016] SADC 75
R v P, S [2016] SASCF 97; (2016) 261 A Crim R 329
R v Robertson [2016] SASCF 133
R v H, R [2017] SASC 67
R v Moores [2017] SASCF 95; (2017) 268 A Crim R 106; (2017) 128 SASR 340
R v Kennedy [2017] SASCF 170
R v Kennett [2018] SASCF 112
R v Smart [2018] SASCF 123
R v L-D [2018] SADC 126
R v Bristow [2018] SADC 128
R v L, J [2018] SADC 143
R v Van Wyk [2018] SASCF 138; (2018) 275 A Crim R 584; (2018) 132 SASR 46
R v Sultani [2019] SADC 26
R v Crafter [2019] SASCF 25

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- R v Dhir* [2019] SASCFC 55; (2019) 133 SASR 452
M, B v Police [2019] SASC 58; (2019) 134 SASR 575
R v Hanks [2019] SADC 139
Ekisa v The Queen [2019] SASCFC 159
R v Ohudare [2020] SADC 15
R v Webb [2020] SADC 16
SPC v The Queen [2020] SASCFC 43
Gray v The Queen [2020] SASCFC 46
R v Rogers [2020] SADC 72
R v Tennant [2021] SADC 95
Weragoda v R [2021] SASCA 123
R v L OS [2021] SADC 125
R v Nawroazi [2021] SADC 143
R v Dobbs [2022] SADC 53
R v De Wilde [2022] SADC 116
R v AP [2022] SADC 136
R v Esposito [2023] SADC 64

OPTIONAL AND ILL-DEFINED? RECONSIDERING STRICT AND QUALIFIED NEUTRALITY IN LIGHT OF STATE RESPONSES TO RUSSIA'S INVASION OF UKRAINE

I INTRODUCTION

Russia's ongoing invasion of Ukraine is an international crisis of the highest order. Many States have rallied in support of Ukraine, dedicating billions in aid to buoy its efforts at self-defence while imposing extensive sanctions on Russia.¹ At least 30 States, to date, have also provided Ukraine military aid such as arms, armaments and military vehicles.² These actions, and their uncertain legal basis, have triggered an avalanche of scholarship about the law of neutrality³ —

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¹ See, eg: White House, 'Fact Sheet: One Year of Supporting Ukraine' (Press Release, 21 February 2023) <<https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/21/fact-sheet-one-year-of-supporting-ukraine/>>; Comment, 'The United States and Allies Provide Military and Intelligence Support to Ukraine' (2022) 116(3) *American Journal of International Law* 646; 'EU Sanctions against Russia Following the Invasion of Ukraine', *European Commission* (Web Page) <https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en>; 'Russia's Invasion of Ukraine', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/crisis-hub/invasion-ukraine-russia>>.

² Christoph Trebesch et al, 'The Ukraine Support Tracker: Which Countries Help Ukraine and How?' (Working Paper No 2218, Kiel Institute for the World Economy, July 2023) <<https://www.ifw-kiel.de/publications/ukraine-support-tracker-data-20758/>>; Claire Mills, 'Military Assistance to Ukraine since the Russian Invasion' (Research Briefing No 9477, Parliamentary Library, United Kingdom House of Commons, 14 August 2023) 8.

³ See, eg: Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?', *European Journal of International Law: Talk!* (Blog Post, 2 March 2022) <<https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/>>; Pearce Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) 72(2) *International and Comparative Law Quarterly* 527; Wolff Heintschel von Heinegg, 'Neutrality in the War against Ukraine', *Articles of War* (Blog Post, 1 March 2022) <<https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>>; CL Lim and Ryan Martínez Mitchell, 'Neutral Rights and Collective Countermeasures for *Erga Omnes* Violations' (2023) 72(2) *International and Comparative Law Quarterly* 361; Stephen P Mulligan, 'International Neutrality

an area which has remained somewhat controversial since at least World War I.⁴ In brief, to observe strict neutrality,⁵ a State must abide by all requirements established by customary international law and codified in the two Hague conventions on neutrality: the *Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* ('Hague V')⁶ and the *Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War* ('Hague XIII').⁷ Strict neutrality requires that a neutral State not involve itself in the conflict in any way and treat all belligerents with complete impartiality. But at times, a neutral State may determine that certain aspects of an armed conflict permit the requirements of strict neutrality to be qualified: for example, that one State party to an armed conflict has clearly violated international law by committing an act of aggression against another. In this situation, it may assume a position of qualified neutrality, where it deviates from some of the requirements of strict neutrality while still purporting to maintain neutral status.

Although this comment will briefly address the basis and content of both strict and qualified neutrality, that will not be its focus. Based on extensive recent State practice and the conclusions of many international law commentators,⁸ this comment will assume that: (1) qualified neutrality is a valid position under international law (in appropriate circumstances); and (2) provision of arms and funding is not sufficient to make a State a party to the armed conflict, or co-belligerent. The comment will also assume that the law of neutrality remains relevant to modern armed conflict and is not, as has sometimes been claimed, obsolete.⁹ However, it will query what scope of application strict neutrality now has, given the current developments in the

Law and US Military Assistance to Ukraine' (Legal Sidebar No LSB10735, Congressional Research Service, United States Congress, 26 April 2022); Raul (Pete) Pedrozo, 'Ukraine Symposium: Is the Law of Neutrality Dead?', *Articles of War* (Blog Post, 31 May 2022) <<https://lieber.westpoint.edu/is-law-of-neutrality-dead/>>; Michael N Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force', *Articles of War* (Blog Post, 7 March 2022) <<https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>> ('Providing Arms and Materiel to Ukraine'); Michael N Schmitt, "'Strict" versus "Qualified" Neutrality', *Articles of War* (Blog Post, 22 March 2023) <<https://lieber.westpoint.edu/strict-versus-qualified-neutrality/>> ('Strict versus Qualified Neutrality').

⁴ Detlev F Vagts, 'The Traditional Legal Concept of Neutrality in a Changing Environment' (1998) 14(1) *American University International Law Review* 83, 88–95.

⁵ Also called 'traditional' or 'Hague' neutrality.

⁶ *Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, opened for signature 18 October 1907, 205 CTS 299 (entered into force 26 January 1910) ('Hague V').

⁷ *Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War*, opened for signature 18 October 1907, 205 CTS 395 (entered into force 26 January 1910) ('Hague XIII').

⁸ See above n 3.

⁹ See below n 17 and accompanying text.

area: when must a State adhere to all the requirements of strict neutrality in order to claim neutral status?

It concludes that such situations may now be limited. Based primarily on State practice emerging out of the Russia–Ukraine conflict, this comment concludes that numerous valid justifications could be raised by a State that does not wish to adhere to strict neutrality. Further, it appears that decisions reached by States within the United Nations (‘UN’) may now determine, in even more contexts, the applicable role and obligations of third-party States when armed conflict occurs. This may be directly, because of a determination by the Security Council,¹⁰ or indirectly, where States respond to the General Assembly formally assigning blame to one belligerent.

II STRICT NEUTRALITY

The two main conventions governing the law of neutrality are *Hague V* and *Hague XIII*, both from 1907. Despite the naming dichotomy, these conventions do not strictly set out the rules applying to land and sea respectively and have generally been taken as together representing the law¹¹ — at least, the law as at 1907, before two world wars upset the proverbial apple cart.

Under the provisions set out therein, a neutral State must treat all belligerents impartially.¹² In particular, ‘[t]he supply, in any manner ... by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden’.¹³ Even the provision of significant financial support to one side of the conflict may potentially be considered non-neutral.¹⁴ The legal problem with the actions of many ‘neutral’ States towards the Ukraine conflict is immediately apparent.

The need for the law of neutrality has been explained in two main ways. Non-belligerent States remaining strictly neutral prevents maritime and other commerce from grinding to a halt when some States are at war:¹⁵ those that are not directly

¹⁰ Such determinations are binding on States under the *Charter of the United Nations* arts 2(5), 25 (‘UN Charter’). See generally Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004).

¹¹ Heintschel von Heinegg (n 3).

¹² *Hague V* (n 6) art 9; *Hague XIII* (n 7) Preamble para 5, art 9.

¹³ *Hague XIII* (n 7) art 6.

¹⁴ Lim and Mitchell (n 3) 366; Unit for Relations with Armed and Security Forces, International Committee of the Red Cross, *The Law of Armed Conflict: Neutrality* (Lesson No 8, June 2002) 6 <https://www.icrc.org/en/doc/assets/files/other/law8_final.pdf>. Although not explicitly set out in *Hague V* (n 6) and *Hague XIII* (n 7), this is based on the requirement that neutral States be impartial to the belligerent parties.

¹⁵ See, eg, Constantine Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality* (Cambridge University Press, 2022) 1–2.

involved in the hostilities can continue to trade non-military goods as usual, with only minor interruptions for inspection by belligerents. More crucially, impartiality by neutral States — and the obligation on belligerents to respect this status — prevents them being dragged into and thus expanding the conflict.¹⁶

For decades, States and academics alike have debated whether strict neutrality is obsolete.¹⁷ The International Court of Justice (‘ICJ’) found that the law of neutrality continues to apply to all armed conflict, but kept a foot in each camp when it added ‘whatever its content’.¹⁸ *Hague V* and *Hague XIII* do not have a huge number of parties (34 and 30, respectively),¹⁹ but these include many significant military States (such as China, France, Russia and the United States (‘US’))²⁰ and the conventions were ultimately codifications of existing customary international law developed over the course of the 19th century.²¹ State manuals pertaining to the law of armed conflict (‘LOAC’) are similarly equivocal: although some express doubt as to the extent of the law of neutrality’s relevance in the context of the modern UN security regime,²² they often set out in great detail the granular requirements of strict

¹⁶ See, eg: Pedrozo (n 3); Clancy (n 3) 527.

¹⁷ See, eg: *Report of the International Law Commission: Sixty-Second Session (3 May–4 June and 5 July–6 August 2010)*, UN Doc A/65/10 (2010) 311 [281]; Antonopoulos (n 15) 4–5.

¹⁸ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 261 [89] (‘*Nuclear Weapons Advisory Opinion*’).

¹⁹ Australia and the United Kingdom, for example, are not party to either.

²⁰ ‘Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land: The Hague, 18 October 1907’, *International Humanitarian Law Databases* (Web Page) <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-v-1907/state-parties?activeTab=undefined>>; ‘Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War: The Hague, 18 October 1907’, *International Humanitarian Law Databases* (Web Page) <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-xiii-1907?activeTab=default>>.

²¹ See, eg, Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 4th ed, 2004) 1399.

²² See, eg: Australian Defence Force, *ADDP 06.4: Law of Armed Conflict* (Defence Publishing Service, 2006) 11-2–11-3 [11.7] (‘*Australian LOAC Manual*’); Jes Rynkeby Knudsen (ed), *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (Danish Ministry of Defence and Defence Command Denmark, 2016) 62–3 (‘*Danish LOAC Manual*’); New Zealand Defence Force, *DM 69 (2 ed) Manual of Armed Forces Law: Law of Armed Conflict* (2nd ed, 2019) vol 4, 16-4 [16.2.2]–[16.2.4] (‘*NZ LOAC Manual*’); Joint Doctrine and Concepts Centre, *JSP 383: The Joint Service Manual of the Law of Armed Conflict* (2004) 19–20 [1.42.1]–[1.42.2] (‘*UK LOAC Manual*’); Office of General Counsel, Department of Defense, *Law of War Manual* (rev ed, 2023) 965–7 [15.2.2]–[15.2.3.1] (‘*US LOAC Manual*’).

neutrality derived from the broad principles set out in *Hague V* and *Hague XIII*.²³ Overall, strict neutrality remains broadly on the books.²⁴

III EXCEPTIONS FROM OBSERVING STRICT NEUTRALITY

Though strict neutrality may not be obsolete, it has become increasingly complicated to identify a scenario in which its full requirements must be observed in order for a State to claim neutral status. Current State practice suggests that a growing range of situations, all to some extent dependent on the response of the UN to the outbreak of armed conflict, may allow strict neutrality to be qualified.

A Security Council Decision

Under the *Charter of the United Nations* ('UN Charter'), the Security Council can simply require UN member States to assist it with peace enforcement action and can therefore override a State's decision to remain neutral.²⁵ Assuming member States comply with the requirements of the *UN Charter*, this renders any status they assume under the law of neutrality in regard to an armed conflict irrelevant. To be clear: this should, in theory, make the law of neutrality entirely irrelevant. When an armed conflict arises somewhere in the world, the Security Council can dictate how this should be managed, and States must then present a collective front with none allowed to take matters into their own hands or opt out of the decision.

Unfortunately, as is now painfully well understood, when one of the five permanent members has a stake in an armed conflict it often becomes practically impossible for the Security Council to take effective action. Even if the Security Council does act, it does not necessarily achieve decisive results. In such situations it might appear that States seeking to remain neutral must adhere to strict neutrality — however,

²³ See generally: *Australian LOAC Manual* (n 22) ch 11; *Danish LOAC Manual* (n 22) chs 13–14; Bundesministerium der Verteidigung, *Law of Armed Conflict Manual* (2013) ch 12; Wolff Heintschel v Heinegg and Hans-Joachim Unbehau, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, tr Bundessprachenamt (German Navy, 2002) pt II; *NZ LOAC Manual* (n 22) ch 16; Norwegian Defence University College, *Manual of the Law of Armed Conflict* (Norwegian Chief of Defence, 1st rev ed, 2018) 23 [1.44]–[1.45], chs 10–11; *UK LOAC Manual* (n 22) 20 [1.43], chs 12–13; Navy Warfare Development Command, *NWP 1-14M, MCTP 11-10B, COMDTPUB P5800.7A: The Commander's Handbook on the Law of Naval Operations* (Navy Warfare Library, 2022) ch 7; *US LOAC Manual* (n 22) ch XV.

²⁴ See, eg: Schmitt, 'Providing Arms and Materiel to Ukraine' (n 3); Pedrozo (n 3).

²⁵ *UN Charter* (n 10) arts 2(5), 25. See generally: de Wet (n 10); 'Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', *United Nations Security Council* (Web Page) <<https://www.un.org/securitycouncil/content/repertoire/actions>>.

this has long been questioned,²⁶ and clearly has not been observed in relation to Ukraine.

B Uniting for Peace *Resolution*

Where the Security Council does not act — whether due to veto by or failure to agree among permanent members — applying strict neutrality would effectively prevent States from assisting a victim of aggression, unless they are willing to join the war as a belligerent on the side of the victim State (in the exercise of collective self-defence). The *Uniting for Peace* procedure can give the General Assembly a voice in this situation,²⁷ allowing it to give non-binding recommendations to member States for the restoration of peace.

The *Uniting for Peace* resolution states:

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.²⁸

The first emergency special session of the General Assembly was held in 1956, in response to the Suez Crisis.²⁹ There have since been 10 more, including that convened in response to the invasion of Ukraine.³⁰

The General Assembly passed a *Uniting for Peace* resolution shortly after the invasion of Ukraine, with overwhelming support of 141 votes in favour to 5 against (with 35 abstentions, including China and India).³¹ It should be noted that the

²⁶ See, eg, Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995) 87–8 [13.11]–[13.12].

²⁷ *Uniting for Peace*, GA Res 377(V), UN Doc A/RES/377(V) (3 November 1950) (*'Uniting for Peace Resolution'*). See also Michael P Scharf, 'Power Shift: The Return of the Uniting for Peace Resolution' (2023) 55(1) *Case Western Reserve Journal of International Law* 1, 7.

²⁸ *Uniting for Peace Resolution* (n 27) 10 [1].

²⁹ GA Res 997 (ES-I), UN Doc A/RES/997(ES-I) (2 November 1956) (*'GA Res 997 (ES-I)'*).

³⁰ 'UN General Assembly Resolutions Tables', *Dag Hammarskjöld Library* (Web Page) <<https://research.un.org/en/docs/ga/quick/emergency>>.

³¹ *Aggression against Ukraine*, GA Res ES-11/1, UN Doc A/RES/ES-11/1 (18 March 2022, adopted 2 March 2022) (*'Aggression against Ukraine Resolution'*).

resolution did not approve sanctions against Russia or military aid to Ukraine.³² The closest it came was a statement that it welcomed efforts by member States (and others) to ‘support the de-escalation of the current situation’.³³ However, the resolution ‘[d]eplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the [UN Charter]’.³⁴ It demanded that Russia ‘cease its use of force’³⁵ and ‘immediately, completely and unconditionally withdraw’ from Ukraine.³⁶

Interestingly, the most recent example is far from the first time that the General Assembly has attributed blame to one belligerent during an emergency special session. In the very first resolution of the first special session, the General Assembly noted that ‘the armed forces of Israel ha[d] penetrated deeply into Egyptian territory in violation of the General Armistice Agreement between Egypt and Israel’.³⁷ Another session held in 1956 responded to the short-lived occupation of Budapest by Soviet Union forces (ostensibly to suppress widespread political demonstrations); the General Assembly ‘condemn[ed] the use of Soviet military forces to suppress the efforts of the Hungarian people to reassert their rights’.³⁸ In January 1980, the General Assembly ‘[s]trongly deplore[d] the recent armed intervention in Afghanistan’,³⁹ while later that same year it ‘[c]all[ed] upon Israel to withdraw completely and unconditionally from all the Palestinian and other Arab territories occupied since June 1967’.⁴⁰

But despite such previous apportionment of blame, States have not previously used a *Uniting for Peace* resolution to justify departures from the strict law of neutrality. State responses to Ukraine now suggest that the finding of an act of aggression on the part of one belligerent is enough for States to adopt a position of qualified neutrality. Even beyond simply refusing to abide by strict neutrality themselves,

³² Those following it have also been silent on the matter. See, eg: *Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations*, GA Res ES-11/4, UN Doc A/RES/ES-11/4 (13 October 2022, adopted 12 October 2022); *Furtherance of Remedy and Reparation for Aggression against Ukraine*, GA Res ES-11/5, UN Doc A/RES/ES-11/5 (15 November 2022, adopted 14 November 2022); *Principles of the Charter of the United Nations Underlying a Comprehensive, Just and Lasting Peace in Ukraine*, GA Res ES-11/6, UN Doc A/RES/ES-11/6 (2 March 2023, adopted 23 February 2023).

³³ *Aggression against Ukraine Resolution* (n 31) 4 [15].

³⁴ *Ibid* 3 [2].

³⁵ *Ibid* 3 [3].

³⁶ *Ibid* 3 [4].

³⁷ GA Res 997 (ES-I) (n 29) Preamble para 1.

³⁸ GA Res 1004 (ES-II), UN Doc A/RES/1004/ES-II (4 November 1956) Preamble para 4.

³⁹ *Situation in Afghanistan and its Implications for International Peace and Security*, GA Res ES-6/2, UN Doc A/RES/ES-6/2 (14 January 1980) 2 [2].

⁴⁰ *Question of Palestine*, GA Res ES-7/2, UN Doc A/RES/ES-7/2 (29 July 1980) 3 [7].

States have in fact exerted pressure on others to follow suit.⁴¹ The rationale for such pressure seems to be: if extensive State practice does now demonstrate a customary international law basis for States to lawfully support a victim of aggression without giving up their neutrality, why would they still refuse to do so? The degree of neutrality adopted by a State then appears motivated predominantly by political and economic self-interest, rather than any legal compulsion, which has been seen as distasteful by States supporting Ukraine (in light of its dire situation).⁴² In these sentiments are faint echoes of the scornful attitude towards permanently neutral States after World War II.⁴³

Two aspects remain obviously unclear in regard to when such a resolution could serve as justification for adopting qualified neutrality. The first is whether the practice established in the current war could be generalised to other armed conflicts (especially where the aggressor is not a P5 member,⁴⁴ but the Security Council's action is blocked due to P5 political interests). The second is the level of concurrence required for States to use a *Uniting for Peace* resolution as a basis for adopting qualified neutrality. As stated above, in the case of Russia's invasion of Ukraine, the General Assembly vote was 141 to 5, overwhelmingly confirming Russia had committed an act of unlawful aggression. Could qualified neutrality apply on this basis in a case where the vote was, say, 100 to 46? 80 to 66? There is as yet no basis for assigning any threshold. Regardless, it must be acknowledged that there is now precedent allowing a finding of aggression by the General Assembly potentially to excuse States from adherence to strict neutrality.

⁴¹ See, eg: Clea Caulcutt, 'Macron Slams Nations Staying Neutral on Ukraine as "Complicit" with Russia', *Politico* (online, 20 September 2022) <<https://www.politico.eu/article/macron-accuses-neutral-nations-complicity-russia-new-imperialism-ukraine-war-un-general-assembly/>>; Andrea Shalal, 'US Aims to Rally Allies to Up Pressure on Russia, Shore Up Ukraine Support', *Reuters* (online, 11 April 2023) <<https://www.reuters.com/world/europe/us-aims-rally-allies-up-pressure-russia-shore-up-ukraine-support-2023-04-10/>>; Constanze Stelzenmüller, 'Ukraine Crisis Could Transform the Future of Neutrality', *Financial Times* (online, 23 November 2022) <<https://www.ft.com/content/2ddad5db-3500-44b9-a93e-d5ca40c7409e>>; Melissa Conley Tyler, 'Why Outrage Over the War in Ukraine Isn't Universal', *The Strategist* (online, 7 March 2023) <<https://www.aspistrategist.org.au/why-outrage-over-the-war-in-ukraine-isnt-universal/>>; Abdullah Bozkurt, 'Russia Turned to Turkey on Land Transportation to Avoid Western Sanctions', *Nordic Monitor* (online, 19 December 2022) <<https://nordicmonitor.com/2022/12/russia-turned-to-turkey-on-land-transportation-to-avoid-western-sanctions/>>.

⁴² See, eg, Afsah Qazi, Muhammad Shoaib and Muhammad Faisal, 'Russia-Ukraine War and the Indo-Pacific: A Perspective from Pakistan' (2023) *Journal of Asian and African Studies* 1745-2538:1-18, 11.

⁴³ See, eg, Leos Müller, *Neutrality in World History* (Routledge, 2019) 11.

⁴⁴ A P5 member is a permanent member of the UN Security Council. The P5 members are China, France, Russia, the United Kingdom and the US.

C *Self-Defence and the Responsibility of States for Internationally Wrongful Acts*

Another rationale put forward for adopting a position of qualified neutrality is the justification of assisting, via non-violent means, a State which is acting in legitimate self-defence. Article 51 of the *UN Charter* confirms the inherent right of States to act in ‘individual or collective self-defence’ in response to an armed attack, until the Security Council takes necessary measures. Neutral States may view the provision of arms to a belligerent State, in apparent violation of the obligations of neutrality, as justified where: (1) that State is responding in legitimate self-defence; and (2) the Security Council has failed to act, or has taken actions which have not yet restored international peace and security. The argument is that this support is a form of ‘countermeasure’ justified by the aggressor State’s violation of international law, which permits a neutral State to support the victim State without joining in collective self-defence and thus becoming a co-belligerent.⁴⁵

Acts of aggression by one State against another are a violation of *jus cogens*, the peremptory norms of international law from which States may not derogate.⁴⁶ Article 41 of the *Responsibility of States for Internationally Wrongful Acts* (‘RSIWA’) provides that States ‘shall cooperate to bring to an end through lawful means any serious breach’ of a peremptory norm.⁴⁷ Some commentators have argued this could go beyond a mere right to qualify neutrality and become arguably a duty for States to act in support of Ukraine via collective countermeasures.⁴⁸

But is the provision of military aid to Ukraine, contrary to a claimed neutral status, a lawful means to respond to Russia’s violation of a peremptory norm? It certainly does not appear to be a permitted countermeasure under *RSIWA*, which provides that ‘[c]ountermeasures are limited to the non-performance for the time being of international obligations’.⁴⁹ Countermeasures also specifically cannot extend to the use of force,⁵⁰ which the ICJ has determined includes the provision of arms and training.⁵¹ This said, the ICJ’s determination related to the provision of such military assistance to encourage incursions by non-government actors on the territory of a State,⁵² and not in the context of arming a State to defend its own territory. It therefore may be that the provision of arms to Ukraine in the circumstances could not be considered a use of force.

⁴⁵ Schmitt, ‘Strict versus Qualified Neutrality’ (n 3); Clancy (n 3) 539–40.

⁴⁶ *Report of the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019)*, UN Doc A/74/10 207.

⁴⁷ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) art 41 (‘RSIWA’).

⁴⁸ See, eg: Clancy (n 3) 540–1; Lim and Mitchell (n 3) 386.

⁴⁹ *RSIWA* (n 47) art 49(2).

⁵⁰ *Ibid* art 50(1)(a).

⁵¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 119 [228].

⁵² *Ibid*.

Even assuming that the provision of military aid to Ukraine could be construed as a use of force (which is perhaps doubtful), *RSIWA* also specifies that '[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the *Charter of the United Nations*'.⁵³ Although a somewhat strained interpretation, it could be argued that technically excessive countermeasures are permissible where States are assisting one of their number which is acting in valid self-defence, in response to a serious breach of a peremptory norm. Some commentators have outlined the logical paradox if a State fully joining the conflict as a co-belligerent supporting Ukraine in collective self-defence would be acting lawfully, but a State supplying military aid while otherwise remaining neutral is acting unlawfully.⁵⁴

Therefore, a neutral State providing aid to another State acting in lawful self-defence (but not joining the conflict as a co-belligerent) seems yet another situation potentially excusing derivation from strict neutrality.

D Possible Application

To recap, the full demands of strict neutrality appear to have been displaced in favour of the lesser requirements of qualified neutrality where:

1. the Security Council has acted under chs VI or VII of the *UN Charter*;
2. the Security Council has failed to act, but:
 - a. the General Assembly has identified, with a very high level of concurrence, an aggressor under a *Uniting for Peace* resolution; and/or
 - b. one State is clearly acting in self-defence (such as where an actual invasion of its territory has occurred).

On this basis, in what situations would States now agree they are bound to observe strict neutrality to the letter? The main circumstance is probably where the Security Council cannot achieve unanimity (likely where a P5 member is involved or otherwise invested in the hostilities), and it is unclear which side is the aggressor — if a *Uniting for Peace* resolution reflected more division among voting States, for example. In such circumstances, States would likely seek to maintain impartiality and could be expected to adhere more rigidly to the requirements of strict neutrality.

Regardless of the positions taken by States in their LOAC manuals, the application of strict neutrality now appears to be optional in a range of armed conflicts that might be anticipated in future. State practice suggests that there is no rigid binary between belligerent and neutral, and that the potential for third-party State involvement in armed conflict may be more nuanced than the requirements of strict neutrality imply.

⁵³ *RSIWA* (n 47) art 21.

⁵⁴ Markus Krajewski, 'Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine', *Völkerrechtsblog* (Blog Post, 9 March 2022) <<https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/>>; Schmitt, 'Providing Arms and Materiel to Ukraine' (n 3).

IV QUALIFIED NEUTRALITY

The concept of ‘qualified neutrality’, or ‘non-belligerency’ is not new: it dates at least back to World War II, when the US used its Lend-Lease Program to support the allied States despite its officially neutral status.⁵⁵ Waging war as a means of international relations had been made unlawful by the 1928 Kellogg–Briand Pact,⁵⁶ and in these circumstances the US’ position was that ‘[a] system of international law which can impose no penalty on a lawbreaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind’s hope for enduring peace’.⁵⁷ After the establishment of the UN, qualified neutrality has been justified by the tenets of the *UN Charter* — effectively that, since waging war is now a clear violation of international law, neutral States ‘can take non-neutral acts when supporting the victim of an unlawful war of aggression’.⁵⁸ The US has supported this doctrine ever since, despite accepting that it was controversial.⁵⁹

Arguably, qualified neutrality is simply an ‘abandonment of neutrality as it had crystallized in international law’.⁶⁰ Until the invasion of Ukraine, the ‘general paucity in State practice’ made it difficult to establish any right for neutral States to discriminate between belligerents in this way.⁶¹ But on the other hand, it has long been apparent that strict neutrality may be difficult to apply in practice. Historically, even when States make a good faith effort to observe its requirements, the desperation of 20th century war has soon prevailed: this is reflected in the continuous expansion of ‘contraband’ in World War I,⁶² as well as the aggressive treatment of ‘neutral’ ships and other clear breaches of strict neutrality during World War II.⁶³

⁵⁵ ‘Lend-Lease Act (1941)’, *National Archives* (Web Page, 28 June 2022) <<https://www.archives.gov/milestone-documents/lend-lease-act>>; ‘The Lend-Lease Act’, *Library of Congress* (Web Page) <<https://www.loc.gov/item/today-in-history/october-23/>>.

⁵⁶ *General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929). See also Lim and Mitchell (n 3) 367–8.

⁵⁷ Robert H Jackson, ‘Address of Robert H Jackson: Attorney General of the United States’ (Speech, First Conference of the Inter-American Bar Association, 27 March 1941) 15 <<https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf>>.

⁵⁸ Mulligan (n 3) 1.

⁵⁹ See, eg, *US LOAC Manual* (n 22) 965–6 [15.2.2].

⁶⁰ Antonopoulos (n 15) 15.

⁶¹ *Ibid* 146.

⁶² Stephen C Neff, ‘Disrupting a Delicate Balance: The Allied Blockade Policy and the Law of Maritime Neutrality During the Great War’ (2018) 29(2) *European Journal of International Law* 459, 462; Roger Howell, ‘Contraband Lists in the Present War’ (1917) 4(5) *Virginia Law Review* 371, 377–9.

⁶³ Sally V Mallison and W Thomas Mallison, ‘The Naval Practices of Belligerents in World War II: Legal Criteria and Developments’ (1993) 65(1) *International Law Studies* 87, 90; Schmitt, ‘Strict versus Qualified Neutrality’ (n 3).

While the ICJ has supported that the law of neutrality exists, in some manner,⁶⁴ it has also acknowledged the extremes to which a State may be driven when its very survival is threatened.⁶⁵ The law of neutrality must accommodate the reality that when war is no longer a permissible approach to international relations, it becomes the province of the desperate and the deluded. This acceptance seems reflected in the large number of neutral States adopting a position of qualified neutrality to aid Ukraine in the current war, with their right to do so now acknowledged even by some of the staunchest critics of qualified neutrality.⁶⁶

This rapid emergence of norms has been one of necessity: without the actions of States supporting Ukraine, it appeared very likely that Russia's egregious violation of international law would succeed, thereby setting a dangerous precedent. Much as States once argued they were compelled to wage just wars to suppress acts of evil by other States,⁶⁷ 'States continuing to rely on and believe in international law can no longer stand by and allow an aggressor government to pursue its apparently illegal aims'.⁶⁸ At least 30 'neutral' States, to date, have provided military aid to Ukraine.⁶⁹ This wave of positive State practice may be sufficient to establish qualified neutrality as a rule of customary international law, applicable where the General Assembly has identified an aggressor.

Of course, there is no unanimity among States; even among the 141 that voted in favour of the *Uniting for Peace* resolution, only a fraction have adopted a position of qualified neutrality and provided military aid to Ukraine. Qualified neutrality is largely a western stance. Africa, Central America and the majority of Asia have remained strictly neutral.⁷⁰ Brazil, despite being a fellow member of the BRICS alignment of States⁷¹ with Russia, voted in favour of the special resolution; however, its president Luiz Inácio Lula da Silva has criticised western States for 'encouraging war'⁷² (although this has fallen short of suggesting they are acting unlawfully).

⁶⁴ *Nuclear Weapons Advisory Opinion* (n 18) 261 [89].

⁶⁵ *Ibid* 263 [97].

⁶⁶ Heintschel von Heinegg (n 3).

⁶⁷ See generally David D Corey and J Daryl Charles, *The Just War Tradition: An Introduction* (ISI Books, 2012).

⁶⁸ Heintschel von Heinegg (n 3).

⁶⁹ Trebesch et al (n 2). See also Mills (n 2) 8.

⁷⁰ Trebesch et al (n 2). See also: Maria Siow, 'Asia's Russia-West Balancing Act on Show with Push for Peace in Ukraine from Indonesia's Prabowo', *South China Morning Post* (online, 10 June 2023) <<https://www.scmp.com/week-asia/politics/article/3223563/asias-russia-west-balancing-act-show-push-peace-ukraine-indonesias-prabowo>>; Mohammed Haddad, 'Where Does Your Country Stand on the Russia-Ukraine War?', *Al Jazeera* (online, 16 February 2023) <<https://www.aljazeera.com/news/2023/2/16/mapping-where-every-country-stands-on-the-russia-ukraine-war>>.

⁷¹ The BRICS alliance includes, inter alia, Brazil, Russia, India, China and South Africa.

⁷² Duarte Mendonca, 'US Should Stop "Encouraging" Ukraine War, Brazilian President Says', *CNN* (online, 15 April 2023) <<https://edition.cnn.com/2023/04/15/world/brazil-president-ukraine-war-intl/index.html>>; Gabriel Araujo and Eduardo

Neither China nor India — two of the notable abstentions in the October 2022 *Uniting for Peace* resolution — have publicly taken a stand for or against qualified neutrality. China's official position on the 'Ukraine Crisis' is very general: it suggests that '[h]umanitarian operations should follow the principles of neutrality and impartiality' and that States should 'avoid fanning the flames and aggravating tensions', but there are no concrete assertions made about the actions of any State or States.⁷³ India's Prime Minister, Narendra Modi, has simply reiterated that India has 'urged both sides to resolve issues through dialogue and diplomacy',⁷⁴ while some commentators have speculated that India's complex political and geographic position makes it difficult for it to speak out against either Russia or the US.⁷⁵ India's remarks at the General Assembly vote (from which it abstained) emphasised the need to de-escalate the conflict, but otherwise seemed focussed on concerns for the impact of the war on the 'global South'.⁷⁶ But despite the lack of absolute consensus, there now appears to be sufficient State practice to support the validity of the doctrine of qualified neutrality. After all, it should be borne in mind that despite *Hague V* and *Hague XIII* having been ratified by only 34 and 30 States parties respectively, they have been held out as representative of the law of neutrality for over a century.

After World War II, the effect of the US position on the law of neutrality remained unsettled. Japan attacked Pearl Harbor on 7 December 1941, bringing the US into the war as a belligerent. It is unclear if Russia would ever go so far as to launch an actual attack against any of the States supporting Ukraine, although it certainly

Simoes, 'Brazil's Lula Calls for "Peace Group" to Broker Ukraine-Russia Deal', *Reuters* (online, 17 April 2023) <<https://www.reuters.com/world/brazils-lula-calls-peace-group-broker-ukraine-russia-deal-2023-04-16/>>.

⁷³ Ministry of Foreign Affairs of the People's Republic of China, 'China's Position on the Political Settlement of the Ukraine Crisis' (Media Release, 24 February 2023) <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202302/t20230224_11030713.html>.

⁷⁴ 'PM Modi Bats for Permanent UN Security Council Seat, Rights of Global South', *India Today* (online, 13 July 2023) <<https://www.indiatoday.in/india/story/modi-france-visit-pushes-permanent-un-security-council-seat-rights-global-south-2405983-2023-07-13>>.

⁷⁵ See, eg: Emily Tamkin, 'India is Stuck in a New World Disorder', *Foreign Policy* (online, 1 June 2023) <<https://foreignpolicy.com/2023/06/01/india-g7-un-ukraine-russia-war-global-south/>>; Teresa Mettela, 'What's Behind India's Strategic Neutrality on Russia's Invasion of Ukraine', *ABC News* (online, 30 March 2023) <<https://abcnews.go.com/Politics/india-remaining-neutral-russias-invasion-ukraine/story?id=97891228>>.

⁷⁶ United Nations, 'With 143 Votes in Favour, 5 Against, General Assembly Adopts Resolution Condemning Russian Federation's Annexation of Four Eastern Ukraine Regions' (Press Release GA/12458, 12 October 2022) <<https://press.un.org/en/2022/ga12458.doc.htm>>.

does not accept the legal rationale given for ‘neutral’ States’ actions.⁷⁷ However, the likelihood is that faced with a significant number of States supporting Ukraine from a position of qualified neutrality, and an already uncertain position in the conflict, Russia would be geopolitically ill-advised to encourage any other States to assume belligerent status. This will likely leave the right of neutrals to assert qualified neutrality substantively unchallenged.

V CONCLUSION

The law of neutrality appears to have entered a phase of accelerated revision. Russia’s campaign against Ukraine has both changed many minds about the validity of qualified neutrality, and potentially further narrowed the requisite application of strict neutrality in the era of State decision-making within the constructs of the UN. This seems to reflect modern attitudes to war in the wake of the 20th century: leaving a victim State forced into armed conflict and fighting for its survival unaided due to legal technicalities is simply not acceptable. However, questions still remain as to the legal justification for qualified neutrality, especially in the absence of formal State explanations for its rationale. Further definition is also needed for what is now required of neutral States, in what contexts, and how this may interact with the more granular requirements of the law of neutrality. Neutrality remains an important doctrine, for the same reasons it always was: it is capable of protecting non-belligerent States and preventing armed conflicts from becoming uncontrollably and unpredictably enlarged. The time is right for States to put forward *opinio juris* as to when qualified neutrality will apply, and when strict neutrality must still be observed, to clarify what has now become a fairly unpredictable and flexibly interpreted area of law.

⁷⁷ See, eg, Russian ambassador Vassily Nebenzia’s comments that ‘[i]t’s not Ukraine that is fighting Russia, but rather it is a collective West ... All decorum is set aside, and the goal is to inflict strategic defeat on my country’: ‘Ukraine: General Assembly Resumes Emergency Special Session, Taking up New Text to End War’, *UN News* (online, 22 February 2023) <<https://news.un.org/en/story/2023/02/1133797>> (emphasis omitted).

ADVERSE INFERENCES AND FAILURES TO ‘COME UP TO PROOF’

ABSTRACT

Can an adverse inference be drawn against a witness when their evidence does not ‘come up to proof’ with the opening address of counsel? Currently, there is an apparent conflict between appellate decisions of the Supreme Court of South Australia on this issue. On one approach, an opening address is not evidence and any discrepancy is not a proven inconsistency. On another, the process of drawing the adverse inference is a ‘traditional and well known process’. After examining the conflict between the decisions, this article explores the principles underlying the admission and treatment of prior inconsistent statements and argues that to allow an inference to be drawn in such circumstances would fail to give effect to the longstanding principles of fairness to witnesses which also support accuracy in fact-finding. It is argued that the preferable approach is to ensure any inconsistency must be proven in line with the common law and statutory preconditions before an inference adverse to a witness may be drawn.

I INTRODUCTION

A witness fails to ‘come up to proof’.¹ Counsel, in opening, outlined in terms that the witness’s evidence would include four key details. The witness’s evidence only contained two. The failure means that certain facts cannot be established in the evidence. Opposing counsel, in cross-examination, determined not to explore the difference in the witness’s evidence from their sworn statements, disclosed prior to trial. It comes time to prepare for addresses, and the trial judge is asked — can the witness’s failure to come up to proof, in addition to meaning that facts cannot be established in the evidence, be the subject of a direction that the tribunal of fact draw an inference adverse to that witness’s credibility and reliability, on the basis of the discrepancy between the opening address and the witness’s

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¹ The expression ‘failing to come up to proof’ is an informal way of saying that a witness has failed to testify in accordance with their written statement(s): *Oxford Reference* (online at 11 August 2023) ‘proof’ (defs 1–2).

evidence? On one view,² this would be contrary to basic principle and would elevate the status of the opening address to evidence in the trial. On another, it is a ‘traditional and well known process’.³ This article explores the discrepancy between these two views, including by reference to the laws governing the admission of evidence of prior inconsistent statements and the so-called rule in *Browne v Dunn*.⁴ Ultimately, it is argued that, any ‘inconsistency’ must be established in the evidence before a tribunal of fact can draw an inference adverse to that witness. To proceed otherwise would be to invite speculation and be contrary to fundamental precepts of fairness to witnesses enshrined in the laws of evidence.

II THE CONFLICT

The case of *R v A, GP* (*A, GP*)⁵ was an appeal against convictions for sex offences against a child, heard in 2012 in the Court of Criminal Appeal of the Supreme Court of South Australia. One ground of appeal alleged that the trial judge sitting alone had erred in finding the appellant guilty of the third alleged occasion of abuse. Underpinning the ground of appeal was an argument that the discrepancy which had arisen at trial between the prosecutor’s opening address as to what the complainant’s evidence would be on the relevant count in the information, and the evidence that the complainant gave, meant there was an inconsistency in the complainant’s account. This argument was given short shrift by Vanstone J (with whom Nyland J and David J agreed), who remarked that the appellant’s submission

misunderstands the nature of an opening address. It is not evidence and in particular it is not evidence that witnesses have previously made statements in accordance with what counsel foreshadows will be their evidence. There might well have been an inconsistency to be explored. However it was not explored. Again, the appellant is bound by the conduct of his trial counsel. Again, counsel might have taken a forensic decision not to cross-examine, since the conduct described in evidence was arguably less serious than the allegation outlined by the prosecutor.⁶

The next year in the same Court, a differently constituted bench appeared to endorse the opposite view. In *R v MAS* (*MAS*),⁷ also a case dealing with sexual offending against a child, the topic of a discrepancy between a prosecutor’s opening address and a complainant’s evidence came up. This time, it was in the context of a consideration of the sufficiency of the trial judge’s directions to the jury in assessing the complainant’s credibility and reliability and the inconsistencies in her evidence. It is of note that there was extensive cross-examination of the complainant in that

² *R v A, GP* (2012) 113 SASR 146 (*A, GP*).

³ *R v MAS* (2013) 118 SASR 160, 183 [91] (*MAS*).

⁴ (1894) 6 R 67.

⁵ *A, GP* (n 2).

⁶ *Ibid* 150 [29] (Vanstone J, Nyland J agreeing at 147 [1], David J agreeing at 151 [32]).

⁷ *MAS* (n 3).

matter which established the complainant had made a number of prior inconsistent statements.⁸ However, the Court observed that the discrepancy between the prosecutor’s opening address and the witness’s evidence was capable of bearing on the credit of the complainant, in particular in being used as an ‘inconsistency’: ‘[t]he use of a demonstrated inconsistency between the prosecutor’s opening and a witness’ testimony to test the credit of that witness is a traditional and well known process’.⁹

While the authorities cited by the Court in *MAS* are considered in detail below, what is immediately apparent is the *potential* conflict between the two judgments.¹⁰ The first question that emerges is whether or not what is being considered is evidence of an inconsistency — and, if so, whether the laws of evidence governing the admission and use of evidence of prior inconsistent statements apply.

III PRIOR INCONSISTENT STATEMENTS AND FAIRNESS TO WITNESSES

The laws of evidence governing prior inconsistent statements can be traced to *The Queen’s Case*.¹¹ While there has been an understandable degree of modification since that decision in the 19th century, the substance of the decision is reflected in statutory form in South Australia in ss 28–9 of the *Evidence Act 1929* (SA). These provisions and interstate analogues¹² reflect the substance of ss 4–5 of the *Criminal Procedure Act 1865*.¹³

As was noted by Doyle J (with whom Kourakis CJ agreed) in *R v Trabolssi*,¹⁴ the provisions exist to ensure that the statements are relevant to the facts in issue, are inconsistent with evidence the witness has given, and that the witness is given ‘a fair opportunity to admit or deny the previous statement’.¹⁵ These rules ensure that the scope of attacks on the credit of witnesses is confined, to avoid the principal litigation becoming bogged down with collateral attacks on credit. Similarly, it ensures that the fact finder who must apply the burden and standard of proof does so only against the background of the facts in issue in the case itself.

⁸ Ibid 168 [37].

⁹ Ibid 183 [91].

¹⁰ The matter is not resolved — see, eg, *R v Munn* [2021] SADC 97 where Kimber DCJ observed that the judgment in *MAS* ‘is consistent’ with allowing a discrepancy between an address and the evidence of a witness being used as a prior inconsistent statement: at [36]. See also: *R v Smith* [2023] SADC 108, [77]–[100]; *R v JH* [2023] SADC 163, [228]–[232].

¹¹ *The Queen’s Case* (1820) 2 Brod & Bing 284; 129 ER 976.

¹² *Evidence Act 1977* (Qld) ss 18–19; *Evidence Act 1906* (WA) ss 21–2. See also: *Evidence Act 2011* (ACT) s 43; *Evidence Act 1995* (NSW) s 43; *Evidence (National Uniform Legislation) Act 2011* (NT) s 43; *Evidence Act 2001* (Tas) s 43; *Evidence Act 2008* (Vic) s 43.

¹³ *Criminal Procedure Act 1865*, 28 & 29 Vict, c 18, ss 4–5.

¹⁴ (2018) 131 SASR 297.

¹⁵ Ibid 330 [157]–[159] (Doyle J, Kourakis CJ agreeing at 299 [1]).

Another aspect of the rules governing the admission of prior inconsistent statements is the underlying aim to strive for accuracy in fact-finding. Rather than allowing one party to impugn the credit of a witness without putting any inconsistencies to them, the rules have developed to ensure that cross-examination of witnesses on prior inconsistencies is done in a way that promotes transparency.

The witness must be taken to the prior statement and be given an opportunity to acknowledge it, and, importantly as regards fairness, an opportunity to explain any inconsistency between the prior statement and the evidence they have given in the trial. In this way, tribunals of fact are able to assess the witness when they are confronted with any inconsistency, and also able to assess the veracity of any explanation given. As former Justice of the Supreme Court of South Australia WAN Wells states, in relation to ss 28–9 of the *Evidence Act 1929* (SA), the provisions and the principles underlying them

cover the field; they are not merely enabling. Accordingly, if you wish to tender, or to elicit, proof of a prior inconsistent statement, you must lay the proper foundation for such proof strictly in accordance with the procedure and order prescribed. It is mandatory under each section that a witness may be contradicted only where the prior inconsistent statement is ‘relative to the subject matter of the cause’: in other words, the testimonial effect of the prior statement must be relevant to the issues; the section does not authorise contradiction where that testimonial effect merely would affect the witness’s veracity upon a collateral matter. It is also mandatory that, before a witness may be contradicted, he must be given a fair opportunity to say whether he made the statement; what is a fair opportunity is prescribed appropriately by each section.¹⁶

Moreover, the assessment of the witness by the tribunal of fact is done with reference to only the evidence admitted at the trial. This would include the evidence of any prior inconsistency (and any potential explanation for that inconsistency) given by the witness. This prevents counsel, and tribunals of fact, from impugning the credit of witnesses on the basis of material other than the evidence in the trial. It is also designed to ensure that tribunals of fact do not speculate on potential explanations for inconsistency (whether nefarious or benign). In that sense, while the conflict raised above relates to the evidence of complainants, it can also be of central importance when assessing evidence given by an accused person in a criminal trial. The principles relating to this, and analogy with the rules relating to prior inconsistent statements, were recently considered by the High Court in *Hofer v The Queen* (*Hofer*).¹⁷

IV THE RULE IN *BROWNE V DUNN* AND FAIRNESS TO WITNESSES

It is a rule of practice in Australian trials that counsel cross-examining a witness from an opposing party, who intends to submit the witness’s evidence ought not

¹⁶ WAN Wells, *Evidence and Advocacy* (Butterworths, 1988) 178–9.

¹⁷ (2021) 274 CLR 351 (*Hofer*).

to be accepted, should put the propositions that are to be relied upon to impugn the witness's testimony for the witness's comment or explanation.¹⁸ This rule of practice is commonly referred to as the rule in *Browne v Dunn*. The High Court recently observed that, in the criminal context, '[a]s a general rule, defence counsel should put to witnesses for the Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence'.¹⁹

The rule has been held to apply in criminal practice.²⁰ The rule, simple to state, is more complex when considered in application to the conduct of a trial. This is particularly so in the context of a criminal defence case, and the tension that can arise between the desire for fairness underpinning the rule and the burden of proof that rests on the prosecution.

This complexity, and the tension, were the subject of consideration and comment by King CJ in *R v Manunta*.²¹ There, considering the potential application of the rule to the cross-examination of an accused, where propositions had not been put to prosecution witnesses consistently with the evidence then given by the accused person, King CJ observed that the assumption that there was only a single reason that the propositions were not put by defence counsel and the inference from counsel's omission that the defendant's evidence 'was an untrue embellishment', was 'a process of reasoning ... fraught with peril and [which] should therefore be used only with much caution and circumspection'.²²

In similar circumstances before the High Court in *Hofer*, Kiefel CJ, Keane and Gleeson JJ outlined that where cross-examination to the above effect has occurred, a direction from the trial judge was required:

It was necessary that the trial judge put the omissions in perspective, discount any assumption as to why they occurred by reference to other possibilities and warn the jury about drawing any inference on the basis of a mere assumption. Absent such directions there was a real chance that the jury may have assumed that the reason for the omission was that the appellant had changed or more recently made up his story.²³

¹⁸ Ibid 360–1 [26]–[28] (Kiefel CJ, Keane and Gleeson JJ); *Browne v Dunn* (n 4) 70–1 (Lord Herschell LC), 76–7 (Lord Halsbury); *MWJ v The Queen* (2005) 222 ALR 436, 448 [38] (Gummow, Kirby and Callinan JJ) ('*MWJ*').

¹⁹ *Hofer* (n 17) 361 [28].

²⁰ *MWJ* (n 18) 440–1 [18] (Gleeson CJ and Heydon J), discussing *R v Manunta* (1989) 54 SASR 17, 23 (King CJ) ('*Manunta*').

²¹ *Manunta* (n 20).

²² Ibid 23.

²³ *Hofer* (n 17) 366–7 [47] (citations omitted).

In *MWJ v The Queen* (*MWJ*),²⁴ Gummow, Kirby and Callinan JJ made a number of observations about the impact of the rule in practice:

One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her. An offer to tender a witness for further cross-examination will however, in many cases suffice to meet, or blunt a complaint of surprise or prejudice resulting from a failure to put a matter in earlier cross-examination.²⁵

The judgment went on to observe that, in the context of prosecution witnesses, ‘subject to the obligation of the prosecution not to split its case’, the recall of the relevant witness to allow the matters to be put to them, in compliance with the rule, was the course ‘that should be able to be adopted on most occasions without injustice’.²⁶

The rule, perhaps unsurprisingly given its age, has been subject to various criticism. Given the different adversarial contest that underpins civil litigation, it has been the subject of rather different scrutiny in the context of its continuing usefulness or applicability in civil proceedings.²⁷ Despite the differing considerations that attend the rule in civil proceedings, an observation made by Justice Sackar is apposite to its application in both civil and criminal proceedings. That is, where issues are joined and a tribunal of fact called upon to assess witnesses, those witnesses are entitled to an opportunity to ‘tell their side of the story’.²⁸

That the rule in *Browne v Dunn* exists, in part, due to considerations of fairness aligns it with the principles governing the admission and use of evidence of prior inconsistent statements of witnesses discussed above. Each body of law reflects a desire to ensure that tribunals of fact only approach the assessment of the credibility and reliability of witnesses in line with rules that ensure that witnesses are afforded a fair opportunity to comment on lines of attack that may be mounted on their evidence — and, to the extent possible and with an eye to confining the issues in any given trial, an opportunity to explain any aspects which might otherwise damage their accounts.

²⁴ *MWJ* (n 18).

²⁵ Ibid 448 [39].

²⁶ Ibid 448–9 [40].

²⁷ See, eg, Justice John Sackar, ‘The Rule in *Browne v Dunn*: Essential or Anachronistic’ (Speech, University of Oxford, 16 Jan 2019) <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2019-Speeches/Sackar_20190116.pdf>.

²⁸ Ibid 35.

Having considered the principles applicable to prior inconsistent statements and the rule in *Browne v Dunn*, it is convenient to turn to what the Court in *MAS* described as the ‘traditional and well known process’²⁹ of drawing an inference adverse to a witness’s credit due to a discrepancy between an address of counsel and a witness’s evidence.

V ‘TRADITIONAL AND WELL KNOWN PROCESS’

As outlined above, the Court in *MAS* observed that the drawing of an inference adverse to a witness’s credit based on a discrepancy between counsel’s opening and the witness’s evidence was a ‘traditional and well known process’.³⁰ Various authorities are cited for the proposition.³¹

When those authorities are considered, it can be observed that none clearly articulate that it is a rule of evidence that a tribunal of fact can draw an inference adverse to a witness on a basis of a discrepancy between an address of counsel and sworn evidence. None grapple with the potential conflict such an approach might give rise to with the rules governing the admission of prior inconsistent statements.

The primary authority the Court refers to, *Davis v The Queen* (‘*Davis*’),³² involved a consideration of the adequacy of directions given to a jury about inconsistencies in circumstances where the complainant’s evidence was at odds with the prosecutor’s opening and statements given to a doctor and the police (which the judgment outlines were also explored in the evidence). There, Prior J (Doyle CJ agreeing) held that in the circumstances of that case, the effect of the proven inconsistencies in the complainant’s evidence and the two directed acquittals required directions that did more than just reiterate submissions of counsel.³³ It is significant that Prior J’s assessment of the directions as to inconsistency in the evidence was closely related to a separate ground of appeal impugning the trial judge’s directions on intoxication, which was separately upheld.³⁴ To that extent, *Davis* does not hold that discrepancies between

²⁹ *MAS* (n 3) 183 [91].

³⁰ *Ibid.*

³¹ *Ibid* 183 [91]–[92], citing: *Walker v Kraft* (Supreme Court of South Australia, O’Loughlin J, 19 March 1987); *G v The Queen* (Supreme Court of South Australia, Cox, Olsson and Mullighan JJ, 4 April 1995); *Davis v The Queen* (1995) 183 LSJS 186 (‘*Davis*’); *R v Carter* (Supreme Court of South Australia, Lander J, 18 April 1997) (‘*Carter*’); *Wheeler v The Queen* (Court of Criminal Appeal of Western Australia, Franklyn, Walsh and Ipp JJ, 20 April 1998) (‘*Wheeler*’); *Huynh v The Queen* [1999] WASCA 45 (‘*Huynh*’); *Jaensch v The Queen* [2000] WASCA 212 (‘*Jaensch*’); *R v M* [2001] QCA 458; *Dyers v The Queen* (2002) 210 CLR 285, 310 (Kirby J) (‘*Dyers*’); *R v ND* [2004] 2 Qd R 307; *Rowney v The Queen* (2007) 168 A Crim R 579 (‘*Rowney*’); *DPJB v Western Australia* [2010] WASCA 12 (‘*DPJB*’).

³² *Davis* (n 31).

³³ *Ibid* 190–2 (Prior J, Doyle CJ agreeing at 192).

³⁴ *Ibid* 189–90.

a prosecutor's opening and a witness's evidence, in the absence of a foundation elsewhere in the evidence, can be used to draw inferences adverse to that witness.³⁵

Other authorities considered by the Court in *MAS*³⁶ include analyses of inconsistencies (with some references to discrepancies between a prosecutor's opening and the evidence of a witness) in numerous contexts, from reasons for verdict,³⁷ to considerations of grounds of appeal alleging inconsistent or unreasonable verdicts.³⁸ The majority fall into the latter category. This means that any discussion of the evidence has to be seen in its proper context. The comments made in a number of those authorities are in the context of the appellate court undertaking their own independent review as they must pursuant to *M v The Queen*,³⁹ rather than analysing the principles applicable to evidence of prior inconsistent statements.

More problematic is the fact that some of the other authorities make clear that any reference to a discrepancy does not have the effect of elevating an address of counsel to the status of evidence. Instead, they make clear that the tribunal of fact is only to consider a witness's evidence as it was properly admitted; none speak of a 'traditional' or 'well known process' which would allow an inference adverse to that witness to be drawn in the absence of proof of an inconsistency in line with the rules of evidence. One such example can be found in observations from one of the authorities cited in *MAS*, *Huynh v The Queen* ('Huynh'):⁴⁰

However, I am not sure that there is any rule of law or practice that prevents the Crown from putting to the jury a case for conviction that is somewhat different from that alluded to in the opening address. Each case has to be assessed on its merits and it would depend on the nature and materiality of the departure. *It is a truism that the case which the jury has to consider is that which is established by the evidence, not by the opening. To take an example, it cannot be the case that because a Crown witness has not 'come up to proof' the prosecution must fail because what remains differs from the way it was put in opening.* Of course, a departure from the opening may be the subject of comment at the appropriate time. There will also be occasions on which the trial judge is obliged to hold the Crown to the case it said in opening that it intended to advance. ... Much will depend on the materiality of the departure and the effect it would have on the ability of the accused to put his or her defence squarely to the jury.⁴¹

³⁵ Ibid 190–2.

³⁶ *MAS* (n 3) 183 [92] n 52.

³⁷ *Carter* (n 31).

³⁸ See, eg: *G v The Queen* (n 31); *Wheeler* (n 31); *Huynh* (n 31); *Jaensch* (n 31); *Dyers* (n 31); *R v ND* (n 31); *Rowney* (n 31); *DPJB* (n 31).

³⁹ (1994) 181 CLR 487, 492 (Mason CJ, Deane, Dawson and Toohey JJ), 525 (McHugh J).

⁴⁰ *Huynh* (n 31).

⁴¹ Ibid [30] (Owen J) (emphasis added).

The difficulties attending the approach in *MAS* are apparent. It should also be noted that, given that the comment in *MAS* was made in respect of a ground of appeal that was considering the sufficiency of directions given by the trial judge in that particular case, it can be considered properly as obiter dictum.⁴² Further, it is of note that the descriptor ‘demonstrated’ is deployed by the Court.⁴³ One way in which to reconcile the comments with ss 28–9 of the *Evidence Act 1929* (SA) would be to understand the comment as only referable to inconsistencies which are proven (or put another way, ‘demonstrated’) in the evidence before the tribunal of fact in line with those provisions. This reading may also mean that the judgment may not conflict with the comments of Vanstone J in *A, GP*.⁴⁴ However, this is difficult to reconcile with the comment made in the preceding paragraph in *MAS*, that ‘there was here stark evidence that D had failed to give any evidence of a serious and specific allegation’.⁴⁵ Without further examining the basis for the assertion that an absence of evidence was ‘stark evidence’,⁴⁶ it may be observed that, notwithstanding its status as obiter, it leaves trial courts and counsel in a difficult position.

VI CONSEQUENCES: AN INFERENCE ADVERSE, DRAWN WITHOUT NOTICE?

Tribunals of fact determine disputes at trial on the basis of the evidence admitted before them in accordance with the rules of evidence. The emphasis on in-person testimonial evidence that had long underpinned our system of adversarial litigation may have begun to shift. For example, such a shift is apparent through ss 12AB and 13BA of the *Evidence Act 1929* (SA) and surrounding amendments relating to vulnerable witnesses which may be contrasted with the ‘testimonial emphasis’ underpinning many rules of evidence.⁴⁷ Despite this shift, the emphasis on affording fairness to witnesses as part of an effort to ensure there is accuracy in fact-finding has not. To that extent, one may question whether the drawing of an inference adverse to a witness on the basis of a discrepancy between an opening address and that witness’s evidence is in accordance with principle.

Further, it should be observed that in the criminal context, a ‘failure to come up to proof’ often has the result that an accused person is acquitted on certain charges. To that extent, the benefit to the accused is immediate. Further, that benefit is an obvious justification for any counsel for an accused person making a forensic decision not to explore any inconsistency in cross-examination (in accordance with any relevant statutory provisions governing that process). The most obvious risk of

⁴² *MAS* (n 3) [10], [28]–[30], [91], [107]–[109].

⁴³ *Ibid* 183 [91].

⁴⁴ See above n 6 and accompanying text.

⁴⁵ *MAS* (n 3) 183 [90].

⁴⁶ *Ibid*.

⁴⁷ Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5th ed, 2010) 575 [7.1].

such a course is that a complainant's memory may be refreshed and the prospect of acquittal, which may have been guaranteed to the extent that there was no evidence admitted in relation to certain charges, may vanish and be replaced with a cogent, coherent account of the witness in cross-examination and re-examination as to why the evidence was not given in chief. Moreover, to the extent that inconsistencies are in fact proven in line with the applicable rules, there is nothing stopping counsel then incorporating the fact that the proven inconsistencies are highlighted or exacerbated when considered against the allegations that were contained in an opening address. So much was contemplated in the authorities cited in *MAS*, including the observation in *Huynh* that departures from an opening address may be subject to 'comment at the appropriate time'.⁴⁸ To that extent, any discrepancy remains relevant — but it does not undermine or otherwise adversely impact the justification for and operation of the rules of evidence governing the admission of prior inconsistent statements.

The alternative seems difficult to reconcile with the rules of fairness as to witnesses that underpin the law governing the admission and use of prior inconsistent statements and the rule in *Browne v Dunn*. On one view, *MAS* would permit an accused to not only obtain the benefit of any directed acquittals as a result of a failure to come up to proof, that may be in no way the complainant's fault, but then compound that benefit by inviting a fact-finder to draw an inference adverse to that complainant's credit without having to abide by the rules established to allow fairness to witnesses that would otherwise apply.

VII CONCLUSION

The conflict between the judgments in *A*, *GP* and *MAS* potentially puts trial courts in difficulty. To the extent there is a discrepancy between counsel's opening and a witness's evidence, at least in South Australia, it currently appears that the position of a fact-finder in assessing that discrepancy is unclear. As recent decisions in the District Court of South Australia demonstrate,⁴⁹ the issue remains unresolved. The examination of the judgment in *MAS*, and the authorities which it cites for what it describes as a 'traditional and well known process',⁵⁰ was undertaken to demonstrate that there does not appear to be a general principle that an inference adverse to a witness's credit may be drawn against a witness when they fail to 'come up to proof'. Instead, in accordance with the common law and ss 28–9 of the *Evidence Act 1929* (SA), any prior inconsistent statement must be proven in line with the established laws of evidence. It is contended that such a view best gives effect to the principles of fairness to witnesses and accuracy in fact-finding.

⁴⁸ *Huynh* (n 31) [30] (Owen J).

⁴⁹ See above n 10.

⁵⁰ *MAS* (n 3) 183 [91].

**INNOCENT UNTIL PREDICTED GUILTY:
GARLETT V WESTERN AUSTRALIA (2022) 404 ALR 182**

‘Liberty: Not the Daughter but the Mother of Order.’¹

I INTRODUCTION

In *Garlett v Western Australia* (*‘Garlett’*),² the High Court dismissed a challenge to the validity of item 34 of sub-div 3 of div 1 of sch 1 to the *High Risk Serious Offenders Act 2020* (WA) (*‘HRSO Act’*) on the basis of repugnancy with ch III of the *Constitution*. The challenged provision of the *HRSO Act* grants the Supreme Court of Western Australia the power to make restriction orders in respect of individuals previously convicted of robbery.³ If satisfied an individual subject to a custodial sentence is a ‘serious offender’ posing a risk to the community the Supreme Court must order a supervision or continuing detention order.⁴ Under a supervision order, the serious offender is subject to stated conditions, whereas a continuing detention order entails detaining the serious offender for an indefinite term.⁵

At the centre of this appeal lies a fundamental observation about the nature and role of courts established under the *Constitution* and diverse interpretations of what punishment means in the context of the decision in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (*‘Lim’*).⁶ For Gageler and Gordon JJ, investing power is curtailed by the substantive nature of courts and the proper administration of justice.⁷ Detention guarding against future offending was considered punitive in the circumstances and impermissible to flow from anything other than a judicial determination of guilt.⁸ However, for Kiefel CJ, Keane, Steward, Edelman and Gleeson JJ, judicial power can and was wielded to protect the community from the potential

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¹ Pierre-Joseph Proudhon, *Liberty* (Boston, 6 August 1881).

² (2022) 404 ALR 182 (*‘Garlett’*).

³ *High Risk Sexual Offenders Act 2020* (WA) s 48 (*‘HRSO Act’*).

⁴ *Ibid* ss 7, 48.

⁵ *Ibid* ss 26(1), 27(1).

⁶ (1992) 176 CLR 1 (*‘Lim’*).

⁷ *Garlett* (n 2) 213 [134]–[136], 214 [140] (Gageler J), 224–5 [179]–[180] (Gordon J).

⁸ *Ibid* 224–5 [179]–[180] (Gordon J).

harms posed by recidivism of individuals previously convicted of robbery.⁹ When punishment is protective,¹⁰ the Supreme Court's institutional integrity remains.¹¹

This case note considers: (1) the constitutional background informing these views; (2) the facts and decision underlying *Garlett*; (3) the implications of and consequences for the *Lim* principle in the state and Commonwealth context; (4) the role of reasoning by analogy; and (5) policy and other considerations under international law concerning upholding continuing detention orders.

II CONSTITUTIONAL BACKGROUND

In *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*')¹² the High Court held that Australia's constitutional structure restricts the legislature's capacity to repose ch III power.¹³ Consequently, federal judicial power shall only be vested in ch III courts, and ch III courts may only be invested with such power.¹⁴ For the purposes of this discussion, the relevant prohibition is the legislative conferral of non-judicial power on ch III courts.

At the Commonwealth level, a result of the decision in *Boilermakers* was a challenge in *Lim* to div 4B of the *Migration Act 1958* (Cth). In *Lim*, the protective implication underlying *Boilermakers* was made explicit.¹⁵ Justices Brennan, Deane and Dawson held that aside from

exceptional cases ... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.¹⁶

This seminal observation, known as the '*Lim* principle', expounds the core constitutional limitation on detention arising from the federal separation of powers.

The doctrine recognised in *Boilermakers* also implicates state courts. The unified nature of federal and state jurisdiction established by the *Constitution* and *Judiciary*

⁹ Ibid 186 [8], 193 [45], 194 [49], 195–6 [54]–[56], 199 [69] (Kiefel CJ, Keane and Steward JJ), 246 [255]–[257], 253 [283]–[284] (Edelman J), 260–1 [312]–[314] (Gleeson J).

¹⁰ Ibid 246–7 [255]–[258] (Edelman J).

¹¹ Ibid 207 [107]–[108] (Kiefel CJ, Keane and Steward JJ).

¹² (1956) 94 CLR 254 ('*Boilermakers*').

¹³ Ibid 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁴ Ibid.

¹⁵ See, eg, Mary Gaudron, 'Some Reflections on the Boilermakers Case' (1995) 37(2) *Journal of Industrial Relations* 306, 309.

¹⁶ *Lim* (n 6) 27.

Act 1903 (Cth), contemplates the continued existence of a superior court capable of answering that description.¹⁷ Accordingly, while state courts may not *only* be invested with federal judicial power, for a power to be validly invested in such a court its exercise must uphold the institutional integrity of ch III.¹⁸ This is a lesser standard than the strict separation of powers that exists at the Commonwealth level pursuant to the *Boilermakers* doctrine.

The decision which recognised that restriction regarding state courts, *Kable v Director of Public Prosecutions (NSW)*,¹⁹ held that in granting the New South Wales Supreme Court the power to issue a continuing detention order, the *Community Protection Act 1994* (NSW) unlawfully imposed an ad hominem task on the Court, which was so significantly non-judicial to impair the Court's integrity as a potential repository of ch III power.²⁰ Accordingly, the legislation was invalid.²¹

Following the decisions in *Boilermakers* and *Kable*, a series of cases attempted to invoke these principles to challenge the validity of laws vesting courts with the power to make preventive detention orders. All but *South Australia v Totani* ('*Totani*')²² have been unsuccessful.

In *Totani*, the power of South Australian courts to make control orders under s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) was found to be invalid.²³ The power impermissibly enlisted the judiciary to severely restrict an individual's liberty — regardless of their likelihood to offend and subject to the Attorney-General's declaration.²⁴

However, in *Fardon v Attorney-General (Qld)* ('*Fardon*')²⁵ and *Minister for Home Affairs v Benbrika* ('*Benbrika*')²⁶ the Court dealt with laws pertaining to

¹⁷ See *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67–8 [39]–[43] (Gleeson CJ), 73–4 [56]–[57] (Gummow, Hayne and Crennan JJ).

¹⁸ *Kable v DPP (NSW)* (1996) 189 CLR 51, 100–3, 107 (Gaudron J), 109–10, 114–16 (McHugh J), 126, 136–8, 140 (Gummow J) ('*Kable*'). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

¹⁹ *Kable* (n 18).

²⁰ Ibid 103 (Gaudron J), 109 (McHugh J), 135, 143–4 (Gummow J). A narrower approach was adopted by Toohey J based on the Supreme Court exercising federal jurisdiction under the *Community Protection Act 1994* (NSW) and vested in it by s 39 of the *Judiciary Act 1903* (Cth): at 96–9. See also New South Wales, *Parliamentary Debates*, Legislative Council, 16 November 1994, 5091–4.

²¹ *Kable* (n 18) 98–9 (Toohey J), 108 (Gaudron J), 108–9, 124 (McHugh J), 135, 143–4 (Gummow J).

²² (2010) 242 CLR 1.

²³ Ibid 21 [4] (French CJ), 67 [149] (Gummow J), 92–3 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

²⁴ Ibid.

²⁵ (2004) 223 CLR 575 ('*Fardon*').

²⁶ (2021) 272 CLR 68 ('*Benbrika*').

post-sentence continuing detention differently, finding each scheme to be valid. In *Fardon*, s 5 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('*DPSO Act*') granted the Supreme Court of Queensland power to order continuing detention. The validity of that power hinged on the detention's proportionality to protecting the community from the most serious and inherently harmful kind of criminal activity: sexual offending against minors.²⁷ In *Benbrika*, the validity of a continuing detention order pursuant to s 105A.7 of the *Criminal Code 1995* (Cth) rested on the tailored nature of the scheme, which required judicial satisfaction that no less restrictive measure could prevent the singular threat posed by terrorist criminal activity to the community.²⁸

Challenges attempting to invoke *Kable* against schemes imposing restrictions on liberty falling short of detention in custody have been equally unsuccessful. The decisions in *Pollentine v Bleijie*²⁹ and *Vella v Commissioner of Police (NSW)*³⁰ are two such examples.

Against this backdrop, Peter Garlett mounted a challenge to the validity of the *HRSO Act* based on both the principle in *Lim* and *Kable*.

III FACTS

A *The HRSO Act*

Under the *HRSO Act*, the State of Western Australia may apply to the Supreme Court for a restriction order in respect of a person who has been convicted of a defined 'serious offence', which includes robbery.³¹ If the Court is satisfied that the person is a 'high risk serious offender' — that is, 'it is necessary to make a restriction order in relation to the offender to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence'³² — the Court must make a restriction order.³³ This could be a continuing detention order for the offender's indefinite detention,³⁴ or a supervision order subjecting the offender to certain conditions considered appropriate by the Court.³⁵ However, the Court can

²⁷ *Fardon* (n 25) 592 [19] (Gleeson CJ), 593–4 [25] (McHugh J), 620 [112] (Gummow J), 647–8 [196] (Hayne J), 658 [234] (Callinan and Heydon JJ).

²⁸ *Benbrika* (n 26) 87 [11] (Kiefel CJ, Bell, Keane and Steward JJ).

²⁹ (2014) 253 CLR 629.

³⁰ (2019) 269 CLR 219.

³¹ *HRSO Act* (n 3) ss 5, 11, sch 1 div 1 sub-div 3 item 34.

³² *Ibid* s 7(1).

³³ *Ibid* s 48(1).

³⁴ *Ibid* s 26(1).

³⁵ *Ibid* s 27(1).

only make a supervision order if satisfied that the person will substantially comply with the relevant conditions.³⁶

B *Peter Garlett*

Garlett is an Indigenous man from Western Australia. He had a history of using alcohol and drugs, dating from when he was 12 years old, and he also had a history of offending.³⁷ In November 2017, pretending to be armed with a handgun and in company, Garlett broke into a dwelling and stole a pendant necklace and \$20 in cash, for which he was convicted of robbery and assault with intent to rob.³⁸ At 23 years of age, it was his first adult offence.³⁹

In 2021, the State of Western Australia sought a continuing detention order against Garlett; in response, he challenged the validity of the *HRSO Act*.⁴⁰ By the time it reached the High Court, his challenge was confined to whether the application of the *HRSO Act* to individuals convicted of robbery, by the designation in the *HRSO Act* of robbery as a ‘serious offence’, was contrary to ch III of the *Constitution*.⁴¹ Interestingly, the State of Western Australia ultimately sought only a supervision order in respect of Garlett, and their application was refused.⁴²

IV THE DECISION

The majority of the High Court, comprising Kiefel CJ, Keane, Steward, Gleeson and Edelman JJ, found that in its application to robbery, the *HRSO Act* was consistent with ch III of the *Constitution*, and was therefore valid.⁴³ Justices Gageler and Gordon disagreed.⁴⁴

A *Chief Justice Kiefel, Keane and Steward JJ*

Chief Justice Kiefel, Keane and Steward JJ held that sch 1 of the *HRSO Act* was valid, primarily because of material indistinguishability between the impugned provisions of the *HRSO Act* in *Garlett* and those permitted by *Kable* in *Fardon*.⁴⁵

³⁶ Ibid s 29(1).

³⁷ *Garlett* (n 2) 185 [3].

³⁸ Ibid 185 [1]–[2].

³⁹ Ibid 232 [200].

⁴⁰ Ibid 186 [6].

⁴¹ Ibid 186 [6]–[7].

⁴² Ibid 254 [289].

⁴³ Ibid 186 [8] (Kiefel CJ, Keane and Steward JJ), 233–4 [207] (Edelman J), 254–5 [291] (Gleeson J).

⁴⁴ Ibid 217–18 [155]–[160] (Gageler J), 228–9 [190]–[192], 230–2 [195]–[201] (Gordon J).

⁴⁵ Ibid 186 [8], 196–7 [57], 197–8 [61]–[64], 199 [69].

Their Honours held that *Fardon* is not limited to the proposition that courts are empowered to make detention orders for individuals serving sentences of serious sexual offences.⁴⁶ A conviction of robbery was capable of being sufficiently serious to find the basis for a restriction order.⁴⁷ That conclusion was based in equal parts on the forward looking nature of an order protecting the community⁴⁸ and the need to respect legislative judgment regarding which *kinds* of offences the community requires protection from.⁴⁹ The plurality also considered that the *HRSO Act* and *DPSO Act* permit comparable judicial discretion.⁵⁰ For their Honours, prescribing the Supreme Court ‘must’ make a restriction order if satisfied the offender is captured by the definition of ‘high risk serious offender’, did not materially distinguish the power under s 48 of the *HRSO Act* from that considered in *Fardon*.⁵¹ As the court exercises judgment as to the nature, extent of and appropriate restrictive response to prospective future harm, judicial discretion is not impermissibly fettered by prescribing that the court make the order.⁵²

Indeed, while the plurality considered that characterising the power under the *HRSO Act* as non-judicial would not necessarily violate the *Kable* principle, they ultimately reasoned a power being recognisable as a conventional exercise of judicial power *may* be seen as ‘a positive indicator of validity’ in the *Kable* sense.⁵³ Their Honours resolved that despite the complexity of the ‘open-textured’ task in s 7 of the *HRSO Act*, its imposition to assess future risk for the purpose of protection necessitates engaging in evaluative, independent judicial determination.⁵⁴

Additional considerations concerning institutional integrity supported the plurality finding the law valid pursuant to *Kable*.⁵⁵ First, the *HRSO Act* maintains the independence of the Supreme Court of Western Australia from the legislature and executive government.⁵⁶ Second, and again similarly to the treatment of the *DPSO Act* in *Fardon*,⁵⁷ the *HRSO Act* incorporates processes that bear ‘the “hallmarks of traditional judicial forms and procedure”’.⁵⁸ Third, the defendant is able to engage in the process.⁵⁹ Finally, upholding preventive detention is less likely to damage

⁴⁶ Ibid 200–1 [76]–[77].

⁴⁷ Ibid 201 [78]–[80], 202 [84]–[85].

⁴⁸ Ibid 201 [78].

⁴⁹ Ibid 201 [79].

⁵⁰ Ibid 199–200 [70]–[75].

⁵¹ Ibid.

⁵² Ibid 200 [73].

⁵³ Ibid 193 [41].

⁵⁴ Ibid 199 [66]–[67], 204–5 [97].

⁵⁵ Ibid 203 [89], 204 [93], 205 [100], 205 [102].

⁵⁶ Ibid 207 [107].

⁵⁷ *Fardon* (n 25) 592 [19] (Gleeson CJ).

⁵⁸ *Garlett* (n 2) 198 [64], quoting *ibid* 656 [220] (Callinan and Heydon JJ).

⁵⁹ Ibid 205 [99].

public confidence in the ‘courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy’.⁶⁰

The plurality did not consider the *Lim* principle to be relevant to the validity of laws investing power in state courts.⁶¹ Nonetheless, their Honours stated that given the *HRSO Act*’s protective purpose, its powers do not involve the adjudgment or punishment of criminal guilt.⁶² Therefore, ‘[e]ven if the *HRSO Act* were a law of the Commonwealth, it would not contravene the *Lim* principle’.⁶³ The *HRSO Act*’s protective purpose was evidenced by the evaluation conducted under s 7, which — similarly to the law in *Benbrika* — takes into account and imposes detention for the purpose of safeguarding against future risk rather than penal considerations of retribution and deterrence.⁶⁴ The inclusion of periodic reviews and the requirement under s 48 for courts to order the least restrictive means capable of protecting the community, further demonstrated a purpose distinct from punishment in the view of the plurality.⁶⁵

B Justice Gleeson

Justice Gleeson generally agreed with the plurality, concluding that the *HRSO Act* was ‘materially indistinguishable’ from the impugned legislation in *Fardon* and therefore was not repugnant to the institutional integrity of the Supreme Court of Western Australia.⁶⁶ However, her Honour made some additional observations.

Overall, Gleeson J contended that the *Lim* principle is only applicable to Commonwealth laws, and has no bearing on the validity of a state law, the latter of which relevantly depends on compliance with the *Kable* doctrine.⁶⁷ This was because *Lim*, in her Honour’s view, was a statement about the separation of judicial power at the Commonwealth level, rather than about the nature or characteristics of ch III courts or the scope of state legislative power.⁶⁸ Her Honour further explained that the judgments in neither *Fardon* nor *Kable* treated the *Lim* principle as relevant to the institutional integrity of a state court.⁶⁹

Justice Gleeson also concluded that in any event, the *HRSO Act* did not breach the *Lim* principle: given the legislature’s decision to impose a maximum sentence of

⁶⁰ Ibid 203 [90], quoting *Fardon* (n 25) 593 [23] (Gleeson CJ). See also *Benbrika* (n 26) 169 [226] (Edelman J).

⁶¹ *Garlett* (n 2) 192–3 [40].

⁶² Ibid 192 [38], 196 [55].

⁶³ Ibid 192–3 [40].

⁶⁴ Ibid 196 [55]–[56].

⁶⁵ Ibid.

⁶⁶ Ibid 254–5 [291].

⁶⁷ Ibid 255 [293].

⁶⁸ Ibid 255–6 [294].

⁶⁹ Ibid 256 [295], 258–9 [306]–[309].

life imprisonment for robbery, the offence had a sufficiently grave harm such that it could fall within an exception to the principle.⁷⁰

C Justice Edelman

Justice Edelman adopted a ‘strict and narrow’⁷¹ interpretation of the *HRSO Act*, under which continuing detention orders for robbery would be made only ‘as a matter of last resort’ for ‘anticipated robberies with a sufficiently high degree of seriousness and a sufficiently high magnitude of harm’.⁷² This was because, on his Honour’s interpretation, the *HRSO Act* required the Court to balance the probability of the person committing a serious offence and the magnitude of the harm, against the burden on liberty.⁷³ In addition, it would be ‘rare’ for a restriction order to be a continuing detention order, given the range of potential conditions that could be imposed as part of a supervision order.⁷⁴

Given this interpretation, Edelman J found the *HRSO Act* to be valid: the serious robberies for which a continuing detention order can be made could not be ‘meaningfully distinguished’ from serious sexual or terrorism offences, preventive detention regimes for which were approved by the High Court in *Fardon* and *Benbrika* respectively.⁷⁵ Crucially, his Honour found that in its application to these serious robberies, the *HRSO Act* did not ‘create such individual injustice as to unjustifiably compromise the institutional integrity of a court’,⁷⁶ although it came ‘perilously close’.⁷⁷ However, Edelman J emphasised that absent this narrow interpretation, and if, for example, the *HRSO Act* allowed continuing detention orders for all robberies, the *HRSO Act* would not have been valid.⁷⁸ Furthermore, regardless of whether the interpretation was correct, the *HRSO Act* would have to be read down in this way, pursuant to s 7 of the *Interpretation Act 1984* (WA).⁷⁹

D Justice Gageler (Dissenting)

Justice Gageler found that in its application to robberies, the *HRSO Act* infringed the *Kable* doctrine and was invalid. His Honour arrived at this conclusion by finding the *Lim* principle to have a ‘deeper and broader import’ than merely protecting

⁷⁰ Ibid 259–60 [310]–[313].

⁷¹ Ibid 236 [217].

⁷² Ibid 252–3 [282].

⁷³ Ibid 238 [225]–[226].

⁷⁴ Ibid 240 [233].

⁷⁵ Ibid 233–4 [207].

⁷⁶ Ibid 233 [206].

⁷⁷ Ibid 233–4 [207].

⁷⁸ Ibid 233–4 [207], 247 [262].

⁷⁹ Ibid 236 [218].

the constitutional immunity against detention otherwise than as a result of a court order.⁸⁰

Fundamentally, Gageler J considered that the *Lim* principle was relevant to determining whether the *Kable* doctrine was breached, because it had a substantive implication regarding when courts themselves could validly impose detention. In particular, his Honour found that aside from an exceptional case, the ‘legislative conferral on a court of a function that involves the creation of a liability to detention in custody through an act of adjudication other than as an incident of the adjudgment and punishment of criminal guilt’ would breach both the *Kable* and *Boilermakers* doctrines.⁸¹ That is, detention in custody is only permitted where it is the ‘penal consequence prescribed by law for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct’.⁸² Crucially, his Honour said that this would be the case ‘irrespective of whether the function can be performed in accordance with a judicial process’.⁸³ This was because, in his Honour’s view, conferral of such a function was ‘not simply antithetical to the character of that court as an institution for the administration of justice’, but was ‘antithetical to the very conception of justice which it is the responsibility of courts to administer’.⁸⁴

With regards to the exceptions to the *Lim* principle, Gageler J found that such an exception would only arise if the law was ‘reasonably capable of being seen as necessary for a legitimate non-punitive objective’.⁸⁵ Notably, the ‘mere prevention of the commission of a criminal offence’ was not a legitimate non-punitive objective, but prevention of a ‘grave and specific’ harm arising from such an offence would be.⁸⁶ Furthermore, it was not the legislature’s role to deem a harm sufficiently grave and specific.⁸⁷ His Honour found that the impugned laws in *Fardon* and *Benbrika* were held valid on the basis that they fell within the exceptions to the *Lim* principle.⁸⁸

Ultimately, Gageler J did not consider robbery to cause a sufficiently grave and specific harm to be a valid exception to the *Lim* principle. In terms of the harm caused, neither robbery nor assault with intent to rob were comparable to the offences considered in *Fardon* or *Benbrika*.⁸⁹ Indeed, Gageler J posited that if robbery is considered to cause a sufficiently grave and specific harm, ‘it needs to be asked:

⁸⁰ Ibid 212–13 [132]. See also ibid 213 [133].

⁸¹ Ibid 213 [136].

⁸² Ibid 213 [134].

⁸³ Ibid 213 [136].

⁸⁴ Ibid 213 [135].

⁸⁵ Ibid 215 [143], quoting *Fardon* (n 25) 653–4 [215] (Callinan and Heydon JJ).

⁸⁶ *Garlett* (n 2) 215 [145].

⁸⁷ Ibid 216 [148].

⁸⁸ Ibid 213–14 [138]–[139].

⁸⁹ Ibid 217 [157].

what offence is not?’⁹⁰ This is in stark contrast to the plurality’s position, considering robbery sufficiently serious to justify an individual to continuing detention. Therefore, his Honour concluded that the *HRSO Act* breached the *Kable* doctrine, just as an equivalent Commonwealth law would breach the *Boilermakers* doctrine.⁹¹

E *Justice Gordon (Dissenting)*

Similar to Gageler J, Gordon J determined that the *HRSO Act*, specifically in its application to robbery, contravenes ch III of the *Constitution*.⁹² Her Honour’s judgment was based on two fundamental principles underpinning ch III: (1) the historical protection of personal liberty from encroachments by the legislature and executive; and (2) the preservation of judicial independence and impartiality, allowing effective oversight and balance of the legislative and executive branches.⁹³ Traditional considerations regarding the impact on public confidence and defining characteristics of courts were relevant to assessing if legislation undermines the integrity of state courts.⁹⁴ However, like Gageler J, Gordon J considered the historically significant principle established in *Lim* as ‘not irrelevant to the assessment of whether *State* legislation is compatible with Ch III of the *Constitution*’.⁹⁵

Consequently, her Honour held that pursuant to the *Lim* principle, laws resulting in detention are presumed punitive,⁹⁶ requiring the judiciary ‘hear and authoritatively determine a controversy about an existing liability of the individual which ... arise[s] solely from the operation of some positive law on some past event or conduct’.⁹⁷ As *Lim* does not imply an exceptional category of case arises whenever detention is ordered for reasons other than punishment of a legal violation, any ‘protective’ purpose of the *HRSO Act* would not salvage its validity in her Honour’s view.⁹⁸ Importantly, the *HRSO Act* would apply to large groups of individuals, and did not aim to protect the community from behaviour that was exceptional.⁹⁹ Justice Gordon was not convinced the regime was sufficiently similar to the preventive detention regimes in *Fardon* and *Benbrika* to be saved by the *Lim* exception.¹⁰⁰

⁹⁰ Ibid 218 [158].

⁹¹ Ibid 218 [159].

⁹² Ibid 218 [163].

⁹³ Ibid.

⁹⁴ Ibid 225–6 [182].

⁹⁵ Ibid 226 [184] (emphasis in original).

⁹⁶ Ibid 223 [176].

⁹⁷ Ibid 222 [173], quoting *Benbrika* (n 26) 109–10 [69] (Gageler J).

⁹⁸ *Gartlett* (n 2) 223–5 [175]–[180].

⁹⁹ Ibid 231 [197].

¹⁰⁰ Ibid 227–8 [188].

V COMMENT

A Justice Gageler's Interpretation of the Lim Principle

At the heart of *Garlett* is a significant judicial disagreement as to the meaning and import of the *Lim* principle. On one view, most explicitly articulated by Gleeson J but seemingly also shared by the plurality, the *Lim* principle is a limited observation about the separation of powers at the Commonwealth level; it thus has no application to state laws.¹⁰¹ In contrast, Gageler J would have the *Lim* principle understood as an observation about the fundamental nature and role of courts in our system of government. Under this broader interpretation, a court can *only* impose detention in custody as a result of the adjudgment and punishment of criminal guilt with respect to past conduct, unless an exception applies; the principle would therefore limit laws at both the state and Commonwealth level. For the following reasons, and with respect, this view is far preferable.

First, Gageler J's interpretation adopts a more substantive view of the nature of courts, judicial power, and the 'conception of justice which it is the responsibility of courts to administer'.¹⁰² In contrast, the majority view focuses on the *process* by which this judicial power is administered.¹⁰³ This is in keeping with the High Court's repeated insistence that ch III of the *Constitution* is concerned with 'substance and not mere form', an assertion that was made in *Lim* itself,¹⁰⁴ and more recently affirmed by the majority of the High Court in *Alexander v Minister for Home Affairs*.¹⁰⁵

Second, this interpretation is more consistent with the reasoning of the majority in *Lim* itself. Admittedly, the seminal observation of Brennan, Deane and Dawson JJ, which has come to be known as the *Lim* principle, was made in the context of considering a Commonwealth law providing for executive detention (rather than a state law providing for detention following a court order, as in *Garlett*). However, their Honours justified their declaration of this principle by reference to propositions about the fundamental structure of our legal system, citing Albert Venn Dicey for the claim that every citizen 'is "ruled by the law, and by the law alone" [and] "may with us be punished for a breach of law, but [he can be punished] for nothing else"'.¹⁰⁶ As Gageler J notes, this suggests that the *Lim* principle goes further than merely

¹⁰¹ Ibid 192–3 [40] (Kiefel CJ, Keane and Steward JJ), 255–6 [294] (Gleeson J).

¹⁰² Ibid 213 [135] (Gageler J).

¹⁰³ See, eg, ibid 204–5 [97] (Kiefel CJ, Keane and Steward JJ).

¹⁰⁴ *Lim* (n 6) 27 (Brennan, Deane and Dawson JJ).

¹⁰⁵ (2022) 401 ALR 438, 454 [72] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 461 [98]).

¹⁰⁶ *Garlett* (n 2) 212 [129] (Gageler J), quoting AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, 1885) 215. See also *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 79 (Isaacs J).

limiting Commonwealth executive detention, and rather has a broader import as to the power of state institutions (including courts) to impose punitive detention.¹⁰⁷

Third, Gageler J's interpretation best accords with the significant role of courts in protecting individual liberty, and thus the relationship between individual and state, under our 'inherited constitutional tradition', by limiting detention in custody otherwise than as a consequence of a criminal trial.¹⁰⁸ A conception of the *Lim* principle that endorses these fundamental tenets of our constitutional system is not merely preferable — it is essential to the legitimacy of the principle itself.

B *Would the HRSO Act be Valid as a Commonwealth Law?*

A key consequence of the differing interpretations of *Lim* discussed above — regardless of the applicability of *Lim* at the *Kable* level — is a further disagreement between the majority and minority judgments as to whether as 'a law of the Commonwealth, [the *HRSO Act*] would not contravene the *Lim* principle'.¹⁰⁹ The plurality and Gleeson J conclude the law would not be valid as a Commonwealth law.¹¹⁰ For Gageler and Gordon JJ, the principle in *Lim* is breached by the *HRSO Act* whether it reposes Commonwealth or state power.¹¹¹

From the majority's approach we discern that laws which prevent future conduct will fall within the exceptional cases of the *Lim* principle where they are permissibly protective. A law will be permissibly protective when its purposes and effects are isolated from the deterrent or retributive elements of the criminal law, the latter of which are punitive.¹¹² The minority approaches *Lim* as recognising the inherently punitive nature of detention.¹¹³ Therefore, only an exceptionally narrow scheme, targeting offending which by its nature demonstrates enduring motivation to offend,¹¹⁴ will be protective in the sense capable of being exercised by a ch III court.

There is good reason to accept the latter view, which accords with the reality that '[l]oss of liberty as a punishment is ordinarily one of the hallmarks reserved to

¹⁰⁷ *Garlett* (n 2) 212–13 [132].

¹⁰⁸ *Ibid* 211 [125], quoting *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 610 [94] (Gageler J). For further discussion see generally: *Williams v The Queen* (1986) 161 CLR 278, 292 (Mason and Brennan JJ), quoting *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J); Andrew Foster, 'The Judiciary and Liberty: Assessing the Competing Rationales for the *Lim* Principle' (2022) 33(3) *Public Law Review* 226.

¹⁰⁹ *Garlett* (n 2) 192–3 [40] (Kiefel CJ, Keane and Steward JJ).

¹¹⁰ *Ibid* 192–3 [40] (Kiefel CJ, Keane and Steward JJ), 259 [310], 260 [313] (Gleeson J).

¹¹¹ *Ibid* 218 [159] (Gageler J), 232 [200] (Gordon J).

¹¹² *Ibid* 194 [50], 196 [55] (Kiefel CJ, Keane and Steward JJ).

¹¹³ *Ibid* 223 [175] (Gordon J).

¹¹⁴ *Ibid*.

criminal proceedings conducted in courts'.¹¹⁵ Conversely, the majority's conclusion is, with respect, based on an illusory division of the criminal law. To justify that preventive detention is non-punitive their Honours noted that '[n]one of the means of prevention of crime mentioned by Blackstone [are] now available' under the Australian criminal law.¹¹⁶ This, however, stands at odds with their Honours': (a) acknowledgement that the removal of preventive criminal law mechanisms is 'to mitigate the extreme harshness of the criminal law';¹¹⁷ and (b) concession there is no 'apparent difference of approach in terms of principle' between the decision in *Veen v The Queen*¹¹⁸ and *Veen v The Queen [No 2]*,¹¹⁹ wherein Mr Veen was sentenced to life 'on the ground that he was a danger to society, and was likely to kill again when released'.¹²⁰ As the criminal law *is* able to consider preventive justice, to the extent it does not, the answer lies in restricting an unduly punitive result. That implication is not ameliorated by labelling a post sentence order protective and removing its tie to adjudgment of criminal liability. Instead, as the approach of Gageler and Gordon JJ suggests, only in certain exceptional cases can prevention truly evince a protective purpose which justifies removing the requirements of the traditional operations of the criminal law.

As this disagreement — which, at its heart is a hypothetical exercise — turns on differing interpretations of *Lim*, if the majority of the High Court were to adopt a more substantive interpretation of the principle, the approach advanced in dissent is likely to be persuasive. The reasons above for preferring this interpretation of the *Lim* principle support the conclusion the *HRSO Act* considered in *Garlett* would (or should) be invalid at the Commonwealth level.

C Reasoning by Analogy: Comparison to Fardon and Benbrika

The majority's reliance on analogies with *Fardon* and *Benbrika* is, with respect, misplaced. This is because the kinds of offences for which continuing detention orders were upheld in those cases — serious sexual offences involving violence or against a child, and terrorism offences, respectively — cannot reasonably be compared to the offence of robbery or assault with intent to rob, even under Edelman J's reading down of the *HRSO Act* to apply only to serious robberies. As Gordon J reasons, serious sexual offences may be driven by psychological factors and are 'almost universally given special significance',¹²¹ and terrorism is driven

¹¹⁵ Ibid 231 [198].

¹¹⁶ Ibid 195 [51] (Kiefel CJ, Keane and Steward JJ).

¹¹⁷ Ibid.

¹¹⁸ (1979) 143 CLR 458.

¹¹⁹ (1988) 164 CLR 465.

¹²⁰ *Garlett* (n 2) 195 [53]–[54] (Kiefel CJ, Keane and Steward JJ).

¹²¹ Ibid 227–8 [188], quoting Jean Floud and Warren Young, *Dangerousness and Criminal Justice* (Heinemann, 1981) 50.

by particular motives that pose a ‘*singular threat* to civil society’;¹²² such unique factors are absent in the case of robbery or assault with intent to rob.¹²³ As such, Gageler J is undoubtedly correct in finding that although neither crime is victimless, neither is analogous in terms of the ‘gravity of the harm it has potential to cause’ to those in *Fardon* or *Benbrika*.¹²⁴

Despite the plurality’s insistence that it is not the court’s place to question Parliament’s designation of an offence as serious,¹²⁵ it seems to be the inescapable role of the court in making constitutional decisions to decide whether an offence is sufficiently serious such that ch III will not preclude a continuing detention scheme in respect of it. Otherwise, Parliament could, within the bounds of the *Constitution*, characterise failure to wear a bicycle helmet as a serious offence warranting a continuing detention scheme; this was a submission made on behalf of Garlett that the plurality dismissed as mere rhetoric,¹²⁶ but that appears to be the natural conclusion of their Honours’ reasoning.

D *Policy Implications of the HRSO Act*

There are substantive political and policy issues arising in relation to preventive restriction orders.

As recognised by Edelman J, the *HRSO Act* disproportionately impacts Indigenous Australians.¹²⁷ Although not considered to be a feature of design, his Honour did acknowledge the *HRSO Act*’s operation would necessarily have that outcome. The over-representation of Indigenous Australians in homeless populations is likely to increase orders for continuing detention rather than less restrictive supervision orders within the population.¹²⁸ Requiring the court to consider psychological or psychiatrist reports will equally harm Indigenous Australians whose community is not appropriately served by practices of psychology developed by and in the colonial world.¹²⁹ At best, this impact warns against the utility any preventive role restrictive orders under the *HRSO Act* can provide. At worst, it indicates the overwhelmingly punitive nature of the regime at hand (particularly given how central judicial evaluation between ordering supervision or detention lay to the *HRSO Act*’s validity).¹³⁰

¹²² *Garlett* (n 2) 228 [189] (emphasis in original), quoting *Benbrika* (n 26) 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ).

¹²³ *Garlett* (n 2) 229 [191].

¹²⁴ *Ibid* 217 [157].

¹²⁵ See *ibid* 201 [79] (Kiefel CJ, Keane and Steward JJ).

¹²⁶ *Ibid* 203 [87]–[88].

¹²⁷ See *ibid* 250 [273].

¹²⁸ *Ibid*.

¹²⁹ *Ibid* 250–1 [274].

¹³⁰ *Ibid* 191–2 [36] (Kiefel CJ, Keane and Steward JJ). See also *DPP (WA) v Dal* [No 2] [2016] WASC 212, [34].

Furthermore, the lack of ‘correlation required by the *HRSO Act* between the nature or character of the prior offending ... and the nature or character of the offence that a person is found to be at risk of committing’ problematically criminalises existence.¹³¹ Expanding ‘serious offences’ beyond sexual misconduct or terrorism and including robbery, which by its nature is no more likely to lead to recidivism,¹³² consigns certain individuals to a position with heightened vulnerability to executive power, merely for having committed a crime which they have already been punished for. This criticism is not that ‘legislative power may be misused’ against these individuals but rather that its predictive nature constitutes current misuse and a ‘sufficient reason to deny its existence’.¹³³ Further, judicial back-stopping against this legislative expansion of protecting through detention does not advance a ‘jaundiced view of the integrity or wisdom or practical competence of the representatives chosen by the people’ when it represents the reality of legislative action from *Fardon* until now.¹³⁴

E *International Law*

As a matter of policy or constitutional interpretation, rejecting the role of restrictive detention orders for preventive justice accords with Australia’s obligations under international law. In *Fardon v Australia*, the Human Rights Committee (‘HRC’) determined that legislation deemed valid by the High Court in *Fardon* violated arts 14(7) and 9(1) of the *International Covenant on Civil and Political Rights* (‘ICCPR’).¹³⁵ Article 9(1) safeguards the ‘right to liberty and security of a person’, while art 14(7) protects individuals from being punished for offences which they have already been finally convicted or acquitted.¹³⁶

The HRC found that the *DPSO Act* was excessively arbitrary stemming from the inherently punitive nature of the scheme and practical difficulties with its purported protective application.¹³⁷ Orders subjecting individuals to continuing detention under the same prison regime as their initial penal term, without a direct connection to prior offending or the inclusion of preventive reasons during the sentencing for those offences, were considered necessarily punitive.¹³⁸ Resultingly,

¹³¹ *Garlett* (n 2) 228–9 [190] (Gordon J).

¹³² *Ibid* 228 [189], 229 [191].

¹³³ *Gerner v Victoria* (2020) 270 CLR 412, 423–4 [18], citing *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151–2 (Knox CJ, Isaacs, Rich and Starke JJ).

¹³⁴ *Gerner v Victoria* (2020) 270 CLR 412, 423–4 [18].

¹³⁵ Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) 8 [7.4] (‘*Fardon v Australia*’); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

¹³⁶ *ICCPR* (n 135) art 9(1), 14(7).

¹³⁷ *Fardon v Australia* (n 135) 8 [7.4].

¹³⁸ *Ibid*.

the continuing ‘preventive’ order amounted to double punishment without further determining criminal guilt.¹³⁹ Granting courts the power to issue these orders after the commission of a criminal offence also rendered their application retroactive and therefore arbitrary.¹⁴⁰ This harm was further exacerbated by the inherently problematic task of predicting future offending, which is based on opinion as distinct from factual evidence.¹⁴¹

Similar issues will arise for any preventive detention order angled at protecting the community from the failed rehabilitation of offenders. The interpretation by the HRC regarding penal versus protective measures, and therefore permissible and impermissible detention under international law, is persuasive given the parallels between the exceptions recognised by the HRC to art 9 of the *ICCPR* and those deemed exceptional by Australian courts under the *Lim* principle. In their eyes ‘immigration control or the institutionalised care of persons suffering from mental illness or other conditions harmful to themselves or society’¹⁴² are considered appropriate limitations on detention under international law. But ‘limitations [on liberty] ... consequent upon, punishment for criminal offences may give rise to particular difficulties’.¹⁴³

VI CONCLUSION

On one reading, *Garlett* is simply an application of constitutional principles regarding preventive or continuing detention that have previously been elucidated by the High Court in *Fardon* and *Benbrika*. However, the significance of *Garlett* extends far beyond this.

The majority’s rejection of Gageler J’s interpretation of the *Lim* principle, and their Honours’ finding that the principle does not preclude a regime such as the *HRSO Act* even at the Commonwealth level, represents a narrowing of a principle that should instead be regarded as encapsulating the very essence of our judicial system. Similarly, the plurality’s refusal to question Parliament’s decision to designate an offence as serious reflects a significant abdication of the Court’s role in assessing the constitutional validity of preventive detention schemes. Unfortunately, *Garlett* is therefore another example of judicial acquiescence to the phenomenon noted by Gordon J, whereby ‘[r]egimes which once were seen as exceptional measures ... now risk becoming the norm’.¹⁴⁴

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid 8 [7.3].

¹⁴³ Ibid.

¹⁴⁴ *Garlett* (n 2) 220 [167].

The plurality in *Garlett* cautions us against '[t]he rhetorical deployment of extreme and distorting examples'.¹⁴⁵ However, it is the warning of Gageler J, that the relationship between individual and state under our constitutional system of government 'cannot be taken for granted',¹⁴⁶ and of Gordon J, against the 'potential normalisation of regimes that override individuals' liberty on the grounds of legislatively asserted "preventive" or "protective" imperatives',¹⁴⁷ that reflect the true significance of the majority's decision in *Garlett*: an encroachment into the fundamental principles of individual liberty and freedom from detention guaranteed by ch III of the *Constitution*.

¹⁴⁵ Ibid 203 [88].

¹⁴⁶ Ibid 211 [127].

¹⁴⁷ Ibid 220 [168].

**A FLY ON THE WALL, MET WITH A SWAT:
FARM TRANSPARENCY INTERNATIONAL LTD V
NEW SOUTH WALES (2022) 403 ALR 1**

I INTRODUCTION

The legality of animal activism often involves navigating a delicate balance between upholding the right to privacy and disseminating factual information which may be of political concern. In *Farm Transparency International Ltd v New South Wales* (*'Farm Transparency'*)¹ the High Court, by a 4:3 majority, prioritised the right to privacy, finding that ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) (*'SD Act'*) did not impermissibly burden the implied freedom of political communication. Sections 11 and 12, in their operation together with s 8, prohibit persons from possessing, communicating or publishing a record or report of an activity which has been obtained by installing a surveillance device on private property, through an act of unlawful trespass.² By upholding the validity of these provisions, the High Court has placed a serious impediment upon activist organisations in New South Wales, including the plaintiffs in this case. These activists are now prohibited from publishing or possessing footage obtained by way of trespass, regardless of the social importance or severity of the activities that this footage uncovers.³ Animal welfare groups and concerned consumers can no longer employ the powerful imagery of animal cruelty obtained in this manner to agitate for social change. The political ramifications of this decision are recognised by Gageler J, as stated in his Honour's dissenting opinion:

The prohibitions are too blunt; their price is too high; the cost they impose on the communication and receipt of information about matters of political and governmental concern is more than could be warranted for every activity which might be shown by a visual record to have occurred on private property.⁴

Underlying the High Court's decision in *Farm Transparency* is a weak operation of the implied freedom. The majority refused to legitimise the 'fruits' of unlawful

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¹ (2022) 403 ALR 1 (*'Farm Transparency'*).

² *Surveillance Devices Act 2007* (NSW) ss 8, 11, 12 (*'SD Act'*).

³ *Farm Transparency* (n 1) 20 [80]–[81] (Gageler J), 63 [265] (Edelman J).

⁴ *Ibid* 20–1 [82].

trespass despite the plaintiffs acting in aid of the public interest.⁵ This case note will explore the competing moral and legal objectives inherent in this decision — including the implications for privacy, activism and political communication in Australia. It will be concluded that the High Court's narrow analysis of ss 11 and 12 of the *SD Act* has led to ongoing uncertainty regarding the validity of these provisions and the strength of the implied freedom.

II BACKGROUND

A *Facts*

Farm Transparency International Ltd ('Farm Transparency') is a not-for-profit organisation dedicated to advocating for animal welfare by promoting social, policy and legal changes to existing animal welfare standards.⁶ Farm Transparency achieves this through investigations, documentaries and video footage to uncover the treatment of animals in farms and abattoirs, and remove the secrecy surrounding the meat industry.⁷ Christopher James Delforce, the second plaintiff and director of Farm Transparency, was charged under the *SD Act* in 2015 for the publication of footage which depicted cruelty to pigs in pig slaughterhouses.⁸ Although the charges were eventually dismissed, Farm Transparency sought to challenge the *SD Act* — which they described as containing ag-gag laws⁹ — and prevent the passage of similar acts in future.¹⁰ However, the primary purpose of proceedings was to allow Farm Transparency to continue possessing and publicising videos of animal cruelty practices 'without the burden' of the *SD Act*.¹¹

⁵ Ibid 42 [178] (Gordon J).

⁶ Ibid 3 [1].

⁷ 'About Farm Transparency Project', *Farm Transparency Project* (Web Page) <<https://www.farmtransparency.org/about>>.

⁸ Danielle Ireland-Piper, 'What the High Court Decision on Filming Animals in Farms and Abattoirs Really Means', *The Conversation* (online, 25 August 2022) <<https://theconversation.com/what-the-high-court-decision-on-filming-animals-in-farms-and-abattoirs-really-means-177146>>.

⁹ Ag-gag laws are laws which hinder the activity of activists seeking to expose animal cruelty within animal agriculture: Westlaw AU, *The Laws of Australia* (online at 5 August 2023) 14 Environment and Natural Resources, '14.14 Animals' [14.14.760].

¹⁰ Farm Transparency Project, 'Animal Advocates Mount Landmark High Court Challenge to Australia's Ag-Gag Laws' (Media Release, 29 June 2021) <<https://www.farmtransparency.org/media/19-animal-advocates-mount-landmark-high-court-challenge-australias-ag-gag-law>> ('Animal Advocates Mount Landmark High Court Challenge').

¹¹ *Farm Transparency* (n 1) 47 [202].

B Surveillance Devices Act 2007 (NSW)

The relevant sections of the *SD Act* in issue were ss 8(1), 11(1) and 12(1), which are set out below. Sections 11 and 12 serve to strengthen the operation of s 8 by disincantivising any violations of that section.

8 Installation, use and maintenance of optical surveillance devices without consent

- (1) A person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves —
 - (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or
 - (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object.

11 Prohibition on communication or publication of private conversations or recordings of activities

- (1) A person must not publish, or communicate to any person, a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of this Part.

12 Possession of record of private conversation or activity

- (1) A person must not possess a record of a private conversation or the carrying on of an activity knowing that it has been obtained, directly or indirectly, by the use of a listening device, optical surveillance device or tracking device in contravention of this Part.

C Issues

In 2021, the High Court granted leave for Farm Transparency to bring a special case before the Court on an agreed question of law: the constitutional validity of ss 11 and 12 of the *SD Act* under the implied freedom. Since the foundational cases in the early 1990s, there has been a lack of consensus amongst High Court Justices regarding the tests to be applied under the implied freedom.¹² *Farm Transparency* demonstrates that we are no closer to a consensus on these issues.

¹² Murray Wesson, 'The High Court's Opaque Decision in *Farm Transparency International Ltd v State of New South Wales*' (2023) 33(4) *Public Law Review* 281, 294.

In *Lange v Australian Broadcasting Corporation*¹³ and *Brown v Tasmania*,¹⁴ the three stages of the test were developed. This requires determining whether the law: (1) places a burden on political communication; (2) is for a legitimate purpose; and (3) is reasonably appropriate and adapted to achieving that legitimate purpose.¹⁵ In *McCloy v New South Wales*,¹⁶ the majority of the High Court considered structured proportionality to be the appropriate method for determining whether a law is reasonably appropriate and adapted. This involves three further steps which assess the impugned law's: (1) suitability; (2) necessity; and (3) adequacy of balance.¹⁷ The application of these tests by each Justice in *Farm Transparency* will be outlined in Part III.

The Justices adopted differing approaches at several stages of their analysis. This included disparity regarding the appropriate scope of the High Court's adjudication over questions of constitutional validity. Each Justice agreed that by applying the 'prudential approach', the validity of ss 11 and 12 could only be assessed with respect to their operation with s 8, as the plaintiffs' conduct had not contravened any of the other sections under pt 2 of the *SD Act*.¹⁸ However, Edelman J limited his Honour's analysis of the validity of ss 11 and 12 to the specific conduct raised in the plaintiffs' special case.¹⁹ As such, his Honour did not assess the validity of ss 11 and 12 with respect to third-party publishers, such as media outlets, who are not complicit in the trespass in contravention of s 8. Chief Justice Kiefel, Keane, Gageler, Gordon and Gleeson JJ adopted a broader view and assessed the validity of ss 11 and 12 in their application to third-parties.²⁰ The limited scope of Edelman J's analysis has led to a narrow ratio and ongoing uncertainty regarding the validity of ss 11 and 12 of the *SD Act*. The consequences of this narrow ruling will be discussed further in Parts III(A) and IV(B).

III DECISION

The High Court held by a 4:3 majority that ss 11 and 12 do not impermissibly burden the implied freedom in their application to the possession, communication or publication of a record or report of lawful activity by persons who were complicit in the record or report being obtained in contravention of s 8 of the *SD Act*. This

¹³ (1997) 189 CLR 520.

¹⁴ (2017) 261 CLR 328 ('*Brown*').

¹⁵ *Farm Transparency* (n 1) 36 [153] (Gordon J).

¹⁶ (2015) 257 CLR 178 ('*McCloy*').

¹⁷ *Ibid* 217 [79] (French CJ, Kiefel, Bell and Keane JJ).

¹⁸ *Farm Transparency* (n 1) 7–8 [21] (Kiefel CJ and Keane J), 16 [60] (Gageler J), 127–8 [114]–[120] (Gordon J), 46 [198] (Edelman J), 64 [269] (Steward J), 65 [272] (Gleeson J). See also Wesson (n 12) 294–6.

¹⁹ *Farm Transparency* (n 1) 50 [213].

²⁰ *Ibid* 13 [45], 15 [56] (Kiefel CJ and Keane J), 25–6 [103]–[104] (Gageler J), 44 [185]–[190] (Gordon J), 65 [272] (Gleeson J).

bare majority reflects the inherent nuances in each judgment, summarised below, which placed varying levels of importance upon the right to privacy, the value of communicating matters of public interest, and the underlying strength of the implied freedom.

A Majority

The majority consisted of Kiefel CJ, Keane, Edelman and Steward JJ, who determined that in applying a structured proportionality approach, the provisions were reasonably necessary and adequate in their balance. All Justices of the High Court — and the plaintiffs — agreed that the relevant provisions of the *SD Act* served a legitimate purpose.²¹ In their joint judgment, Kiefel CJ and Keane J held that the purpose of ss 11 and 12 was to protect the privacy interests of individuals who had surveillance records taken of activities on their property, and to deter the publication of such materials.²² Justices Edelman,²³ Gageler,²⁴ Gordon,²⁵ Steward²⁶ and Gleeson²⁷ similarly accepted that the purpose was legitimate and aimed at protecting property rights, privacy and dignity. However, upon examining the extent of the burden, the majority held that the sections did not violate the implied freedom.

The extent to which ss 11 and 12 burdened the implied freedom required examining the incremental burden of the provisions, beyond the existing restrictions in general law and legislation. Chief Justice Kiefel and Keane J found that ss 11 and 12 did not lead to a significant incremental burden upon a person's ability to publish or possess footage obtained by trespass.²⁸ Notably, their Honours found that the law of defamation and breach of confidence may, depending on the circumstances, restrict the publication of private activities.²⁹ However, central to their Honours' reasoning was that s 8 already prohibits the recording of activities on private property accessed by trespass, resulting in up to five years imprisonment.³⁰ Thus, '[a]ll that is effectively burdened' by the operation of ss 11 and 12 is the communication of the information obtained by trespass, in the knowledge it contravenes s 8.³¹ Justice Edelman took the view that ss 8, 11 and 12 do burden the implied freedom

²¹ Ibid 9–10 [30]–[32] (Kiefel CJ and Keane J), 17–18 [66]–[68] (Gageler J), 41 [171] (Gordon J), 59 [248] (Edelman J), 64–5 [269]–[270] (Steward J), 65 [273] (Gleeson J).

²² Ibid 10 [32].

²³ Ibid 59 [248].

²⁴ Ibid 17 [66].

²⁵ Ibid 41 [171].

²⁶ Ibid 64 [269].

²⁷ Ibid 65 [273].

²⁸ Ibid 11–13 [36]–[45].

²⁹ Ibid 11–12 [39]–[40], 12 [43].

³⁰ Ibid 13 [44]–[45].

³¹ Ibid 13 [45].

by extending upon existing law, '[b]ut not far beyond'.³² His Honour deemed the provisions to extend beyond the law of confidentiality by applying to activities on private property which are not necessarily confidential and activities conducted by corporations, rather than humans.³³

The Justices then turned to an examination of proportionality, to determine if the provisions are suitable, necessary, and adequately balanced. The majority found that suitability was not an issue.³⁴ Chief Justice Kiefel and Keane J adopted a strict interpretation of necessity, requiring that any alternative measure must 'achieve the same statutory purpose' and be 'less burdensome in effect'.³⁵ This is notably more onerous than their Honours' previous interpretations, which merely require that there be no 'alternative measures [which] are obvious and their practicability compelling' and that any alternatives are 'reasonably practicable' to achieve the same purpose.³⁶ Future cases may reveal whether this strict interpretation was merely responding to the nuanced issues of *Farm Transparency*, or represents a shift in applying the necessity test. In contrast, Edelman J adopted the broader approach of an 'obvious or compelling' reasonable alternative, which 'imposes a lesser burden on the freedom of political communication'.³⁷

The plaintiffs, in presenting their argument, referred to various state legislation which purported to regulate surveillance devices whilst including a public interest exemption.³⁸ However, Kiefel CJ and Keane J rejected this argument, as the other statutory schemes did not pursue the same purpose of protecting privacy interests as part of a person's property rights, and rather, related to privacy more broadly.³⁹ This was similarly held by Edelman J, stating that 'the alternative models do little more than illustrate the existence of a range of different legislative choices available'.⁴⁰ Further, a public interest exemption was found to be inconsistent with the purpose of the *SD Act* — to deter persons from engaging in trespass for the purpose of surveillance.⁴¹ Justice Edelman, in examining the adequacy of balance, also identified that the protection of privacy and dignity of property 'is itself a protection of freedom of political communication' which 'remains a right of great importance'.⁴² Chief Justice Kiefel and Keane J did not consider the adequacy of balance in depth.

³² Ibid 57 [242].

³³ Ibid 58 [244].

³⁴ Ibid 11 [35] (Kiefel CJ and Keane J). Note that Edelman J did not consider suitability in his Honour's judgment.

³⁵ Ibid 11 [36].

³⁶ *Brown* (n 14) 371–2 [139] (Kiefel CJ, Bell and Keane JJ).

³⁷ *Farm Transparency* (n 1) 60 [253].

³⁸ Ibid 13 [47].

³⁹ Ibid 14 [51].

⁴⁰ Ibid 62 [261].

⁴¹ Ibid 15 [53] (Kiefel CJ and Keane J).

⁴² Ibid 62–3 [263]–[264].

Therefore, whilst Kiefel CJ and Keane J adopted a broader view of the operation of ss 11 and 12 than Edelman J (with whom Steward J agreed), together the Justices held that ss 11 and 12 do not burden the implied freedom. However, the ratio only accords with Edelman J's narrow analysis regarding the validity of the *SD Act* in relation to persons complicit in trespass who possess or publish footage of legal activities.⁴³

B *Minority*

The minority, comprising of Gageler, Gordon and Gleeson JJ, agreed that the purpose of protecting privacy was legitimate,⁴⁴ but their Honours disagreed with the majority's view that the provisions were reasonably appropriate and adapted.

1 *Justices Gageler and Gleeson*

Justice Gageler (with whom Gleeson J agreed) considered ss 11 and 12 to be invalid as they place an unjustified burden on the implied freedom.⁴⁵ Justice Gageler considered ss 11 and 12 to indiscriminately target information which would clearly include 'factual information bearing on matters of political and governmental concern'.⁴⁶ Justice Gageler took particular issue with the blanket and indiscriminate nature of ss 11 and 12 as they apply to all visual communications obtained in contravention of s 8, 'regardless of the gravity of the information and of the extent to which electors, their elected representatives and executive officers may have an interest in receiving it'.⁴⁷

Justice Gageler did not apply a strict structured proportionality approach to assessing whether ss 11 and 12 are reasonably appropriate and adapted. However, his Honour did assess alternative state legislation and whether the laws were adequate in their balance. Justice Gageler analysed similar legislation in the Northern Territory, Victoria and Western Australia.⁴⁸ The legislation in these jurisdictions contains a public interest exemption for similar offences.⁴⁹ His Honour considered these state laws to protect privacy in a manner that conforms with the implied freedom.⁵⁰

⁴³ Ibid 64 [268].

⁴⁴ Ibid 18 [71] (Gageler J), 41 [171] (Gordon J), 65 [273] (Gleeson J).

⁴⁵ Ibid 18 [68]–[69], 24 [95].

⁴⁶ Ibid 20 [79].

⁴⁷ Ibid 20 [81].

⁴⁸ Ibid 23 [92]–[94].

⁴⁹ *Surveillance Devices Act 2007* (NT) s 15(2)(b)(i); *Surveillance Devices Act 1999* (Vic) s 11(2)(b)(i); *Surveillance Devices Act 1998* (WA) ss 9(2)(a)(viii), 9(3)(a)(i), 31(1).

⁵⁰ *Farm Transparency* (n 1) 23–4 [94].

Justice Gageler concluded that ss 11 and 12 were unable to be read down to only apply to persons complicit in the trespass under s 8 and rather, should have ‘no application to a visual record that is the subject-matter of a political communication’.⁵¹

2 *Justice Gordon*

Justice Gordon considered ss 11 and 12 to be valid in their application to persons complicit in trespass but invalid with respect to third-parties.⁵² Her Honour considered the plaintiffs to be ‘confined to advancing grounds of challenge which bear on the validity of the impugned provisions in their application to them’.⁵³ In doing so, Gordon J confined her Honour’s analysis to ss 11 and 12 in their operation with s 8. Her Honour made clear that the plaintiffs were not free to ‘roam at large’ over the impugned provisions.⁵⁴ However, unlike Edelman J, Gordon J did not confine her Honour’s analysis further.

Like Gageler J, Gordon J did not adopt a strict structured proportionality approach to determining whether the provisions were reasonably appropriate and adapted. Her Honour wrote that structured proportionality is a useful tool of analysis, however, ‘[i]t is not always (and it is not in this case) necessary or appropriate to undertake all steps of that analysis’.⁵⁵ Instead, Gordon J assessed whether ss 11 and 12 were justified in the circumstances.⁵⁶ This included assessing the rationality of these laws and whether they were undue when considering their purpose and the burden on the implied freedom.⁵⁷

Justice Gordon considered the application of ss 11 and 12 to those who are complicit in trespass as ‘readily justified’.⁵⁸ Her Honour viewed these provisions as ensuring that trespassers and those complicit in trespass are unable to benefit from their unlawful conduct and are therefore disincentivised from contravening s 8.⁵⁹ As such, Gordon J considered ss 11 and 12 not to infringe the implied freedom in this narrower application.⁶⁰

However, in her Honour’s view, the application of ss 11 and 12 to third-parties required a much higher degree of justification.⁶¹ Justice Gordon stated that these provisions are ‘blunt instruments’ which would prevent ‘media outlets communicating

⁵¹ Ibid 26 [105].

⁵² Ibid 43 [184], 44 [189].

⁵³ Ibid 28 [117].

⁵⁴ Ibid 28 [116].

⁵⁵ Ibid 41 [172].

⁵⁶ Ibid.

⁵⁷ Ibid 41–4 [172]–[189].

⁵⁸ Ibid 41 [175].

⁵⁹ Ibid 42 [180].

⁶⁰ Ibid 43 [184].

⁶¹ Ibid 44 [187].

about footage that reveals unlawful conduct taking place at an abattoir or even unlawful conduct engaged in by the Government'.⁶² On this basis, her Honour took the view that ss 11 and 12 should be read down so as not to apply where the provisions place an unjustified burden on the implied freedom — including in their application to third-parties.⁶³

IV COMMENT

A *Tort of Privacy*

Farm Transparency has important implications for the development of privacy law in Australia. Whilst Australia is yet to recognise the tort of an invasion of privacy at common law, recent judicial commentary suggests change is on the horizon.⁶⁴ In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah*'),⁶⁵ the High Court left the door open for such a possibility emerging in future.⁶⁶ *Lenah* concerned secret video footage captured by unidentified trespassers, depicting possum killing at the respondent's abattoirs.⁶⁷ The respondent sought an injunction to prevent this footage from being broadcast by the Australian Broadcasting Corporation.⁶⁸ Ultimately, the High Court found the respondent was unable to identify 'a legal or equitable right which could be pursued at trial' to grant the injunction.⁶⁹ However, the Court did find that a tort for the invasion of privacy is 'ripe for consideration',⁷⁰ and subsequent scholars have similarly agreed that the common law can recognise the tort.⁷¹ Following *Lenah*, courts have demonstrated a reluctance to recognise the tort of privacy.⁷² This is inconsistent with the intention of the High Court, where '*Lenah* has been interpreted as an obstacle as opposed to a

⁶² Ibid 44 [189] (emphasis omitted).

⁶³ Ibid 44–5 [191].

⁶⁴ See Jelena Gligorijevic, 'A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*' (2021) 44(2) *University of New South Wales Law Journal* 673.

⁶⁵ (2001) 208 CLR 199 ('*Lenah*').

⁶⁶ Gligorijevic (n 64) 674.

⁶⁷ *Lenah* (n 65) 220–1 [22]–[26].

⁶⁸ Ibid 215 [5].

⁶⁹ *Farm Transparency* (n 1) 12 [42] (Kiefel CJ and Keane J).

⁷⁰ *Lenah* (n 65) 328 [335] (Callinan J).

⁷¹ See: David Lindsay, 'Protection of Privacy under the General Law Following *ABC v Lenah Game Meats Pty Ltd*: Where to Now?' (2002) 9(6) *Privacy Law and Policy Reporter* 101; Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Discussion Paper 80, March 2014) 49–50 [3.52]–[3.60]; Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29(2) *Melbourne University Law Review* 339.

⁷² Gligorijevic (n 64) 675.

door left open'.⁷³ Therefore, *Farm Transparency* is crucial to indicate the normative demand for the protection of individual privacy and to recognise that it is cognisable for the common law to develop in this way.

Farm Transparency emphasises that the High Court remains open to the emerging tort of privacy, and how it may develop in Australian common law. Notably, during trial proceedings, Edelman J questioned the plaintiffs' counsel about whether the right of privacy is recognised, and if so, the effect it would have on the validity of ss 11 and 12 of the *SD Act*.⁷⁴ This judicial interest is also consistent with the statement of Gageler J that there is a 'potential development of a tort of privacy in Australia'.⁷⁵ Justice Gageler goes on to state that if a tort of privacy were to emerge, it must not provide a 'protection against public scrutiny',⁷⁶ echoing the remarks of Gleeson CJ in *Lenah*.⁷⁷ Whilst the remaining justices remained silent on this issue, the high value that Kiefel CJ and Keane J placed on the protection of privacy reflects the broader concern of the common law to protect privacy. Their Honours stated that the protection of this interest is 'obvious' and 'has long been recognised as a social value'.⁷⁸ Cumulatively, this builds upon the normative strength of an emerging tort of privacy which is gaining judicial traction.

B *Implications for Ag-Gag Laws and Animal Rights Activists*

This decision also has significant implications for animal rights activists and the future of ag-gag laws in Australia. Persons who are complicit in trespass under s 8 of the *SD Act* and obtain visual records of lawful activities are unable to possess, communicate or publish such material, regardless of the degree of public interest in the subject matter. This means that animal welfare activists in New South Wales who enter premises unlawfully to obtain surveillance footage of animal agricultural practices are unable to possess or publish that footage and are therefore strongly disincentivised from engaging in that activity.

Visual imagery is of particular importance in this line of activism.⁷⁹ Footage of cruelty within animal agriculture allows Australians to be informed about the current legislative protections for animals (or lack thereof) and the level of enforcement of those legislative protections. This footage also allows consumers to be fully informed about how their food has been produced.

⁷³ Ibid 675 n 13.

⁷⁴ Transcript of Proceedings, *Farm Transparency International Ltd v New South Wales* [2022] HCATrans 5, 65.

⁷⁵ *Farm Transparency* (n 1) 22–3 [90].

⁷⁶ Ibid.

⁷⁷ *Lenah* (n 65) 224 [35].

⁷⁸ *Farm Transparency* (n 1) 15 [56].

⁷⁹ Ibid 20 [80] (Gageler J).

As has been discussed above, Edelman J narrowed his Honour's analysis to footage of lawful activities.⁸⁰ It is unclear to what extent, if any, this influenced his Honour's ultimate conclusion that ss 11 and 12 are valid. Importantly, within animal agriculture, it is well established that lawful practices involve — or under previous laws, have involved — animal cruelty of some kind.⁸¹ The fact that Edelman J confined his Honour's analysis to footage of lawful activity should have had minimal impact on whether ss 11 and 12 were justified in their burden on the implied freedom. After all, what is lawful conduct today may well be unlawful conduct tomorrow as a result of political discourse.

In our view, the minority was correct to determine that ss 11 and 12 are invalid in their application to third-parties. Unfortunately, the narrow ratio in *Farm Transparency* has left this question unanswered. This may prevent important public interest publications by third-party news organisations. For example, in 2015, exposure by television program Four Corners of unlawful live baiting in greyhound racing led to significant reform across the country.⁸² This was accompanied by widespread public discourse on this issue.⁸³ It is unclear whether ss 11 and 12 would be deemed invalid in their application to this factual scenario — where the relevant footage is of illegal conduct such as live baiting, or where the footage is being published by third-party media programs such as Four Corners.

⁸⁰ Ibid 48 [206].

⁸¹ See: *ibid*; 'Slaughter Without Stunning', *RSPCA* (Web Page) <<https://www.rspca.org.au/take-action/slaughter-without-stunning>>; Calla Wahlquist, 'Australia to Phase Out Live Sheep Export Amid Opposition from Peak Farmers Body', *The Guardian* (online, 3 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/03/australia-to-phase-out-live-sheep-export-amid-opposition-from-peak-farmers-body>>.

⁸² See: Caro Meldrum-Hanna, 'Greyhound Racing: Piglets, Possums and Rabbits Used as Live Bait in Secret Training Sessions, Four Corners Reveals', *ABC News* (online, 16 February 2015) <<https://www.abc.net.au/news/2015-02-16/live-baiting-expose-to-rock-greyhound-industry/6109878>>; Cath Hanrahan, 'Explained: Why NSW is Banning Greyhound Racing', *ABC News* (online, 20 July 2016) <<https://www.abc.net.au/news/2016-07-20/greyhound-racing-ban-nsw-explained/7622052>>; *Domestic Animals (Racing Greyhounds) Amendment Act 2017* (ACT); Explanatory Statement, *Domestic Animals (Racing Greyhounds) Amendment Bill 2017* (ACT) 3; *Animal Welfare (Live Baiting) Amendment Act 2015* (SA); 'Greyhound Training Amendment Bill Passes', *Stephen Mullighan MP* (Blog Post, 17 September 2015) <<https://www.stephenmullighanmp.com.au/blog/2015/9/17/greyhound-training-amendment-bill-passes>>.

⁸³ Anne Tarasov, 'Greyhound Racing Ban: Protesters March to NSW Parliament to Campaign against Decision', *ABC News* (online, 2 August 2016) <<https://www.abc.net.au/news/2016-08-02/greyhound-racing-ban-hundreds-protesters-march-to-nsw-parliament/7683492>>; Tim Barlass, 'First Greyhound Meet in Sydney Since Baiting Allegations: Trainers Bite the Bullet and Move On', *The Sydney Morning Herald* (online, 21 February 2015) <<https://www.smh.com.au/national/nsw/first-greyhound-meet-in-sydney-since-baiting-allegations--trainers-bite-the-bullet-and-move-on-20150221-13kym3.html>>.

Worryingly, *Farm Transparency* has led to significant uncertainty regarding the validity of ag-gag legislation and may lead to an increase in this type of legislation in other states. This was an important concern for Farm Transparency and a reason behind their decision to challenge this legislation.⁸⁴ In particular, this decision may lead to the removal of public interest exceptions contained in similar legislation in the Northern Territory, South Australia, Victoria and Western Australia. This would lead to further constraints on the activities of animal welfare activists.⁸⁵

Farm Transparency also has ramifications far beyond animal activism and ag-gag laws. Sections 11 and 12 of the *SD Act* prevent the possession, communication and publication of material gathered by activists regarding environmental concerns, corporate malpractice and government misconduct.⁸⁶ This could include, for example, material gathered by trespassers on coal mines, logging areas or corporate institutions. Information gathered in these contexts may clearly be in the public interest and of significant governmental and political concern. As such, the High Court's ruling in *Farm Transparency* gives rise to broader concerns regarding the strength of the implied freedom.

C *Strength of the Implied Freedom*

Farm Transparency has emphasised the continuing division between justices in the High Court over the normative strength of the implied freedom of political communication. This division, whilst not new, has a significant impact on judicial outcomes.⁸⁷

Justice Gageler provides a compelling interpretation of the implied freedom — a critical protection for Australia's constitutionally enshrined system of representative and responsible government.⁸⁸ His Honour states that the freedom exists to safeguard against laws that prohibit political communications that are 'unhelpful or

⁸⁴ 'Animal Advocates Mount Landmark High Court Challenge' (n 10).

⁸⁵ *Surveillance Devices Act 2007* (NT) s 15(2)(b)(i); *Surveillance Devices Act 2016* (SA) ss 9(1), 10(1); *Surveillance Devices Act 1999* (Vic) s 11(2)(b)(i); *Surveillance Devices Act 1998* (WA) ss 9(2)(a)(viii), 9(3)(a)(i), 31(1).

⁸⁶ Justice Gordon was particularly concerned that ss 11 and 12 could prevent third-party publishers from communicating about (let alone publishing) footage that reveals unlawful conduct engaged in by government: *Farm Transparency* (n 1) 44 [189]. Justice Gordon's concern is substantiated by the recent insertion of reg 6A of the *Surveillance Devices Regulation 2022* (NSW) which grants the New South Wales Independent Commission Against Corruption ('ICAC') an exemption from pt 2 of the *SD Act*, including ss 11 and 12. This amendment allows ICAC to obtain, possess, publish or communicate recordings of corrupt government activities without contravening ss 11 and 12, demonstrating that the NSW Government considers ss 11 and 12 to apply in this context.

⁸⁷ Wesson (n 12) 299.

⁸⁸ *Farm Transparency* (n 1) 19–26 [77]–[104].

inconvenient ... to a current majority'.⁸⁹ This analysis formed the basis of Gageler J's argument — that indiscriminate and blanket prohibitions on fundamental sources of truth limit the ability for electors to accurately discharge their duty.⁹⁰ According to Gageler J, it 'is inconceivable' that any law would intend to censor the communication or possession of visual information, irrespective of the importance of this information to electors, legislators and policy-makers.⁹¹ Articulating the freedom of political communication in this way was integral to Gageler J's argument that the freedom had been breached. Particularly, through a broad analysis of ss 11 and 12, Gageler J considered these provisions to stifle discourse on matters within the legislative powers of Parliament which bear on electoral choice.

Justice Gageler's notion that 'privacy cannot always trump political communication'⁹² is in opposition to Edelman J, who considered it wrong to view the implied freedom as a 'constitutional trump' over the right to dignity and privacy.⁹³ This reflects a fundamental point of difference between the Justices' analysis. Justice Edelman expressed a tension between the implied freedom, and citizens' enjoyment of other rights such as the right to peaceful possession.⁹⁴ In fact, the right to peaceful possession in itself was described by Edelman J as necessary to uphold the freedom of political communication whereby 'an assault on the one can be an assault on the other'.⁹⁵

Whilst the implied freedom is a well-settled area of law,⁹⁶ Steward J approaches the implied freedom from a textualist approach, with notable caution. Justice Steward operates on the 'assumption' that the implied freedom applies to state legislation, suggesting that his Honour remains sceptical about its application in this context.⁹⁷ This is demonstrated by Steward J's judgment in *LibertyWorks Inc v Commonwealth* ('*LibertyWorks*'),⁹⁸ where his Honour refers to the 'tenuous nature' of the implied freedom and states 'it is still not yet settled law'.⁹⁹ Whilst it is beyond the scope of this case note to examine Steward J's dissent in *LibertyWorks*, *Farm Transparency* tends to indicate that these are still firmly held convictions.

Finally, Kiefel CJ and Keane J's judgment raises significant concerns. Their Honours did not consider ss 11 and 12 (including in their application to third-parties) to constitute an unjustified burden on the implied freedom. As has been discussed

⁸⁹ Ibid 19 [76].

⁹⁰ Ibid 20 [80]–[81], 22–3 [90].

⁹¹ Ibid 22–3 [90].

⁹² Ibid 23 [91].

⁹³ Ibid 62 [262].

⁹⁴ Ibid 62 [263].

⁹⁵ Ibid 62 [264].

⁹⁶ *McCloy* (n 16) 200–1 [23] (French CJ, Kiefel, Bell and Keane JJ).

⁹⁷ *Farm Transparency* (n 1) 64–5 [270].

⁹⁸ (2021) 274 CLR 1.

⁹⁹ Ibid 95 [249], 111 [298].

above, ss 11 and 12 apply broadly to third-party publishing of public interest materials, including recordings of illegal conduct. In our view, these provisions place a significant and unjustified burden on the implied freedom. Therefore, Kiefel and Keane J's judgment may indicate a weakening of the implied freedom, particularly in cases involving the protection of privacy and property rights.

The vastly differing views of Kiefel CJ, Keane, Gageler, Edelman and Steward JJ indicate deepening divisions in the High Court regarding the strength of the implied freedom. In particular, the majority judgments in *Farm Transparency* appear to indicate a weakening of this fundamental constitutional protection.

V CONCLUSION

Farm Transparency has important ramifications for animal welfare activism, privacy and political communication in Australia. This decision demonstrates that there remains a lack of consensus within the High Court regarding several aspects of the implied freedom. In particular, the High Court was divided on the appropriate scope of the Court's adjudication of issues of constitutional validity. This disparity, as well as disparity regarding the application of the key tests underpinning the freedom, led to a narrow ratio and has left many important questions unanswered. In particular, the validity of ss 11 and 12 in their application to third-parties remains unclear. In our view, preventing publication by third-parties places an unjustified burden on the implied freedom. The judgments of Kiefel CJ and Keane J were of particular concern in this respect and appear to demonstrate a weakening of the implied freedom — a fundamental protection for our democratic system.

*John Gava**

***CONTRACTUAL RELATIONS:
A CONTRIBUTION TO THE CRITIQUE
OF THE CLASSICAL LAW OF CONTRACT***

**BY DAVID CAMPBELL
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David Campbell's book¹ is an audacious work, both in the vision of political economy that animates it and in his forthright analysis of the law of contract, a law which, for Campbell, is too often at odds with that vision of political economy.

Let's look at the political economy first. As a thought experiment one can imagine Campbell inviting Friedrich Hayek and John Stuart Mill and George Orwell and EP Thompson (but probably not Karl Marx or Friedrich Engels) to a talk aimed at convincing them that his, Campbell's, understanding of what he calls 'liberal socialism' underlies each of their individual conceptions of the proper constitution and operation of the market in a modern society. An intellectual project with a goal to claim an underlying unity of purpose and understanding among four such thinkers traditionally understood to be poles apart is, clearly, audacious. So, what does he mean by 'liberal socialism'? In his words:

The answers one gives to all questions of personal and political morality ultimately rest on the concept one has formed of the nature of human being, or one's 'philosophical anthropology'. This book is written by a 'liberal socialist' who believes, firstly, that the most attractive yet plausible such philosophical anthropology is that of classical liberalism, which focuses on 'unsocial sociability' as a specific characteristic of humankind, and, secondly, that, considering such natural human beings as economic actors, the market economy, when institutionalised in, *inter alia*, an adequate law of contract, is the best possible general system for the production and

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¹ David Campbell, *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract* (Oxford University Press, 2022).

consumption of economic goods. This seems a very strange thing for a socialist of any stripe to say.²

This strangeness not only arises because of the close association between Marxist antipathy to the market and socialism but also because non-Marxist socialism has, in Campbell's view, become inextricably linked to welfarism in political economy and law, especially contract law: 'In the liberal-democracies, the *laissez faire* market economy legally institutionalised in the classical law of contract has been developed into the "maximalist" welfare state, the policy of which towards the law of contract is "welfarism"'.³

For Campbell, welfarism in contract law embodies the pursuit of 'ideals of social justice [embodying] the communitarian values comprising assistance to the weak and handicapped, fairness in the distribution of wealth, and altruistic concern for the interest of others which gave birth to the welfare state'.⁴

This is in marked contrast to the 'core moral value of *laissez faire* and the classical law [which] is the autonomy of the parties entering into a voluntary exchange'.⁵ For Campbell, welfarism in contract law subordinates the autonomy of the parties to the pursuit of social goals geared to the paternalistic goals outlined above.

The autonomy that Campbell values accords with Hayek's understanding in that

the socialism [Campbell] ha[s] in mind [is] very significantly akin to Hayek's liberal political morality, ... [and] the account of exchange and contract in this book will draw heavily on the understanding of the co-ordination of economic information by competition to which Hayek gave perhaps the twentieth century's leading expression. If contracting is to give optimal effect to freedom to choose and therefore to welfare-enhancing competition, it must be made self-conscious of its moral basis in a relationship of mutual recognition. Consciousness of this necessity is, for reasons which will emerge over the course of this book, best called socialism.⁶

And,

[t]he core of liberal socialism is the preservation and indeed expansion of the individual's freedom to act, which, in regard of the allocation of economic goods, should

² Ibid 4 (citations omitted). The reference to 'unsocial sociability' comes from Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Aim', tr Allen W Wood in Robert B Loudon and Günter Zöller (eds), *Anthropology, History, and Education* (Cambridge University Press, 2007) 107, 113.

³ Campbell (n 1) 4 (citations omitted).

⁴ Ibid 4–5, quoting Hugh Collins, *The Law of Contract* (Weidenfeld and Nicolson, 1986) 1.

⁵ Campbell (n 1) 5.

⁶ Ibid 9.

take the form of the economic actor's freedom to choose, legally institutionalised as freedom of contract.⁷

A self-conscious attempt to equate socialism with the political economy of Hayek merits being called audacious. It might also merit other descriptors but let's leave that for a moment.

One way of understanding Campbell's position is to recognise that Campbell is distinguishing the allocation of wealth in a society from the process of transacting in that society via contract law. As far as I can tell his position is not one arguing that, for example, a welfarist contract law which actively aims at overcoming inequality and disadvantage is not a plausible or effective way of achieving these goals and that there are far more effective and appropriate means of dealing with these issues.⁸ Whilst I guess that Campbell would agree with these sentiments, his is a straightforward position, viz, contract law should be a neutral mechanism to allow for full autonomy for adults of sound mind and is to be welcomed and praised on those grounds alone, irrespective of whether such a law is or is not capable of achieving paternalistic welfare goals.

So, what does this mean for the law of contract?

[T]his book will put forward an explanation and evaluation of the positive law of contract and, behind this, the understanding of economic action expressed in neo-classical economics. The result of this critique will be adequate consciousness of a relationship of mutual recognition. This relationship is always present in economic action and contract, for without it neither are possible, but the classical law of contract and neo-classical economics express this only very inadequately. Conscious mutual recognition by economic actors and contracting parties is what I mean by socialism, actualised in the social market.⁹

In concrete terms, this requires a contract law that eschews entirely self-centred conduct and, instead, is based on notions of good faith.

[T]he reproduction of autonomy in the social relationship of exchange is a question of an actor's conduct towards other actors, with the law of contract turning on the recognition that a party's freedom to choose is crucially influenced by the conduct of the other parties involved in negotiations and contracts. When the question is one of legally enforceable duties to others, this is a question of 'justice'. ... The key to this is not to treat others as mere means to the realisation of one's own ends, but to recognise that others also have the status of ends-in-themselves. This is the necessary condition of realising Pareto optimality as a social system of *mutual* advantage, and it will be

⁷ Ibid 8 (citations omitted).

⁸ I, for example, have made that very argument: see John Gava, 'Contract Law and Inequality: A Response to Frank Carrigan' (2013) 13(1) *Oxford University Commonwealth Law Journal* 9.

⁹ Campbell (n 1) 11 (citations omitted).

argued throughout this book that the positive law of contract has been, and is being, formed by the development of consciousness of this necessity in a concept of good faith which expresses the duties to each other of both parties to a contract. Coherently understanding these duties has long involved and now involves rejection of a classical law that cannot free itself from a commitment to solipsistic self-interest.¹⁰

Wow, one might say. Not only is Campbell embarking on a path-breaking reanalysis of much of classical political economy, he is also, in effect, advocating the remaking of the law of contract to give effect to his vision of liberal socialism. Campbell is continuing a conversation that stretches back over nearly 300 years about the nature of government, society and economy started by Adam Ferguson¹¹ and Adam Smith¹² in Scotland and Montesquieu¹³ in France, amongst others, and which has continued to this day.¹⁴

Other than noting the audacity of Campbell's notion of liberal socialism, I will leave to others, more expert in political economy than I am, the task of evaluating Campbell's theoretical underpinning of a reformed law of contract. My instincts give me pause but ...

I do feel more able to comment about his call for a thoroughly re-evaluated and reformulated law of contract. In the spirit of Campbell's welcome blunt and clear opinions I will be similarly blunt and clear. First, Campbell's understanding of the relationship between transacting in the market and contract law is just plain wrong. Second, he shows a fundamental misunderstanding about the nature of the common law and common law reasoning and of the institutional capacity of the common law and its judges to reform, and then maintain and apply, a law of contract crafted to suit his understanding of personal autonomy and exchange in a market economy.

But, before explaining these criticisms I want to emphasise that Campbell's reading of the law of contract is as audacious as his treatment of political economy, and that even if one were to disagree with all of his analysis (which I am far from doing) no one could read this book's treatment of the law of contract and not come away with a better understanding of this classic form in the common law. His treatment of the hire purchase contract is a wonderful example of this. While, as I have indicated, I am not convinced that the law of contract could be reconceived and applied in the manner desired by Campbell, it is wonderful to see such a straightforward criticism of a whole area of law which was of such importance to so many over many, many years. Campbell's analysis is best put in his own words:

¹⁰ Ibid 27 (emphasis in original) (citations omitted).

¹¹ See, eg, Adam Ferguson, *An Essay on the History of Civil Society* (1767).

¹² See, eg, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

¹³ See, eg, de Secondat, Baron de Montesquieu, *Spirit of Laws* (1800) [trans of: *De L'Esprit des Loix* (1748)].

¹⁴ David Graeber, *Debt: The First 5,000 Years* (Melville House Publishing, 2011) is a fine recent example of such work.

Though still used to finance sales to consumers, especially of cars, the far greater availability to consumers of other forms of credit, and, as we shall see, the extensive legislative steps taken to eliminate the objectionable legal characteristics of the hire purchase contract mean that hire purchase does not now have nearly the importance that it previously had. But between, say, 1877, the year of the formation of the first company with the specific object of financing credit sales of furniture, and 1974, the year of the passage of [t]he *Consumer Credit Act*, hire purchase was the principal means of financing sales of relatively high value, ‘durable’ goods to consumers — sewing machines and pianos featured prominently in the late Victorian era but cars were the most important twentieth-century example — so that hire purchase came to stand a similar relationship to such sales as the mortgage to house purchases.

The hire purchase contract was the result of innovation in the appellate courts in the second half of the nineteenth century which radically altered the objective intentions regarding a sale which were codified in the *Sale of Goods Act 1893*. The aim of this innovation was to give the seller of consumer durables on credit an all but absolute legal security in the goods. But the specific contract which was devised contained great potential for unfairness and the infliction of hardship, and the realisation of this potential is a most instructive example of the shortcomings of the classical law of contract, specifically of its failure adequately to institutionalise contract’s relational character of mutual recognition. This unfairness and hardship gave rise to great public concern, and eventually led to extensive legislative intervention beginning with the *Hire Purchase Act 1938*, and this legislation specifically for hire purchase set a pattern for consumer credit regulation ...

Though it would be the merest affectation to argue that the legislative regulation of hire purchase as a form of consumer credit was unnecessary or has not markedly increased welfare, *it is wrong to say that legislation was necessary to correct market failure. What failed was a law of contract which ... specifically did not attempt to institutionalise the values of exchange and agreement. A market properly regulated by the private law of contract would not have given rise to hire purchase in the specific form which caused such concern.*¹⁵

Say what you will about such a claim, but it does make one *think*. There can be no higher praise for academic writing. Of course, one could argue that this was a matter best left for Parliament which has processes for garnering information and opinions from those expert and experienced in the field. But Parliaments do not always act promptly, or at all, and courts do have to resolve the disputes before them. So, we are back to asking serious questions about the received wisdom in an important area of law.

Now, to Campbell’s understanding of the relationship between law and transacting in the marketplace. Since Stewart Macaulay’s pioneering 1963 essay, ‘Non-Contractual

¹⁵ Campbell (n 1) 214–15 (emphasis added) (citations omitted) .

Relations in Business: A Preliminary Study’,¹⁶ a large body of empirical and theoretical work on the use and non-use of contract law in transacting has been carried out and two broad schools of thought now dominate the field. Both accept that law plays a relatively minor role in day-to-day transacting but differ in their response to this finding. One group, which we can call contextualists, argues that contract law should be changed (continually) to reflect business needs, behaviours and expectations. Catherine Mitchell has provided a wonderfully encyclopaedic treatment of this school of thought¹⁷ and her book on that topic should be a first step for anyone interested in these questions. The other group, which we can call formalists, argues that business prefers formal, clear and relatively unchanging rules so that it can transact knowing that if recourse to law is desired the law will be predictable. Jonathan Morgan has provided a similarly wonderful examination of this body of thought¹⁸ which, too, should be read by anyone investigating this area of law and commercial practice.

It is clear from the description given above that Campbell has a strong and well-argued belief about the nature of contract law and what needs to be done so that its doctrines give effect to the principles that he believes should underpin the common law of contract. With this significant proviso in mind, it is clear that Campbell believes that contract law underpins transacting in the marketplace. In his words, ‘[t]he law of contract can coherently be conceived only as, not a set of limitations upon potential illegitimate action, but as the facilitative conditions of all legitimate economic action’.¹⁹

In another section of his book Campbell describes transacting parties as acting within the ‘shadow of th[e] law’.²⁰ So for Campbell, the non-use of contract law is not evidence of its irrelevance, but rather of its effectiveness, with recourse to law a relatively exceptional undertaking because of the law’s very clear and close identification with the act of transacting.

As I have argued elsewhere, this gets the lessons to be learned from Macaulay and all subsequent empirical work exactly the wrong way around. Contract law and transacting in the marketplace are discrete concepts or entities. What Campbell and most other writers in this field, including Mitchell and Morgan, can’t seem to accept is that contract law does not underpin transacting and that it does not matter if this

¹⁶ Stewart Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28(1) *American Sociological Review* 55.

¹⁷ Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart Publishing, 2013).

¹⁸ Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013). Of course, much work has been published after Mitchell’s and Morgan’s books were published but they are essential starting points for anyone interested in this field.

¹⁹ Campbell (n 1) 39.

²⁰ Ibid 257.

is the case.²¹ Writers such as Campbell and Morgan accept that contract law is not, overtly, used much by business but they think that business transacts in the shadow of the law. Mitchell and other contextualists recognise this non-use of contract law but see it as a problem to be overcome by making contract law mirror business needs, behaviour and expectations.

It is as if these authors just cannot accept the evidence before their eyes.²² Macaulay had shown that contract law was not used much by businesspeople, and that reputation, trust and other non-legal mechanisms were the primary means for securing transactions, and that contracts often were drawn up for internal bureaucratic and other non-legal reasons by businesses.²³ Macaulay's analysis sparked an explosion of empirical and theoretical work on the use and non-use of contract law by business and his explanation for the minor, indeed often non-existent, role played by contract law has been confirmed and augmented through detailed empirical and analytical studies from a variety of jurisdictions.²⁴ Sometimes contract law is used, sometimes business does transact in the shadow of the law, but these are conscious decisions to use law when it suits. To see this opportunistic use of law as the equivalent of most or all of transacting operating in the shadow of the law just runs counter to the evidence before our eyes.

Why do such outstanding scholars fail to see this? I think that they do this because of a shared and deep belief that contract law can only be understood in instrumental terms. They seem unable to accept the evidence that contract law plays a limited role in the market. Instead, whether writing from a contextualist or formalist position, they are determined to argue that contract law is central to market exchange. This means that they do not see that, to the extent that contract law does aid commerce, this use is accidental rather than purposive.

This misplaced belief about the centrality of contract law to the market comes at a cost. It has blinded these scholars to the real lessons to be learned from the sociolegal analysis of transacting and contracting in the marketplace. These lessons are that judges should *not* adapt the law of contract to suit perceived needs, behaviours and expectations of those in commerce *when contract law is relevant* to the parties. *Where contract law is not relevant*, transacting in the market can be rendered more efficient by concentrating on governmental and business policies that make

²¹ See generally John Gava, 'Taking Stewart Macaulay and Hugh Collins Seriously' (2016) 33(2) *Journal of Contract Law* 108.

²² It is a surprise that even Macaulay seemed unable or unwilling to accept his own evidence and analysis showing the relative unimportance of contract law for transacting in the marketplace: see *ibid* 108, 111.

²³ See Macaulay (n 16) 62–5.

²⁴ For a good introduction to the work in this field see the bibliographies in Campbell (n 1), Mitchell (n 17), Morgan (n 18) and Jean Braucher, John Kidwell and William C Whitford (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart Publishing, 2013).

transactions within corporations and governmental entities more efficient or by creating structures which aid and improve the working of trust and reputation in the market.²⁵

Finally, on Campbell's fundamental misunderstanding of the nature of the common law and common law reasoning and of the institutional capacity of the common law and its judges to reform, and then maintain and apply, a law of contract crafted to suit his understanding of personal autonomy and exchange in a market economy.

As we have seen above, Campbell is not shy in demanding of the judges the complete reformulation of contract law to reflect his notion of liberal socialism.²⁶ Can this happen?

To achieve his goal Campbell would need, at the very least, a majority of judges in the higher, appellate courts to be proficient in political economy (and, of course, to adhere to his conception of political economy — one which is idiosyncratic, to put it mildly). It is hard enough in this world to be a master of one skill or one discipline. To ask the best of our judges to display a similar mastery in political economy is asking the impossible. This means that if contract is to be reformulated along Campbell's lines, it will be done by judges outsourcing the work to political economists (assuming that they will agree on implementing Campbell's vision). I can't see this outsourcing happening either.

Further, would the judges accept an intellectually bifurcated common law, with one part, the law of contract, the creation and reflection of a sophisticated notion of political economy, and the remainder, created according to common law methods? The judges who are ostensibly, and to a great extent actually, the guardians of the common law would not, I believe, countenance such a development. The history of the common law has shown that the judges, while often deferential to executive power, are powerfully jealous of their institution and of its methods and results.²⁷ To believe that they would accept a reformulation of contract law to reflect an outsider's vision of political economy, either through their own efforts or through outsourcing to experts, is to misread our judges.²⁸

Putting these concerns aside for the moment, one has to ask how the change that Campbell wants is to be implemented. We can imagine the doctrinal confusion arising if the law of contract were to be reconfigured one case at a time. How

²⁵ For a fully developed argument elaborating on these themes, see Gava, 'Taking Stewart Macaulay and Hugh Collins Seriously' (n 21).

²⁶ See above nn 9–10 and accompanying text.

²⁷ See, eg, the High Court's treatment of judicial power in the *Australian Constitution* since, for example, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

²⁸ For those interested I have dealt with these issues in greater detail in John Gava, 'The Audience for Rick Bigwood's *Exploitative Contracts*' (2007) 32(1) *Australian Journal of Legal Philosophy* 140.

long would this take? Many, many years I would guess, and we must remember Marc Galanter's suggestion that law cases are essentially unrepresentative, with repeat players using their hard-won knowledge and experience to win more than they 'should'.²⁹ This bodes ill for Campbell's proposed reformulation of contract law. Of course, we can imagine a grand law reform committee established to carry out Campbell's wishes but in real life this is just not likely to happen.

To sum up, common law judges do not have the time, inclination or skills to do what Campbell wants and they would not meekly pass on to others their role of guardians of the common law.

Of course, Campbell is perfectly entitled to put his views forward, irrespective of the chances of them being accepted, now, in the near or the distant future. But if he thinks that the common law judges will happily, or otherwise, carry out the changes that he has outlined, he will be disappointed.

David Campbell has produced a humdinger of a book. In chapter after chapter my reactions went from, 'What the ...', to, 'He can't really mean that', to, 'Maybe', and finally to, 'I'm going to have to read that again'. It's not often that a book about contract law does that and for me that is reason enough to recommend this book as strongly as I can. I think that he is wrong on many grounds but ... so what?

²⁹ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95, 103.

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