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Adelaide Law Review Association
Adelaide Law School
The University of Adelaide
Adelaide SA 5005
AUSTRALIA

Adelaide Law Review 2015

Vol 36 No 2



THE UNIVERSITY OF ADELAIDE
ADELAIDE LAW REVIEW
ASSOCIATION

ADELAIDE LAW REVIEW

VOLUME 36 NUMBER 2



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Volume 36 Issue 2 2015

The *Adelaide Law Review* is a refereed journal that is published twice a year by the Adelaide Law Review Association of the Adelaide Law School, The University of Adelaide. A guide for the submission of manuscripts is set out at the back of this issue. Articles and other contributions for possible publication are welcomed.

Copies of the journal may be purchased, or a subscription obtained, from:

Administrative Officer
Adelaide Law Review Association
Adelaide Law School
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AUSTRALIA

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This volume may be cited as:
(2015) 36 *Adelaide Law Review*
The articles in this volume are published in 2015.

ISSN 0065-1915

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PRIVATE POLITICAL ACTIVISTS AND THE INTERNATIONAL LAW DEFINITION OF PIRACY: ACTING FOR ‘PRIVATE ENDS’

ABSTRACT

Piracy under international law grants states the right to exercise universal jurisdiction, provided that all conditions of its definition are cumulatively met. Yet academic debate continues as to whether the requirement that piratical acts be committed ‘for private ends’ excludes politically motivated non-state actors. This article attempts to resolve the dispute through a thorough analysis of the term ‘private ends’. An application of the rules of treaty interpretation is followed by an in-depth examination of ‘private ends’ historical development. State practice is examined in an attempt to resolve the ambiguities found. Finally the rationale of universal jurisdiction underlying the definition of piracy is explored, in order to answer whether such actors should be excluded. This article argues that a purely political ends exception developed, but its application beyond insurgents was never resolved. Limited state practice has ensured such ambiguity survived. Nevertheless given the objective of providing discretionary universal jurisdiction over violence and depredation between vessels at sea, violent actors should not be excluded solely upon their political motivations. Instead the limited (but growing) precedents of equating ‘private ends’ to a lack of state sanctioning should be followed.

* PhD Candidate (UNIJURIS Research Group); Netherlands Institute for the Law of the Sea (NILOS); Utrecht Centre for Water, Oceans and Sustainability Law (UCWOSL), Utrecht University. This article is adapted from a thesis submitted at Utrecht University (2013), and kindly awarded *The Prof Leo J Bouchez Prize* (2013) and *The JPA François Prize* (2014): Arron N Honniball, *Anti-whaling activism in the Southern Ocean and the international law on piracy: An evaluation of the requirement to act for ‘private ends’ and its applicability to Sea Shepherd Conservation Society* (Utrecht University, 2013), <<http://www.knvir.org/francois-prize/>>. The author wishes to thank the anonymous *Adelaide Law Review* referees, who provided insightful comments that have greatly improved this article and Professor Alfred H A Soons for his guidance and support throughout. The thorough and meticulous editing of Isabella Dunning at the *Adelaide Law Review* has also been of significant assistance throughout the article. The research which resulted in this publication has been partly funded by the European Research Council under the Starting Grant Scheme (Proposal 336230 — UNIJURIS).

I INTRODUCTION

You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.¹

So said Judge Kozinski, as the US Court of Appeals for the 9th Circuit overturned the US District Court’s refusal to grant a preliminary injunction against Sea Shepherd Conservation Society.² For the past decade the private environmentalist organisation had harassed vessels of the Institute of Cetacean Research during its seasonal hunting of whales in the Antarctic Sea. The relatively short judgment reopened various debates on defining piracy under international law, perhaps the most surprising conclusion being that acts ‘committed for private ends’ under international piracy law should be interpreted as acts ‘not taken on behalf of a state’.³ The conclusion is contrary to the common, though not uniformly held, view of academics that ‘private ends’ exclude ‘political ends’, such as those of environmental activists.

The importance of settling the ambiguities of ‘private ends’ is manifest when one considers its necessity for exercising universal jurisdiction under the international law definition of piracy. As mutually exclusive interpretations, the adoption of one opens the gateway to enforcement and co-operative action by all interested states; the adoption of another allows enforcement only by those states with the ability to assert jurisdiction upon another more restrictive head, or basis, of jurisdiction.⁴ For states, legal certainty is a necessity for knowing over whom they may exercise jurisdiction,⁵ over whom they should exercise jurisdiction in upholding international law⁶

¹ *Institute of Cetacean Research v Sea Shepherd Conservation Society*, 708 F 3d 1099, 1101 (9th Cir, 2013) (*‘Sea Shepherd’*).

² For the District Court decision: *Institute of Cetacean Research v Sea Shepherd Conservation Society*, 860 F Supp 2d 1216 (WD Wash, 2012). The United States Supreme Court denied certiorari to review the 9th Circuit’s decision: *Sea Shepherd Conservation Society v Institute of Cetacean Research*, 135 S Ct 2816 (2015).

³ *Sea Shepherd*, 708 F 3d 1099, 1102 (9th Cir, 2013).

⁴ At sea this will primarily be the flag state and state of nationality of the offenders. If pirates later enter the territory of the state of nationality of the injured party, it could potentially also exercise jurisdiction. For jurisdiction theory, see Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed, 2015).

⁵ Political activists, or not.

⁶ ‘All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’: *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 100 (*‘UNCLOS’*). See Yaron Gottlieb, ‘Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing’ (2013) 46(1–2) *Case Western Reserve Journal of International Law* 303, 305–316.

and when they must respect the exercise of jurisdiction by other states, even when it concerns their self-interests.⁷ For individuals, it represents whether their politically motivated violence may be susceptible to prosecution by all states, and vice versa, which states a ‘victim’ vessel or organisation may appeal to for assistance in dissuading and prosecuting their violent political opponents. Finally, for international law it represents the test of coherence, the rule of law and its adaptability to meet contemporary challenges. As will be seen, environmental activism was not a consideration when the ‘private ends’ test emerged. Nevertheless, if the law of the sea is to be a ‘constitution for the oceans which will stand the test of time’,⁸ it must evolve to meet contemporary challenges. The scope of ‘private ends’ represents such a challenge. If it is not to lead piracy into the dangers and criticisms of universal jurisdiction more generally,⁹ it needs to be conclusively defined.¹⁰

Therefore, in order to determine whether politically motivated actors are ‘private ends’ actors, subject to international piracy law, the article will first explore the definition of piracy under international law (Part II). It will be established that the requirement of acts committed for ‘private ends’ is part of the customary and treaty law definitions of piracy, before introducing the conflicting academic interpretations that have resurfaced following the 9th Circuit’s decision (Part III). In order to settle the debate on interpreting ‘private ends’, the article embarks on an assessment of different sources available to determine if political ends are excluded from piracy under international law (Part IV). These sources will necessarily include the historical documents that developed the term (Part IV(A)), the state practice in relation to politically motivated actors on the high seas (Part IV(B)) and, finally, the policy and rationale behind the definition of piracy (Part IV(C)). It is hoped by looking at these various sources collectively the definition of ‘private ends’, as interpreted by states, will become apparent and a clearer position on politically motivated violence under international piracy law can be concluded (Part V).

⁷ Eg a vessel flagged to that state. Furthermore if ‘private ends’ is unclear, states are likely to be less forthcoming in exercising universal jurisdiction over ‘piratical’ political activists for fear of flag state protest.

⁸ Tommy TB Koh, ‘A Constitution for the Oceans’ in *The Law of the Sea — Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (St Martin’s Press, 1983) xxxiii, xxxiii; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015) 5 [9] (Judge Lucky): ‘The convention is regarded as the constitution of the oceans and, in my opinion, is akin to (*comparable with*) a national constitution. Therefore, it must “grow” in accordance with the times’.

⁹ A regular feature of the UN General Assembly agenda, see references within *The scope and application of the principle of universal jurisdiction: Report of the Sixth Committee*, 69th sess, Agenda Item 83, UN Doc A/69/503 (14 November 2014).

¹⁰ The suggestions of ‘abuse’ and ‘manipulation’ of universal jurisdiction more generally are pertinently applicable if ambiguities in ‘private ends’ lead to state disagreements over the application of piracy jurisdiction to political activists.

II DEFINING PIRACY UNDER INTERNATIONAL LAW

Before discussing what ‘private ends’ are, it is necessary to establish such a requirement exists in international law — in *piracy jure gentium*.¹¹ As a matter of treaty law, the definition of piracy under the *United Nations Convention on the Law of the Sea* (‘UNCLOS’) is binding upon its 167 contracting parties.¹² Those states which only ratified the *Convention on the High Seas* (‘HSC’) are bound by its near identical definition.¹³ Both require an act ‘for private ends’, yet neither provide an explanation of what that entails.¹⁴

The *HSC* defines piracy as:

Piracy consists of any of the following acts:

- (1) Any illegal acts of violence, detention or any act of depredation, *committed for private ends* by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.¹⁵

UNCLOS defines piracy as:

¹¹ Municipal piracy is a separate matter defined under national law. International piracy law sets the limits of universal jurisdiction exercised by states, whilst municipal piracy stipulates what that state will prosecute via criminal law. As a separate issue municipal definitions, which may be more or less extensive, do not affect the international definition.

¹² *UNCLOS* art 101. See <<https://treaties.un.org/>> for a list of the 167 parties.

¹³ *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962) (‘HSC’). See <<http://treaties.un.org/>> for a list of the 63 parties. *Afghanistan* (signatory *UNCLOS*), *Cambodia* (signatory *UNCLOS*), *The Holy See*, *Iran* (signatory *UNCLOS*), *Israel*, *the USA* and *Venezuela* are all party to the *HSC*, but not *UNCLOS*.

¹⁴ The five elements of piracy: (1) any illegal acts of violence or detention, or any act of depredation (2) committed *for private ends* by crew or passengers (3) of a private ship or private aircraft (4) against another ship or aircraft, or against persons or property (5) on the high seas or in a place outside the jurisdiction of any state.

¹⁵ *HSC* art 15 (emphasis added).

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, *committed for private ends* by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹⁶

As for the position under customary international law, the *HSC* Preamble confirmed the contracting parties' desire 'to codify the rules of international law relating to the high seas'. Yet Rubin argues the resulting piracy rules 'are incomprehensible and codify nothing'.¹⁷ Essentially, some claim *HSC* drafters failed to successfully codify piracy, and under customary law the definition was much wider.¹⁸

Some support can be found in early efforts by Harvard Law School to codify the rules of piracy, where it was proclaimed a 'chaos of expert opinion [exists] as to what the law of nations includes'.¹⁹ Upon joining the *HSC*, Mongolia, Albania, Bulgaria, Poland, Romania, the Russian Federation, Belarus, Ukraine, Czechoslovakia and Hungary all made declarations stating the articles on piracy do not conform to customary law, with the definition being too narrow.²⁰

¹⁶ *UNCLOS* art 101 (emphasis added).

¹⁷ Alfred P Rubin, *The Law of Piracy* (Transnational Publishers, 1988) 393, cited in Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011) 52.

¹⁸ '[T]he *UNCLOS* definition is too narrow to be considered the authoritative definition of piracy under customary international law ... *UNCLOS* presented a significant departure from what the international community accepted as piracy': Erik Barrios, 'Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia' (2005) 28(1) *Boston College International and Comparative Law Review* 149, 161–162.

¹⁹ Joseph W Bingham, 'IV Draft Convention on Piracy, with Comment' in Harvard Law School, *Research in International Law* (Harvard Law School, 1932) 739, reprinted as Joseph W Bingham, 'Part IV — Piracy' (1932) 20(3) *American Journal of International Law — Supplement* 739, 769 ('*Harvard Draft*').

²⁰ See United Nations, *Chapter XXI Law of the Sea* (2015) United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&lang=en>.

However, this article supports the more widely accepted position that piracy, as defined within *UNCLOS*, reflects customary law.²¹ The general state consensus crystallised with the codification efforts at Geneva.²² Subsequent widespread state practice and *opinio juris* can be pointed to as required in the formation of customary law.²³ The extensive ratification and adherence to this definition, including by major maritime powers, provides great weight to the drafters’ intent to codify customary law. Consistent adoption demonstrates a further commitment to that definition. If piracy was wider prior to codification, the successive re-enactment of the same definition and declarations on its customary nature would surely have had an effect and restricted it to that found within *UNCLOS*.²⁴ The disapproving declarations mentioned above were not repeated upon *UNCLOS* ratification, and states within the Horn of Africa and South-East Asia (the principal areas affected by modern piracy) have incorporated the *UNCLOS* definition into co-operative anti-piracy agreements.²⁵

Further evidence of customary international law including a requirement for ‘private ends’ is the affirmation of states through their action in international organisations. The United Nations Security Council has reaffirmed the *UNCLOS* art 101 definition

²¹ Geiss and Petrig, above n 17, 41; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2011) 30; Ömer F Direk et al, ‘Somalia and the Problem of Piracy in International Law’ (2011) 4 *USAK Yearbook of International Politics and Law* 223, 238. The United States, though not a contracting party, has stated that the *UNCLOS* piracy provisions reflect customary law: ‘Declaration of Legal Adviser Harold Hongju Koh’ in *United States v Hasan*, 747 F Supp 2d 599 (ED VA, 2010), cited in Maggie Gardner, ‘Piracy Prosecutions in National Courts’ (2012) 10(4) *Journal of International Criminal Justice* 797, 813. It would be difficult to argue any state has displayed the characteristics necessary to be classified as a persistent objector, *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) (Judgment)* [1969] ICJ Rep 3.

²² It may be customary law only became sufficiently defined once the law was codified. The chaos of opinion means it is difficult to judge what customary law would have been prior to codification. ‘[V]irtually every aspect of piracy was still controversial’: Direk et al, above n 21, 238.

²³ *Statute of the International Court of Justice* art 38(1)(b).

²⁴ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 31.

²⁵ Gardner, above n 21, 813. See: International Maritime Organisation, *Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in The Western Indian Ocean and The Gulf of Aden*, C 102/14 Annex (29 January 2009) art 1; *Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia*, concluded 11 November 2004, 2398 UNTS 199 (entered into force 4 September 2006).

in the fight against piracy,²⁶ describing it as ‘reflective’ of international law.²⁷ The International Maritime Organisation and other relevant UN bodies have also invoked the same definitive definition.²⁸ Whilst the International Maritime Bureau used to invoke a very wide non-legally binding definition for commercial and statistical purposes,²⁹ it is now the case that even they have adopted the *UNCLOS* definition.³⁰

Finally, it is largely in relation to (a) the geographical scope of piracy and (b) the two-ship requirement that suggestions of a wider customary international law of piracy still exist.³¹ Disagreements on ‘private ends’ revolve around the precise meaning and not existence of the requirement under customary law. Thus, piracy under international law requires parties to act for ‘private ends’; the meaning of which is now debated.

III A DIFFERENCE OF OPINION ON ‘FOR PRIVATE ENDS’

Despite applying the same definition of piracy to the same facts, the District Court for the Western District of Washington and the Court of Appeals for the Ninth Circuit

²⁶ Robert C Beckman, ‘The Piracy Regime Under UNCLOS: Problems and Prospects for Cooperation’ in Robert C Beckman and J Ashley Roach (eds), *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar Publishing, 2012) 17, 28.

²⁷ Gardner, above n 21, 813, n 90, gives three examples: SC Res 1976, 6512th mtg, UN Doc S/RES/1976 (11 April 2011), Preamble; SC Res 1950, 6429th mtg, UN Doc S/RES/1950 (23 November 2010), Preamble; and SC Res 1918, 6301st mtg, UN Doc S/RES/1918 (27 April 2010), Preamble. Furthermore, *UNCLOS* ‘sets out the legal framework applicable to combating piracy and armed robbery at sea’: SC Res 2020, 6663rd mtg, UN Doc S/RES/2020 (22 November 2011) para 2, quoted in *United States of America v Ali Mohamed Ali*, 718 F 3d 929, 936 (CA9, 2013).

²⁸ See, eg, UN Division for Ocean Affairs and the Law of the Sea and the UN Office on Drugs and Crime. Gardner, above n 21, 813.

²⁹ The International Maritime Bureau definition contained no ‘private ends’ requirement. ‘[A]n act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act’, quoted in Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer, 2007) 18; and Adam J Young, *Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies* (ISEAS Publishing, 2007) 10.

³⁰ ‘The IMB Piracy Reporting Centre (IMB PRC) follows the definition of Piracy as laid down in Article 101 of the 1982 United Nations Convention on the Law of the Sea’: International Chamber of Commerce — Commercial Crime Services, IMB Piracy Reporting Centre <<http://www.icc-ccs.org/piracy-reporting-centre>>.

³¹ ‘[I]t has been suggested that the customary international law of piracy: (1) extended to acts in territorial waters; or (2) extended to events occurring aboard only one vessel’: Douglas Guilfoyle, ‘Written Evidence from Dr Douglas Guilfoyle’ in House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia*, House of Commons Report No 10, HC 1318, Session 2010–12, (2012) Ev 80, Annex I (‘*The Law of Piracy — Treaty Provisions and Explanatory Note*’) Ev 88 [13].

reached opposite conclusions. This difference is attributable to interpretation on whether Sea Shepherd’s conduct was for private ends.³²

On one hand the District Court decided financial enrichment was the ‘prototypical private end’.³³ Financial gain may have been a by-product of Sea Shepherd’s conduct, but it was not their purpose.³⁴ The purpose of Sea Shepherd’s conduct was preventing slaughter of marine life, a purpose for which the District Court found no universal international norm preventing the use of violence.³⁵ Whilst suggesting financial gain was the ‘ordinary case’, it gave no further examples of private ends for which violent conduct would be prohibited. Sea Shepherd’s conduct was only assessed against whether it was for financial gain.³⁶

The 9th Circuit interpreted private ends as falling at the other side of the scale, reversing the District Court decision. Private was given a wide definition, which according to its ‘ordinary meaning’ is the antonym of public.³⁷ Public ends are those pursued on behalf of a state. Anything not pursued on behalf of a state, including ‘those pursued on personal, moral or philosophical grounds, such as Sea Shepherd’s professed environmental goals’,³⁸ are private ends.

Within academia this public–private theory finds its greatest supporter in Guilfoyle.³⁹ States alone can legitimately use violence or claim, seize and redistribute property.⁴⁰ Thus private ends must be an objective test evaluating the ‘relationship among the act, actors and states’.⁴¹ If violence on the high seas between two ships or aircraft lacks state sanctioning, then it is committed for private ends and thus piracy.

³² The District Court also felt ‘malicious mischief’ did not constitute violence. *Institute of Cetacean Research v Sea Shepherd Conservation Society*, 860 F Supp 2d 1216, 1233 (WD Wash, 2012).

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid. Sea Shepherd argued piracy was ‘no more or less than robbery at sea’. The Institute of Cetacean Research argued a broader ‘private ends’, but provided no authorities on definition and no authorities on political activity as within private ends.

³⁷ *Sea Shepherd*, 708 F 3d 1099, 1101–2 (9th Cir, 2013).

³⁸ Ibid 1102.

³⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 32–42. See also Edward Duncan Brown, *The International Law of the Sea: Volume 1 Introductory Manual* (Dartmouth Publishing Company, 1994) vol 1, 301; Michael Bahar, ‘Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations’ (2007) 40(1) *Vanderbilt Journal of Transnational Law* 1, 26–37. For Sea Shepherd specifically, see Eugene Kontorovich, ‘Yes, Sea Shepherd Engages in Piracy Under International Law’ on The Volokh Conspiracy (27 February 2013) <<http://www.volokh.com/2013/02/27/yes-sea-shepherd-engages-in-piracy-under-international-law/>>.

⁴⁰ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37.

⁴¹ Bahar, above n 39, 17.

However, many authors disagree with this interpretation and do not equate private ends with a lack of state sanctioning. Private ends are seen to exclude *purely* politically motivated violence.⁴² This can be referred to as the private–political theory. Proponents suggest either politically motivated violence has traditionally not been seen as a private end, or political action is another form of public end, or both. Thus, actions of terrorists or political activists pursuing the political agenda of their organisation would not be classified as piracy and therefore not be subject to the universal jurisdiction it entails.

Under both interpretations the District Court clearly erred in restricting the definition to financial gain. Sea Shepherd’s arguments based on an analogy to robbery at sea were also out-dated because it is near universally accepted that private ends do not refer to personal gain.⁴³ It is equally true they do not refer to non-state action.⁴⁴ For example, a limited exception for recognised belligerents’ action against the state to which they are fighting is recognised by all as non-private ends.⁴⁵ Yet where the private ends distinction lies between these two extremes is debatable in international law. It is not as clear-cut as the 9th Circuit suggests in its short and under referenced opinion.

⁴² See, eg, Samuel Pyeatt Menefee, ‘Foreign Naval Intervention in Cases of Piracy: Problems and Strategies’ (1999) 14(3) *The International Journal of Marine and Coastal Law* 353, 357; Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010) 162; HE José Luis Jesus, ‘Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects’ (2003) 18(3) *The International Journal of Marine and Coastal Law* 363, 378; Tina Garmon, ‘International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, (2002) 27 *Tulane Maritime Law Journal* 257, 258. ‘[T]he majority view which still holds that acting for “private ends” excludes anybody acting for political, religious or ethnic reasons from the definition of piracy as found in the two treaties’: Direk et al, above n 21, 234. For blog posts referencing Sea Shepherd specifically, see Kevin Jon Heller, ‘Judge Kozinski’s “Rich History” of Piracy’ on *Opinio Juris* (27 February 2013) <<http://opiniojuris.org/2013/02/27/judge-kozinskis-rich-history-of-piracy/>>; Kevin Jon Heller, ‘Why Political Ends are Public Ends, Not Private Ends’ on *Opinio Juris* (1 March 2013) <<http://opiniojuris.org/2013/03/01/a-final-word-about-politically-motivated-piracy/>>.

⁴³ *Re Piracy Jure Gentium* [1934] AC 586. The International Law Commission equally concluded intent to rob was unnecessary, ‘Articles Concerning the Law of the Sea with Commentaries: 1956’ [1956] II *Yearbook of the International Law Commission* 265.

⁴⁴ ‘Private ships’ excludes state action.

⁴⁵ Guilfoyle interprets the exception as the basis for requiring ‘private ends’: Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33. The most restrictive interpretation requires both a recognised belligerent acting against a state and that such acts are in ‘furtherance of their rebellion’, Tracey E Madden, ‘An Analysis of the United States’ Response to the Achille Lauro Hijacking’ (1988) 8(1) *Boston College Third World Law Journal* 137, 142, quoting Gerald P McGinley, ‘The Achille Lauro Affair — Implications for International Law’ (1985) 52 *Tennessee Law Review* 691, 699.

Are political ends private ends? One of the few articles referenced by the 9th Circuit states:

the history of piracy, the motives behind the establishment of universal jurisdiction, as well as judicial precedent, powerfully demonstrate that a thwarted pirate cannot escape the world’s jails merely by pronouncing a political cause.⁴⁶

Given the debate over political ends being public or private ends, the 9th Circuit failed to inquire into whether this proposition is adequately supported. It will therefore require independent assessment.

IV DEFINING ‘PRIVATE ENDS’ UNDER INTERNATIONAL LAW

Whilst the *UNCLOS* definition of piracy reflects customary law, difficulty arises in the fact that the term ‘private ends’ is not elaborated upon in either treaty. The starting point is thus the *Vienna Convention on the Law of Treaties* (‘*VCLT*’),⁴⁷ which is generally understood as reflective of customary law.⁴⁸

The US Appeals Court in *Sea Shepherd* began by looking into the ordinary meaning of ‘private’.⁴⁹ This approach was mistaken. Firstly, the term of *UNCLOS* is ‘private ends’, not ‘private’. By removing the word from its context and surrounding text one risks differing interpretations from the term itself.⁵⁰ More importantly, the ‘ordinary meaning’ of private does not provide a decisive interpretation that either excludes or includes politically motivated ends. If private ‘is normally used as an antonym to public’ and ‘matters of a personal nature’ as the Court suggested,⁵¹ then a working definition only exists if those terms (public and personal) are clear. But these terms are equally ambiguous. Action ‘taken on behalf of a state’ is one definition of public, but other interpretations remain available.⁵² These ambiguities are highlighted

⁴⁶ Bahar, above n 39, 30.

⁴⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31–33 (‘*VCLT*’).

⁴⁸ *Kasikili/Sedudu Island (Botswana/Namibia) (Judgment)* [1999] ICJ Rep 1045, 1059[18].

⁴⁹ *Sea Shepherd*, 708 F 3d 1099, 1101 (9th Cir, 2013).

⁵⁰ ‘Public’ acts as an adjective to the noun ‘ends’, modifying the terms. Therefore the words should be interpreted collectively, and not in isolation. Article 31(1) of the *VCLT* requires: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

⁵¹ *Sea Shepherd*, 708 F 3d 1099, 1101 (9th Cir, 2013).

⁵² ‘1. Of, concerning, or affecting the community or the people: *the public good* ... 5. Connected with or acting on behalf of the people, community, or government: *public office*’: *The American Heritage Dictionary of the English Language* (Houghton Mifflin Harcourt Publishing Company, 5th ed, 2011). Political action is generally acting in the public interest for the public good — political disagreements being what is for the

when examining politically motivated activity. As discussed below, a Belgian Court equated political views as personal views, and so action in support of political views will be in support of personal ends (ie private ends). But equally, Bingham in 1932 interpreted politically motivated action as another form of public action.⁵³ Political ends could be private, they could be personal or they could be public ends. '[S]upplementary means of interpretation' are required to confirm which meaning is correct.⁵⁴

Kontorovich suggests art 101 of *UNCLOS* should be read in conjunction with art 102, which clarifies governmental ships operated by mutineers are assimilated to private ships.⁵⁵ The argument goes: warships and other governmental ships are under governmental control and therefore public ships. Once the state loses control, the ship is a non-governmental ship, a 'private' ship, and '[t]hus "private" clearly means "non-governmental"'.⁵⁶ The term 'private', in the context of *UNCLOS*, should therefore be taken to mean 'non-governmental' throughout the Convention.⁵⁷

However, this argument is unconvincing, given art 102 deals specifically with issues of piracy by warships and governmental ships whose crews have mutinied. This relates to the term 'private ship' found within art 101, which is of course broader than art 102 and includes all non-governmental ships.⁵⁸ Whilst art 102 may confirm 'private ship' as any non-governmental ship, it does not help define the term 'private' in *UNCLOS*. It does not attribute 'private' a special meaning of non-governmental within the treaty, which could then be transferred from the term 'private ship' to 'private ends'.⁵⁹ If private were used to refer to non-governmental then one would expect its use throughout the treaty in relation to non-governmental situations. The term 'private' is not used outside the context of arts 101 and 102, yet other non-governmental situations arise. Article 169(1) refers to consultation and cooperation with 'non-governmental' organisations, and art 139(1), when discussing liabilities of 'private' persons, uses the term 'natural or juridical persons'. If 'private' was used consistently to refer to non-governmental purposes or situations the argument could be convincing. But the fact private is used once within the term 'private ship', to refer

public good. On the other hand definition No 5 would point to sanctioned activity and the corresponding state responsibility; the 'acting' being on behalf of Government. If you define private as the antonym to public, then the 'private' definition depends on which 'public' definition you adopt. Adopting the first definition, political activity would be 'public' activity, thereby excluded from 'private'. Adopting definition No 5 would exclude political activity from 'public', thereby defining 'private' to encompass political activity.

⁵³ '[I]t seems best to confine the common jurisdiction to offenders acting for private ends only ... acts committed for *political or other public ends* are covered by Article 16': *Harvard Draft*, above n 19, 798 (emphasis added).

⁵⁴ *VCLT* art 32.

⁵⁵ Kontorovich, above n 39.

⁵⁶ *Ibid.*

⁵⁷ *VCLT* art 31(1).

⁵⁸ Geiss and Petrig, above n 17, 62 n 285.

⁵⁹ 'A special meaning shall be given to a term if it is established that the parties so intended': *VCLT* art 31(4).

to non-governmental ships, is insufficient to conclude ‘private’ ends must therefore be non-governmental ends.

Thus, the meaning of ‘private ends’ must be found in the development of piracy law, the underlying object and purpose of *UNCLOS*, and relevant state practice. The *UNCLOS* piracy provisions resulted from a long process beginning with the League of Nations.⁶⁰ It is through examining this history that the drafters’ intended meaning of the term ‘private ends’ may be found. More specifically, did they intend to exclude purely politically motivated ends?

A A History of Piracy Codification and ‘Private Ends’

The use of historical sources in determining drafters’ intentions has been questioned in relation to the *Sea Shepherd* case.⁶¹ Guilfoyle argues historical sources discussed below have been ‘overestimated’ in usefulness, given they are representative of the intentions of different *codifiers* and not *UNCLOS drafters*. Treaty interpretation aims to ascertain the intention of the drafters and so, given the documents are not part of the preparatory work, or within any of the other usual sources for interpretation under *VCLT* Pt III s 3, they are of limited relevance. This argument is said to gain support from the recent US decision, *United States of America v Ali Mohamed Ali*.⁶² Mr Ali, indicted with aiding and abetting piracy, attempted to rely on the *Harvard Draft*⁶³ in order to avoid prosecution for activities on land and within territorial waters:

Ali’s next effort to exclude his conduct from the international definition of piracy eschews *UNCLOS*’s text in favor of its drafting history — or, rather, its drafting history’s drafting history ... Ali would have us ignore *UNCLOS*’s plain meaning in favor of eighty-year-old scholarship that may have influenced a treaty that includes language similar to *UNCLOS* article 101. This is a bridge too far.⁶⁴

⁶⁰ Tullio Treves, *1958 Geneva Conventions on the Law of the Sea* (2008) United Nations Audiovisual Library of International law, 1 <http://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf>. Treves makes this point for the *Geneva Conventions*, however it is equally applicable to the *UNCLOS* piracy provisions. *UNCLOS* introduced many novel concepts and rules, but piracy provisions were re-enacted from the *HSC* with minimal difference and without debate, Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 31. Thus *UNCLOS* is another step in this history — albeit one without a change in definition.

⁶¹ Douglas Guilfoyle, ‘Political Motivation and Piracy: What History Doesn’t Teach Us About Law’ on *Blog of the European Journal of International Law (EJIL: Talk!)* (17 June 2013) <<http://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/>>.

⁶² (DC Cir, No 12-3056, 11 June 2013) (*‘US v Ali’*).

⁶³ *Harvard Draft*, above n 19. See below IV(A)(2).

⁶⁴ *US v Ali* (DC Cir, No 12-3056, 11 June 2013) slip op 15.

However, to ignore the historical context of art 101 is to remove the definition from its legal context. The supplementary means of interpretation ‘include’ but are not limited to preparatory works of the treaty. The International Tribunal for the Law of the Sea has referenced both the *HSC* and the International Law Commission *Articles Concerning the Law of the Sea with Commentaries: 1956* (‘*ILC Draft Articles LOS*’),⁶⁵ when interpreting *UNCLOS*.⁶⁶ National courts applying international law prior to *UNCLOS* also made approving references to the *Harvard Draft*.⁶⁷ *UNCLOS* re-enacted the *HSC* provisions on piracy with minimal difference, and without debate. The intentions of the drafters confirm those of the *HSC* drafters, which are to a large part, through quotes verbatim and approving references, reflective of the *Harvard Draft* and *Matsuda Draft Provisions for the Suppression of Piracy* (‘*Matsuda Draft*’).⁶⁸ Indeed the preamble to *UNCLOS* makes clear the

⁶⁵ ‘Articles Concerning the Law of the Sea with Commentaries: 1956’ [1956] II *Yearbook of the International Law Commission* 265 (‘*ILC Draft Articles LOS*’). See below IV(A)(3).

⁶⁶ *M/V ‘Saiga’ [No 2] (Saint Vincent and The Grenadines v Guinea) (Judgment)* (International Tribunal for the Law of the Sea, Case No 2, 1 July 1999) 26 [80]–[81]:

the Tribunal notes that the provision in article 91, paragraph 1, of the Convention ... does not provide the answer. Nor do articles 92 and 94 of the Convention, which together with article 91 constitute the context of the provision, provide the answer. The Tribunal, however, recalls that the International Law Commission, in article 29 of the *Draft Articles on the Law of the Sea* adopted by it in 1956, proposed the concept of a ‘genuine link’ as a criterion not only for the attribution of nationality to a ship but also for the recognition by other States of such nationality ... while the obligation regarding a genuine link was maintained in the 1958 Convention, the proposal that the existence of a genuine link should be a basis for the recognition of nationality was not adopted. The Convention follows the approach of the 1958 Convention.

‘[I]n view of lingering ambiguity, recourse is now made to supplementary means of interpretation. The direct predecessor of article 33 is article 24 of the 1958 *Convention on the Territorial Sea and the Contiguous Zone*’: *M/V ‘Saiga’ [No 2] (Saint Vincent and The Grenadines v Guinea) (Judgment)* (International Tribunal for the Law of the Sea, Case No 2, 1 July 1999) 5 [12] (Judge Laing). Furthermore, in ‘*Ara Libertad*’ (*Argentina v Ghana*) (*Order*) (International Tribunal for the Law of the Sea, Case No 20, 15 December 2012), the joint separate opinion of Judge Wolfrum and Judge Cot critiqued the order of the tribunal for not taking account of the legislative history of *UNCLOS* including the *ILC Draft Articles LOS* and *HSC*.

⁶⁷ ‘Before leaving the authorities, it is useful to refer to a most valuable treatise on the subject of piracy contained in “The Research into International Law by the Harvard Law School”: *Re Piracy Jure Gentium* [1934] AC 586, 599.

⁶⁸ League of Nations Committee of Experts for the Progressive Codification of International Law, *Questionnaire No 6: Piracy*, 2nd sess, Doc C.196.M.70.1927.V (26 January 1926) reprinted as *Matsuda’s Draft Provisions for the Suppression of Piracy*, 1926 (1926) 20(3) *American Journal of International Law — Supplement* 222, 228 (‘*Matsuda Draft*’). See below IV(A)(1).

drafters intended to codify the law of the sea,⁶⁹ a desire that hardly points to putting aside the historical origins of the piracy definition. Rather than of limited relevance, as proposed by Guilfoyle, they become of critical importance in resolving remaining ambiguities — despite the text and *travaux préparatoires*.

Secondly, one can disagree with Guilfoyle’s interpretation of *US v Ali*. It did not dismiss ‘the relevance of arguments based on the idea that the Harvard codification project reflects the controlling intention of treaty drafters 50 years later’.⁷⁰ *US v Ali* rests on the reasoning that a clear meaning within *UNCLOS* points to no high seas requirement for aiding and abetting. Obviously the *Harvard Draft* (the ‘drafting history’s drafting history’) could not be used to alter the law to the opposite effect because, as the US Court of Appeals for the DC Circuit went on, ‘treaty interpretation — both domestic and international — direct courts to construe treaties based on their text before resorting to extraneous materials’.⁷¹ Had *UNCLOS* been unclear on the issue, the Court *then* could have examined these further materials to confirm a particular meaning or resolved ambiguity (as other courts have). As seen above, ‘private ends’ remains unclear after looking to its legal context. Therefore resort to historical sources is a necessity. The date of thinking should not matter if consistently confirmed. Indeed ‘the definition of piracy has been frozen in what Dubner refers to as “the thinking of 1932”’.⁷² Whilst states and treaty drafters felt it necessary to update thinking on maritime zones, piracy remained much the same. Tracing the term ‘private ends’ through the documentation may reveal what the term meant when it was included within the *UNCLOS* definition of piracy.

1 *The Draft Provisions of the League of Nations Committee of Experts on International Law*

The *Matsuda Draft*⁷³ provisions submitted in 1926 as part of the League of Nations’ attempts to progressively codify international law are certainly far removed from the adoption of the *HSC* and *UNCLOS*. Indeed not many states responded to the draft. The few comments received ‘did not evidence either interest or enthusiasm for the topic and were disparate’.⁷⁴ The project was eventually dropped, with difficulties in reaching agreement and perceived unimportance in piracy codification.⁷⁵

⁶⁹ In addition to progressive development. However, given the piracy definition is quoted near verbatim from the *HSC* it is clear they wished to codify and crystallise the said definition.

⁷⁰ Guilfoyle, ‘Political Motivation and Piracy’, above n 61.

⁷¹ *US v Ali* (DC Cir, No 12-3056, 11 June 2013) slip op 2, 16.

⁷² Max Mejia Jr, ‘Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence’ (2003) 2(2) *Journal of International Commercial Law* 153, 161, citing Barry Hart Dubner, ‘Human Rights and Environmental Disaster — Two Problems That Defy the Norms of the International Law of Sea Piracy’ (1997) 23(1) *Syracuse Journal of International Law and Commerce* 1, 33.

⁷³ *Matsuda Draft*, above n 68.

⁷⁴ P W Birnie, ‘Piracy: Past, Present and Future’ (1987) 11(3) *Marine Policy* 163, 169.

⁷⁵ Geiss and Petrig, above n 17, 38.

However, the report represents the first stage of codification and importantly the origin of ‘private ends’. The term has persisted to this day throughout each codification.⁷⁶ As will be seen in discussions on the *Harvard Draft* and *ILC Draft Articles LOS* a continuity of meaning can be attributed to ‘private ends’.⁷⁷ Thus, if ‘private ends’ is used in the same context, for the same purposes, the origins of that term should help highlight whether the requirement of an undertaking for private ends in *UNCLOS* art 101 excludes political activity from the international piracy framework. If, however, during evolution of the definition of piracy the meaning departed from its original, as applied in the *Matsuda Draft*, it will be of limited use.

Such departure is not evident in the continued use of ‘private ends’. Although the *ILC Draft Articles LOS* commentary only refers to the *Harvard Draft*,⁷⁸ the *Matsuda Draft* was used as an authority on the subject of politically motivated violence during the ILC discussions on ‘private ends’.⁷⁹

Reviewing the *Matsuda Draft*, a clearly private–political distinction is made and not one that turns on public power or state sanctioning.⁸⁰ Article 1 provides:

Piracy occurs only on the high seas and consists in the commission for private ends of depredation upon property or acts of violence against persons.

⁷⁶ Guilfoyle’s research revealed, ‘[a]s far as I have been able to ascertain the words were first used in Joel Prentiss Bishop’s *New Commentaries on the Criminal Law* (8th ed) of 1892, effectively as a synonym for *animo furandi* (intention to rob, now generally dismissed as being a necessary element of piracy)’: Guilfoyle, ‘Political Motivation and Piracy’, above n 61. Bishop’s ‘private ends’ is clearly different to that of Matsuda, as *animo furandi* was specifically rejected by Matsuda; it being ‘contained in the larger qualification for private ends’. It seems reasonable to conclude the term private ends, as used to distinguish ‘piracy and practices similar to piracy’, has its origins in the *Matsuda Draft*. See also *Matsuda Draft*, above n 68, 223–224.

⁷⁷ See below Part IV(A)(2), IV(A)(3).

⁷⁸ *ILC Draft Articles LOS*, above n 43, 282.

⁷⁹ International Law Commission, ‘Summary record of the 290th meeting’ (1955) 1 *Yearbook of the International Law Commission* 37, 41 [40]–[45] (emphasis added):

In the matter of political motive, *the Matsuda report stated*: ‘Nevertheless, when the acts in question are committed *from purely political motives*, it is hardly possible to regard them as acts of piracy’ ... The principle of common jurisdiction, according to which a pirate was treated with universal public enmity, *could only exist where the political element was lacking* and where the ship concerned was not the public property of a State. *All that was made clear by the words ‘for private ends’, as used in article 23.*

The political motives thinking of the *Matsuda Draft* was carried through to the *ILC Draft Articles LOS* under ‘private ends’. The *ILC Draft Articles LOS* formed the basis of the *HSC*.

⁸⁰ Kevin Jon Heller, ‘A response to Kontorovich and Gallagher About Piracy (Updated)’ on *Opinio Juris* (27 February 2013) <<http://opiniojuris.org/2013/02/27/a-response-to-kontorovich-and-gallagher-about-piracy/>>.

It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.⁸¹

The reason politically motivated violence did not qualify as piracy in the *Matsuda Draft* was the realisation of the ‘important consequences which follow upon the commission of that crime’.⁸² In short, it was felt such criminals should be subject to ordinary rules of jurisdiction because they would not classify as ‘enemies of the community of civilised States’.⁸³ *Purely* politically motivated violence would not indiscriminately target vessels or be a threat to all states and the ‘security of commerce’ against which piracy is a crime.⁸⁴ Therefore it was not a crime against mankind which could be subject to the jurisdiction and punishment of mankind.

What constituted purely political objectives was not elaborated, nor any examples provided. It can, however, be concluded that the exception did not rest on whether violence was state sanctioned,⁸⁵ and secondly, the exception was very narrow. ‘It is better, in laying down a general principle, to be content with the external character of the facts without entering *too far* into the often delicate question of motives’.⁸⁶ This was the reasoning applied for rejecting a personal gain criterion, but would be equally applicable to establishing political motives. Thus it would need to be objectively clear that action was purely political, the absence of which suggests violence for private ends.

⁸¹ *Matsuda Draft*, above n 68, 228.

⁸² *Ibid* 224.

⁸³ *Matsuda Draft*, above n 68, 225. When discussing *unrecognised* belligerents attacking third party vessels, ‘Third Powers, on the other hand, may consider such ships as pirates ... unless the acts are inspired by purely political motives, in which case it would be exaggeratedly rigorous to treat the ships as declared enemies of the community of civilized States’: *Matsuda Draft*, above n 68, 225. Guilfoyle’s proposed intention of the Harvard drafters including ‘private ends’ to exclude insurgents attacking governmental vessels of those they seek to overthrow is clearly inapplicable to the *Matsuda Draft*, Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33–35. Matsuda also sought to exclude attacks on third party vessels.

⁸⁴ *Matsuda Draft*, above n 68, 224.

⁸⁵ Matsuda began, ‘According to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State’: *Matsuda Draft*, above n 68, 223. Authorisation is treated as a separate issue from private ends, although most likely distinguishes public ships and private ships. Nonetheless at no point is ‘political acts’ equated with state sanctioning.

⁸⁶ *Matsuda Draft*, above n 68, 224 (emphasis added).

2 *The Harvard Law School Draft Convention on Piracy*

The *Harvard Draft Convention on Piracy* was prompted by the League of Nations' work.⁸⁷ Despite its status as an academic endeavour it had a major impact on piracy development throughout the 20th century.⁸⁸ This is because the *Harvard Draft* was the basis of the International Law Commission's work.⁸⁹ The draft text produced by Dutch Rapporteur François was a French translation of the *Harvard Draft*.⁹⁰ This draft was then adopted by the ILC, including the 'private ends' requirement.⁹¹ The *ILC Draft Articles LOS* in turn formed the basis of the *HSC* and the subsequent *UNCLOS* definition. The *ILC Draft Articles LOS* commentary noted:

In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.⁹²

Despite the definition of piracy being the most difficult article to draft and the 'chaos of expert opinion' at the time,⁹³ the draft is the result of thorough analysis and extensive research. The draft reflects 'the most common views on piracy, seen from the angle of state practice over the centuries'.⁹⁴ Collection of piracy laws and doctrinal debate of the time enabled the Harvard drafters to carry out the most extensive discussion and evaluation of the term 'private ends' seen to date, the findings of which were generally endorsed by the ILC and carried through treaty law. The ILC and *UNCLOS* drafters were free to disagree or demonstrate a differing view on 'private ends' (having only agreed 'in general'), but this does not appear to be the case.

Those who argue an expansive view of piracy based on lack of state sanction look to the purpose and historical context of the *Harvard Draft*. 'Private ends' was included for the sole purpose of excluding civil-war insurgents.⁹⁵ That is, those 'acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence'.⁹⁶ The *HSC* similarly included 'for private ends' for such purpose. Insurgencies attacking ships of their state was one tool used for gaining

⁸⁷ *Harvard Draft*, above n 19, 739–886. Geiss and Petrig, above n 17, 38.

⁸⁸ Geiss and Petrig, above n 17, 39.

⁸⁹ Beckman, above n 26, 17.

⁹⁰ Geiss and Petrig, above n 17, 39.

⁹¹ The ILC Report to the General Assembly explicitly adopted the rapporteur's position. Malvina Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82(2) *The American Journal of International Law* 269, 278.

⁹² *ILC Draft Articles LOS*, above n 43, 282 art 38, Commentary.

⁹³ *Harvard Draft*, above n 19, 769.

⁹⁴ Jesus, above n 42, 382.

⁹⁵ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33.

⁹⁶ Halberstam, above n 91, 277.

independence.⁹⁷ This would be a public end,⁹⁸ which only threatens the state from which independence is sought and *not* the international community.⁹⁹ The historical exception included by the Harvard drafters was based on an objective test of ships targeted by insurgents,¹⁰⁰ not the subjective intentions of actors.¹⁰¹

The *Harvard Draft* commentary focused on issues of insurgency, and the exception to art 3 of the Draft does appear to apply in ‘all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognised belligerent organizations, or of unrecognised revolutionary bands’.¹⁰² Guilfoyle suggests this is a closed list of contentious cases, seemingly excluding political actors like Sea Shepherd.¹⁰³ Thus ‘private ends’ was formulated to remove only insurgency attacks on state vessels.¹⁰⁴ This is the only ‘political end’ outside the definition of piracy.¹⁰⁵

But as Heller observes, art 16 of the *Harvard Draft*, which deals with non-piratical cases, does *not* adopt a limited list approach.¹⁰⁶ Although designed *primarily* for such cases, it ‘covers *all* non-piratical but unjustifiable attacks for public or private ends on persons or property under the protection of a state on the high sea’.¹⁰⁷ Article 16 ‘covers *inter alia* the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed on the high sea by unrecognised organizations’.¹⁰⁸ Article 16 covers the examples of art 3 quoted above, but with no indication

⁹⁷ Halberstam, above n 91, 275; Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33.

⁹⁸ Guilfoyle explains such attacks as the exercise of a ‘limited form of public power’. Insurgents have the capability to become lawful Governments, and thus attain limited public status unlike terrorists or pirates, Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 35.

⁹⁹ Halberstam, above n 91, 275.

¹⁰⁰ Governmental ships of the state to which insurgents are seeking independence from.

¹⁰¹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37.

¹⁰² *Harvard Draft*, above n 19, 786.

¹⁰³ Guilfoyle, ‘Political Motivation and Piracy’, above n 61.

¹⁰⁴ Both recognised and unrecognised. Clyde H Crockett, ‘Toward a Revision of the International Law of Piracy’ (1976) 26 *DePaul Law Review* 78, 93.

¹⁰⁵ Article 16 provided: ‘The provisions of this convention do not diminish a state’s right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, *when such measures are not based upon jurisdiction over piracy*’, *Harvard Draft*, above n 19, 746 (emphasis added).

¹⁰⁶ Kevin Jon Heller, ‘Comment 2’ on Guilfoyle, ‘Political Motivation and Piracy’, above n 61. Furthermore, see Heller, ‘A Response to Kontorovich’, above n 80.

¹⁰⁷ *Harvard Draft*, above n 19, 857 (emphasis added).

¹⁰⁸ *Ibid* (emphasis added). ‘*Inter alia*’ suggests room for other acts. Illegal forcible acts for political ends against foreign commerce, committed on the high seas by groups other than unrecognised organisations, although not anticipated by the Harvard

of limitation to only such cases.¹⁰⁹ Thus political violence by unrecognised organisations and not just insurgents *could* fall within art 16, which covers cases unqualified as piracy under art 3.¹¹⁰

Furthermore, concluding exclusion rests on the class of vessels as legitimate insurgent targets, as opposed to motives, seems unsupported.¹¹¹ Academic writings referenced by the Harvard drafters do restrict the exception to insurgents attacking vessels of the state they wish to seek independence from.¹¹² This is presumably the ‘better view’ the drafters support.¹¹³ However, the *Harvard Draft* does not distinguish between acts against innocent third national shipping and acts against a particular flagged vessel as a legitimate target.¹¹⁴ Nor does it distinguish groups targeting a single government and those affecting multiple states.¹¹⁵ The rationale for exclusion is rather that: (a) there is no reasonable justification for extending universal jurisdiction;¹¹⁶ (b) such acts would

drafters, could fall as another example of excluded conduct. Such conclusions would be dependent on subsequent state practice in shaping the law.

¹⁰⁹ Ibid. Harvard drafters gave the example of a revolutionary organisation attacking or blockading foreign commerce. This is however ‘for instance’. Terrorism does not seem to have been considered by the drafters. Presumably if the list is not closed it could be assessed if such action should be considered as ‘not cases falling under the common jurisdiction of all states as piracy by traditional law, but are special cases of offences for which the perpetrators may be punished *by an offended state* as it sees fit’ (ie within art 16).

¹¹⁰ Heller has summarised the *Harvard Draft* references that support the view politically motivated violence could be committed by parties other than insurgents and states, but still be a public end and not a private end: Heller, ‘Why Political Ends are Public Ends, Not Private Ends’, above n 42.

¹¹¹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 33–35. Also see Halberstam, above n 91, 277:

on the basis of the *travaux préparatoires*, that ‘for private ends’ was used in the Harvard draft to exclude acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence, and was used in the Geneva Convention for that purpose and also to exclude attacks by state ships.

¹¹² Halberstam, above n 91, 279.

¹¹³ *Harvard Draft*, above n 19, 857.

¹¹⁴ Crockett, above n 104, 94. Also see *Harvard Draft* commentary to art 16, which when discussing acts not covered by piracy refers to attacks on ‘foreign commerce’, ‘persons or property under the protection of a state’ and the ‘offended state’ — none of which seem to take any consideration of the ships status or flag: *Harvard Draft*, above n 19, 857.

¹¹⁵ Crockett, above n 104, 87.

¹¹⁶ Offended states are free to take action under traditional jurisdictional rules. Although universal jurisdiction requires no nexus between the state and act, the basis of the principle is that the crime affects a common interest of all states (piracy affecting the freedom of navigation and commerce). If the action does not threaten the common interest, then piracy should not concede jurisdiction to states not offended or threatened.

not fall indisputably within the common jurisdiction of traditional piracy law;¹¹⁷ and (c) such cases involve political considerations that could direct the action of the offended state.¹¹⁸ Theoretically, therefore, if the listed contentious cases are not exhaustive, and comparable cases of purely politically motivated violence fulfilled the rationale above, it would not be for 'private ends'. Insurgency is the primary incident the test addresses, but other violence for non-private ends lacking state sanction could exist.

In summary, the *Harvard Draft* restricts piracy to acts pursuing private ends. Similar to Matsuda, political ends are not private ends. They are the opposite; they are public ends. The offended state is to prosecute under ordinary jurisdictional rules of international law: 'The cases of acts committed for *political or other public ends* are covered by Article 16'.¹¹⁹ Looking at that article, whilst state sanctioned violence would be non-piratical, there is no indication this is the *only* conduct that would not qualify. Insurgents were the focus of discussion and origin of the private ends test. But the commentary contemplates other unrecognised organisations using force for political ends that would not be piratical. Although environmental activists were never considered, the reasoning behind excluding insurgents could equally apply.¹²⁰

3 *The International Law Commission Draft and the UN Conferences on the Law of the Sea*

The *ILC Draft Articles LOS*¹²¹ is an indispensable tool in interpreting the *HSC*, and *UNCLOS* piracy provisions which borrow from that convention. As the ILC noted:

its Report, the reports of its Special Rapporteurs and the related research projects, studies, working documents and questions directed to States are indispensable also for the following reasons:

- (i) they are a critical component of the process of consulting States and obtaining their views;
- (ii) they assist individual States in the understanding and interpretation of the rules embodied in codification conventions;
- (iii) they are part of the *travaux préparatoires* of such conventions, and are frequently referred to, or quoted in the diplomatic correspondence of States, in argument before the International Court of Justice and by the Court itself in its judgments ...¹²²

¹¹⁷ *Harvard Draft*, above n 19, 857.

¹¹⁸ *Ibid.* The Japanese refrained action against Sea Shepherd could only be explained on grounds of a political decision.

¹¹⁹ *Ibid* 798 (emphasis added).

¹²⁰ See Part IV(C), for whether reasonable justification exists for applying universal jurisdiction, and Part IV(B) for state practice.

¹²¹ *ILC Draft Articles LOS*, above n 43.

¹²² *Report of the International Law Commission: Fifty-fifth session (5 May–6 June and 7 July–8 August 2003)*, UN GAOR, 58th sess, Supp No 10, UN Doc A/58/10 (2003) 277 [442].

As mentioned, the *ILC Draft Articles LOS* generally agreed with the Harvard Law School research and *Harvard Draft*. This is highlighted within the piracy section.¹²³ However, whether agreeing in general includes the *Harvard Draft* interpretation on private ends, and whether ‘private ends’ excludes purely political motivation is unclear.¹²⁴ The *Matsuda Draft* was discussed during sessions of the ILC approvingly, and language within the *ILC Draft Articles LOS* is taken from that draft.¹²⁵ But noticeably, the political exception Matsuda went on to describe is not featured in the commentary, which some authors take to suggest such an exception was not accepted.¹²⁶ This is not a convincing argument, however, when placed in the context of the *ILC Draft Articles LOS*. Point (1) (i) of the art 39 commentary on possibilities of piracy driven by hatred or revenge is immediately followed by (ii): ‘The acts must be committed for private ends’.¹²⁷ Thus, the commentary makes two distinct points; firstly an intention to rob (*animus furandi*) is not required, and secondly, the act must be for private ends. If private ends were non-political then the fact the commentary does not mention a political exception cannot be taken as rejection of previous codification attempts.¹²⁸

¹²³ *ILC Draft Articles LOS*, above n 43, 282, art 38, Commentary.

¹²⁴ However see the interesting example of Beckman from the ILC reports. ‘Following the Harvard precedent, he had defined as piracy acts of violence or of depredation committed for private ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a political purpose’: Beckman, above n 26, 23, citing ‘Summary Records of the Seventh Session (2 May–8 July 1955)’ (1955) 1 *Yearbook of the International Law Commission* 1, 40 [38]. Beckman goes on to argue it would be troubling therefore if terrorist or political activists were ‘unrecognized revolutionary bands’ — the words from the *Harvard Draft* quoted by the ILC. It would be ‘better’ to distinguish private-public ends based on state sanctioning, but no legal argument is made in support of the ‘better’ interpretation, Beckman, above n 26, 23.

¹²⁵ ‘Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain’: *ILC Draft Articles LOS*, above n 43, 282, art 39, Commentary. This is very similar to the language and examples used in the *Matsuda Draft: Matsuda Draft*, above n 68, 224.

¹²⁶ Eugene Kontorovich, ‘“Private ends” in the Travaux Préparatoires of the Law of the Sea Treaty’ on *The Volokh Conspiracy* (28 February 2013) <<http://www.volokh.com/2013/02/28/private-ends-in-the-travaux-preparatoires-of-the-law-of-the-sea-treaty/>>.

¹²⁷ *ILC Draft Articles LOS*, above n 43, 282, art 39, Commentary.

¹²⁸ Different viewpoints were raised during the ILC discussions, but such an interpretation of private ends could be seen in the Special Rapporteur’s phrasing of the question to the commission:

Mr. FRANÇOIS (Special Rapporteur) said that finally the Commission had to decide whether to restrict piracy to *acts committed for private ends, thus excluding acts committed for political motives or by warships ...* The CHAIRMAN then put to the vote the retention of the words ‘for private ends’ in the Special Rapporteur’s revised text. *It was decided, by 11 votes to 2, that those words should be retained.*

‘Summary Records of the Seventh Session (2 May–8 July 1955)’ (1955) 1 *Yearbook of the International Law Commission* 1, 55 [16] (emphasis added), 57 [35].

Sir Gerald Fitzmaurice, on the other hand, seems to have adopted the state sanction—lack of state sanctioning approach during the ILC discussions, see Halberstam, above n 91, 281.

In the absence of convincing contrary evidence, it must be taken that ILC approval and references to previous codification efforts extended to discussions on political violence. Indeed this was the position taken by Czechoslovakia, which criticised the ILC for failing to include piracy committed for political ends when the draft was discussed during negotiations.¹²⁹ The Czech proposal was part of a number of criticisms pointing to a very wide interpretation of piracy never seen within international law,¹³⁰ and subsequently rejected by other states.¹³¹

The only major change brought about was the addition of ‘any *illegal* acts’ to the original *Harvard Draft* definition. The addition is best understood to broaden conduct falling under the definition of piracy — yet the term ‘illegal’ is unclear and open to interpretation. It has been suggested the term ‘emphasize[s] that the act must “be to some degree dissociated from a lawful authority”’¹³² in support of the public–private theory of private ends. But the link between the two phrases is not explained or argued. It is difficult to see, if the term illegal does restrict piracy to exclude privateers sanctioned by governments,¹³³ how that conclusion affects the interpretation of private ends. The political exception theory does not suggest the action would be legal. It is perfectly reasonable for actions to be illegal (non-state sanctioned), but still unqualified as ‘private ends’ due to its political nature.¹³⁴

Finally, differences between *UNCLOS* and *HSC* are minimal, merely confirming custom. A variation is visible within the French text, but this does not tell us much, and does not demonstrate a changing approach, given the consistency of the English text.¹³⁵ It might be thought re-enactment without debate tells us little about the

¹²⁹ Natalino Ronzitti, ‘The Law of the Sea and the Use of Force Against Terrorist Activities’ in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, 1990) 1, 2. See also *United Nations Conference on the Law of the Sea — Summary Records of Meetings and Annexes*, UN GAOR, vol IV, 2nd Comm, UN Doc A/CONF.13/40 (24 February–27 April 1958) 78 [33].

¹³⁰ Mr Cervenka for Czechoslovakia suggested that piracy should also cover attacks within the territorial sea or indeed the mainland if the vessel came or left to the high seas. He also suggested attacks within the *terra nullius* should not be piracy. *United Nations Conference on the Law of the Sea — Summary Records of Meetings and Annexes*, UN GAOR, vol IV, 2nd Comm, UN Doc A/CONF.13/40 (24 February–27 April 1958) 78 [33].

¹³¹ Ibid 84 [4]. The Albanian–Czechoslovak joint proposal was rejected by 37 votes to 11 (with one abstention).

¹³² Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 43, quoting Clyde H Crockett, ‘Toward a Revision of the International Law of Piracy’ (1976) 26 *De Paul Law Review* 78, 82.

¹³³ Beckman, above n 26, 22.

¹³⁴ An alternative view of the addition of ‘illegal’ acts is to highlight an intention to rob is not required. Gardner, above n 21, 809.

¹³⁵ The French text of the *HSC* referred to ‘*but*s personnels’ (personnel goals) in art 15, whilst *UNCLOS* uses the term ‘*fin*s privées’ (private purposes) in art 101. Neither term would appear to be conclusively clear as to whether political motives are included or

private ends debate. But ‘private ends’ was maintained despite academic preferences to broaden the definition by deleting the term.¹³⁶ Clearly states were unwilling to enlarge the scope of piracy.

But perhaps inaction is due to similar reasons as the failure of states to define terrorism within international law. At the time of the *Harvard Draft* there was a ‘chaos of expert opinion’ on what constituted piracy,¹³⁷ yet the drafters as a minimum agreed with Matsuda that purely political ends fell outside piracy.¹³⁸ Whilst the limits were never expanded or established beyond political insurgent attacks, by the time of drafting *UNCLOS* the problem of political activity at sea and the doctrinal debate would have been apparent. Yet the drafters still left the issue unaddressed. With terrorism no definition exists because no will exists at UN level to do so.¹³⁹ Perhaps the grey area of politically motivated violence at sea faces similar insecurity, with states unwilling to delineate the point at which individuals should be subject to universal jurisdiction.

What is clear from piracy’s history is thus that the exact position of politically motivated violence by private individuals or organisations remains unclear. The ‘rich history’ alluded to in *Sea Shepherd* does not define private ends as acts ‘not taken on behalf of a state’.¹⁴⁰ Crockett argues ‘private ends’ was added to settle debate on whether acts of political groups and states were piracy.¹⁴¹ If so, the ‘sledgehammer’ private ends test failed to do so.¹⁴² It can hesitantly be concluded, however, that *purely* political acts perpetrated against a particular state or states are not included within the definition of piracy, although the exact boundaries remain ill-defined. Very much will depend on state practice and the policy underlying piracy. This shall be reviewed to evaluate whether it confirms such interpretation, and what the limits of political ends are.

B State Practice on Defining ‘Private Ends’

The history of piracy codification was clear that public ends are not private ends. It was equally clear political acts could be public acts. Although discussions of ‘private

excluded under the definition of piracy. The change is simply to bring the French text into line with that of the English text. Joe Verhoeven concludes both terms are to be treated as substantially equivalent. (*Les termes doivent sans doute être tenus pour substantiellement équivalents, la version anglaise étant identique dans l’un et l’autre instruments*): Joe Verhoeven, *Droit International Public* (De Boeck & Larcier, 2000) 568.

¹³⁶ Ronzitti, above n 129, 2.

¹³⁷ *Harvard Draft*, above n 19, 769.

¹³⁸ *Ibid* 857 (art 16).

¹³⁹ ‘The world still seems to be split between those who believe that defining terrorism is a totally political issue best addressed by individual states and those who believe that world deserves to have the phenomenon of terrorism defined in an international convention’: Mejia, above n 72, 172.

¹⁴⁰ *Sea Shepherd*, 708 F 3d 1099, 1102 (9th Cir, 2013).

¹⁴¹ Crockett, above n 104, 79.

¹⁴² *Ibid* 87.

ends’ were limited, and at times mixed, it appears ‘political’ acts might extend beyond those sanctioned by state authority and acts by insurgents against their government. Despite such distinction, the *Matsuda Draft*, and subsequent *HSC–UNCLOS* codifications, have not defined the boundaries of ‘purely political acts’ beyond insurgency acts — since the introduction of ‘private ends’ to *primarily* deal with insurgency acts.

Nevertheless, concluding public ends, as opposed to private ends, could extend beyond state sanctioned violence is one thing. But concluding politically motivated violence by individual groups *is* a public end is quite another.¹⁴³ It remains unclear.¹⁴⁴ State practice will confirm or deny whether political acts of private organisations on the high seas are ‘for private ends’ under customary law¹⁴⁵ and treaty law.¹⁴⁶ The 2012 ICJ decision on immunities provides the nature of such an evaluation. Whilst dealing with the question of immunity, the case demonstrates how and when domestic implementation and application of an international law rule can be used to interpret and define international law of a treaty and customary nature:

State practice of particular significance is to be found in the *judgments* of national courts faced with the question whether a foreign State is immune, the *legislation* of those States which have enacted statutes dealing with immunity, the *claims* to immunity advanced by States before foreign courts and the *statements* made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations

¹⁴³ Thus the conclusion that private ends are *all* acts lacking state sanction does not appear in the history of the piracy definition. State sanctioned violence is not a private end. The question now is whether politically motivated violence without state sanctioning is also not a private end.

¹⁴⁴ Halberstam, above n 91, 278.

¹⁴⁵ A customary rule will be ‘in accordance with a constant and uniform usage practised by the States in question’: *Asylum (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 276. ‘[T]he conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule’: *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 98 [186]. State practice should be accompanied by *opinio juris* — the recognition that a legal obligation obligates a particular behaviour. ‘[N]ot only must the acts concerned “amount to a settled practice”, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”’: *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 108–9 [207], quoting *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) (Judgment)* [1969] ICJ Rep 3, 44 [77]. See Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 72–93.

¹⁴⁶ *VCLT* art 31(3)(b), ‘subsequent practice in the application of the treaty’ can be taken into account in confirming the interpretation reached on ‘private ends’.

Convention. *Opinio juris* in this context is reflected in particular in the *assertion* by States claiming immunity that international law accords them *a right* to such immunity from the jurisdiction of other States; in the *acknowledgment*, by States granting immunity, that international law imposes upon *them an obligation* to do so; *and, conversely, in the assertion by States in other cases of a right* to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.¹⁴⁷

Such reasoning applies when evaluating universal jurisdiction exercised by states over pirates. If the exercise of jurisdiction, or state assertions, based on either a wider or narrower interpretation of ‘private ends’ is not accompanied by the requisite *opinio juris* (or evidence of), it will be of little use. Equally ‘judgments of national courts’ must be those faced with the question of piracy under international law. States are free to define piracy under national law; art 101 of *UNCLOS* merely provides definition for the purposes of exercising universal jurisdiction.¹⁴⁸ Municipal piracy is a separate crime, the judgments of which provide no evidence.¹⁴⁹ This applies equally to state legislation, unless it is apparent that such legislation is a ‘domestic implementation of the legal regime for combating piracy under international law’.¹⁵⁰ The position of states and the ILC have already been discussed. But other treaty law, as state practice,¹⁵¹ may help identify the limits of ‘private ends’ as understood by states involved.

¹⁴⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment)* [2012] ICJ Rep 99, 122–3 [55] (emphasis added).

¹⁴⁸ A definition of piracy under international law has one purpose, ‘that purpose is to define the common special jurisdiction of the several states based on certain sorts of facts which it calls piracy’: *Harvard Draft*, above n 19, 785.

¹⁴⁹ ‘[T]he decisions of courts of a certain state or the dictates of its legislation as to what the crime of piracy includes *for the purposes of the law of that state*, are not throughout pertinent to the scope of this common international jurisdiction’: *Harvard Draft*, above n 19, 785 (emphasis added).

¹⁵⁰ Atsuko Kanehara, ‘Japanese Legal Regime Combating Piracy: The Act on Punishment of and Measures Against Acts of Piracy’ (2010) 53 *Japanese Yearbook of International Law* 469, 469. For an overview of the different municipal definitions see: *Letter dated 23 March 2012 from the Secretary-General to the President of the Security Council*, UNSC Doc S/2012/177 (26 March 2012) annex (‘*Compilation of Information Received From Member States on Measures They Have Taken to Criminalize Piracy Under Their Domestic Law and to Support the Prosecution of Individuals Suspected of Piracy off the Coast Of Somalia and Imprisonment of Convicted Pirates*’).

¹⁵¹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38. Shaw, above n 145, 82 n 37, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 23–4.

1 *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*

The *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (‘SUA Convention’)¹⁵² currently has 156 contracting parties representing 94.62 per cent world tonnage.¹⁵³ Various protocols have been adopted, with those of 2005 entering into force in 2010.¹⁵⁴ Significant state adoption, particularly by those ‘whose interests are specifically affected’, suggests a convention to prevent, punish and prosecute all forms of violence against shipping was necessary.¹⁵⁵

¹⁵² *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 222 (entered into force 1 March 1992) (‘SUA Convention’), as amended by *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992), *Protocol of 2005 to the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 14 October 2005, IMO Doc LEG/CONF.12/22 (entered into force 28 July 2010) and *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (entered into force 28 July 2010).

¹⁵³ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Extension by the Kingdom of the Netherlands to Bonaire, Sint Eustatius and Saba*, Circulars for the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, 79, SUA.1 (8 November 2010).

¹⁵⁴ *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992) — 145 parties as of 2 December 2010, see <<http://cil.nus.edu.sg/1988/1988-protocol-for-the-suppression-of-unlawful-acts-against-the-safety-of-fixed-platforms-located-on-the-continental-shelf/>>; *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/22 (entered into force 28 July 2010) — 13 parties as of 2 December 2010, see <<http://cil.nus.edu.sg/2005/2005-protocol-for-the-suppression-of-unlawful-acts-against-the-safety-of-fixed-platforms-located-on-the-continental-shelf/>>; *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (entered into force 28 July 2010) — 17 parties as of 2 December 2010, see <<http://cil.nus.edu.sg/2005/2005-protocol-to-the-convention-for-the-suppression-of-unlawful-acts-against-the-safety-of-maritime-navigation/>>.

¹⁵⁵ BEING CONVINCED of the urgent need to develop international co-operation between States in devising and adopting effective and practical measures for the prevention of all unlawful acts against the safety of maritime navigation, and the prosecution and punishment of their perpetrators.

SUA Convention, 1678 UNTS 221, Preamble para 6.

Although crimes under the *SUA Convention* and piracy are not exclusive crimes,¹⁵⁶ some authors take adoption of the *SUA Convention* as evidence piracy did not cover terrorists and other politically motivated actors.¹⁵⁷ This is supported by the fact adoption was in direct response to the *Achille Lauro* incident.¹⁵⁸ The sponsoring states that introduced the draft convention, Austria, Egypt and Italy, cited the two-ship restriction and the private ends requirement as why a new convention on terrorism was needed.¹⁵⁹ Both the Special Representative of the UN Secretary General for the Law of the Sea (Satya Nandan), and the Italian Minister of Justice (Guiliano Vassalli) stated at the opening of the International Maritime Organisation conference where the Convention was drafted that the private end criterion would not be met by maritime terrorism; thereby making piracy inapplicable.¹⁶⁰ The *SUA Convention* does appear to adopt the wider interpretation, covering acts within art 3 that lack

¹⁵⁶ See *SUA Convention* art 3. The UN Security Council has ‘stressed the potential simultaneous applicability of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* (“*SUA Convention*”) to certain acts of piracy’: Douglas Guilfoyle, ‘Combating Piracy: Executive Measures on the High Seas’ (2010) 53 *Japanese Yearbook of International Law* 149, 159–160, citing SC Res 1846, 6026th mtg, UN Doc S/RES/1846 (2 December 2008) para 15; SC Res 1851, 6046th mtg, UN Doc S/RES/1851 (16 December 2008) Preamble; SC Res 1897, 6226th mtg, UN Doc S/RES/1897 (30 November 2009) Preamble.

¹⁵⁷ ‘The mere fact of the adoption of the *SUA Convention* stands testimony that the international sea piracy rules cannot handle terrorist activities at sea’: Jesus, above n 42, 389.

¹⁵⁸ Briefly, members of the Palestinian Liberation Front, a splinter group from the Palestinian Liberation Organization, hijacked an Italian cruise liner on the 7 October 1985 and demanded the release of 50 Palestinian prisoners incarcerated in Israel.

¹⁵⁹ Guilfoyle, ‘Written Evidence’, above n 31, Annex II (‘*The SUA Convention – Treaty Provisions and Explanatory Note*’) Ev 93 [24], citing International Maritime Organisation, IMO Doc PCUA 1/3 (3 February 1987) annex [2]. The crimes covered by the *SUA Convention* were only touched upon by the piracy provisions of the *HSC* and *UNCLOS*:

These provisions apply to illegal acts of violence or detention or any other act of depredation committed for private ends by the crew or the passengers of a private ship on the high seas against another ship or against persons on board of such ship. Thus, these acts cover only a small part of the unlawful acts that deserve punishment as such acts are mostly not committed for *private ends* or from aboard a ship against persons on board of another ship.

Quoted in Tullio Treves, ‘The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’ in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, 1990) 69, 87 n 13 (emphasis in original).

¹⁶⁰ Ronzitti, above n 129, 2 n 7, citing International Maritime Organisation, *Record of Decisions of the Sixth Meeting Held at 11 am on 10 March 1988* (International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 1–10 March 1988), IMO Doc SUA/CONF/RD 13 (20 February 1989).

state sanctioning.¹⁶¹ If piracy covered all violence on the high seas that lacked state sanctioning, the *SUA Convention* would be obsolete in that respect — all states would already be able to exercise universal jurisdiction against such actors (putting aside the two-ship requirement). Yet the convention was introduced for the very purpose of covering politically motivated violence, which lacked state sanctioning, and which was thought by those states to not be covered by piracy as defined in the *HSC*.

Guilfoyle, however, interprets the *SUA Convention* within its historical context, and concludes the treaty represents state practice condoning the idea political motives could ever exclude criminal responsibility.¹⁶² Later terrorism suppression treaties excluded a ‘political offences exception’ from applying in extradition requests.¹⁶³ Although the exception is not expressly excluded in the *SUA Convention*, this is due to debate at the time within the UN General Assembly on whether acts in furtherance of self-determination were legitimate acts of politically motivated violence, or whether they were terrorist attacks.¹⁶⁴ Since the 1994 *Declaration on Measures to Eliminate International Terrorism* the position has been settled that no such considerations exist — all such violent attacks are unjustifiable.¹⁶⁵ The 2005 Protocol to the *SUA Convention* adopts this position, expressly excluding any ‘political offence’

¹⁶¹ Article 2 provides the *SUA Convention* does not apply to:

(a) a warship; or

(b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or

(c) a ship which has been withdrawn from navigation or laid up.

2 Nothing in this Convention affects the immunities of warships and other governmental ships operated for non-commercial purposes.

¹⁶² Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38–40.

¹⁶³ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38, n 58, citing *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256 (entered into force 23 May 2001) art 11; *International Convention for the Suppression of Terrorist Financing*, opened for signature 10 January 2000, 39 ILM 268 (entered into force 10 April 2002) art 14; *International Convention for the Suppression of Acts of Nuclear Terrorism*, opened for signature 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007) art 15, annexed to, *Measures to Eliminate International Terrorism — Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc A/59/766 (4 April 2005).

¹⁶⁴ Guilfoyle, *Shipping Interdiction and the Law of the Sea* above n 21, 39.

¹⁶⁵ ‘Criminal acts ... are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them’: *Measures to Eliminate International Terrorism*, GA Res 49/60, 49th sess, 84th plen mtg, Agenda Item 142, UN Doc A/RES/49/60 (9 December 1994) annex para 3. Reiterated: *Measures to Eliminate International Terrorism*, GA Res 50/53, 50th sess, 87th plen mtg, Agenda Item 146, UN Doc A/RES/50/53 (11 December 1995) para 2.

ground to refuse extradition.¹⁶⁶ Thus subsequent state practice confirms political motivation cannot excuse otherwise criminal acts. Private ends should thus be interpreted as not excluding action just because it was politically motivated.

Furthermore, although the states introducing the *SUA Convention* were of the opinion politically motivated attacks were excluded from piracy, that is merely an opinion. Yes it should be borne in mind as state practice and *opinio juris* to the effect political ends are excluded, but this is hardly uniform practice shared by all states. At least one major maritime power, the US, clearly did not view politically motivated attacks as excluded. The US charged those involved in the *Achille Lauro* incident with piracy, citing domestic law pointing towards the ‘law of nations’, and basing jurisdiction on the universal jurisdiction principle applicable to *piracy jure gentium*.¹⁶⁷ It is perfectly reasonable to look to other reasons for introducing the *SUA Convention*, which could explain the vast state practice beyond the three states that introduced the draft. The Convention suppresses a broader array of acts equally disruptive to navigation,¹⁶⁸ it provides a working regime applicable to a larger geographical area than piracy,¹⁶⁹ and most importantly, it provides a duty to prosecute or extradite.¹⁷⁰

Such interpretations demonstrate the fundamentally different starting point each theory adopts. Academics setting out to demonstrate purely politically motivated violence is another form of public end are thus demonstrating ‘private ends’ has not been fulfilled, and so universal criminal jurisdiction should not be extended. The piracy regime is in the interest of the freedom of the seas — ‘one of the exceptional cases where individuals are directly the objects of International Law’.¹⁷¹ Freedom of navigation is upheld by exclusive flag state jurisdiction, which prevents unnecessary restrictions or impediments to high seas navigation. ‘[I]t cannot be taken for granted that remedies which states are allowed to take against the more traditional instances

¹⁶⁶ *SUA Convention*, as amended by *2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Dox LEG/CONF.15/21 (entered into force 28 July 2010) art 10(2) inserting art 11bis:

None of the offences set forth in article 3, 3bis, 3ter or 3quater shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

¹⁶⁷ Madden, above n 45, 140.

¹⁶⁸ See, eg, if a person ‘unlawfully and intentionally ... communicates information which he knows to be false, thereby endangering the safe navigation of a ship’: *SUA Convention* art 3(1)(f). The *SUA Convention* also does not have a two-ship requirement.

¹⁶⁹ See *SUA Convention* arts 4(1), 6.

¹⁷⁰ *SUA Convention* arts 6, 10.

¹⁷¹ Anna van Zwabenberg, ‘Interference with Ships on the High Seas’ (1961) 10(4) *International and Comparative Law Quarterly* 785, 805.

of maritime violence are also available in the case of maritime terrorism’.¹⁷² So it goes, states adopted the *SUA Convention* to regulate violence that was not for private ends or involving two ships, but which nonetheless demanded further exceptions to flag state jurisdiction.

Expansive interpretations of piracy, however, are premised on the general rule being that freedom of navigation means ships should not be subject to violence at sea. Only states, and belligerents or insurgents targeting state vessels, can legitimately use violence.¹⁷³ The lack of state responsibility for private political organisations means the international community must rely on criminal law to hold those responsible accountable.¹⁷⁴ Thus one turns to piracy law; the general rule excluding all violence lacking in state sanctioning and responsibility. The private ends term is a limited exception applying to the particular facts of insurgency, and the argument proceeds that purely political violence does not fall within this limited exception.¹⁷⁵

Thus, those who see purely political violence as a public end ask whether purely political violence falls within the piracy exception of universal jurisdiction,¹⁷⁶ whilst the wider view asks if purely political violence falls within the exception of non-private ends to the exercise of universal jurisdiction over violence at sea. Such viewpoints clearly affect how the *SUA Convention* is interpreted.¹⁷⁷ Put simply, is ‘private ends’ a requirement for exercising universal jurisdiction, or is it an exception to the exercise of universal jurisdiction if the other elements of piracy exist? The answer necessarily turns on how the definition of piracy operates in terms of policy, and the justifications for universal jurisdiction. This question is dealt with

¹⁷² Ronzitti, above n 129, 1.

¹⁷³ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37.

¹⁷⁴ Bahar, above n 39, 17; Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 37; Direk et al, above n 21, 233. Although it is true that such acts do not raise the issue of state immunity or state responsibility, the link between the lack of state responsibility and the necessity of dealing with this via piracy is not demonstrated. The need to resort to criminal law does not mean the actions must be dealt with via international piracy rules, only that they must be dealt with via criminal law in general.

¹⁷⁵ This can be seen in Douglas Guilfoyle’s responses, eg:

Analysing from that historical context to say that the words ‘private ends’ now cover terrorists (who do not seek to establish the government or territorial control) or political protesters, is effectively to confer belligerent powers (or a privileged belligerent status) on actors who are not party to an armed conflict.

Douglas Guilfoyle, ‘Comment 6’ on Guilfoyle, ‘Political Motivation and Piracy’, above n 61. Equally the interpretation of the *SUA Convention* above suggests that political violence is not an exception. If it is not an exception it falls into the general rule of piracy.

¹⁷⁶ An exception to the exclusive flag state jurisdiction on the high seas.

¹⁷⁷ As a confirmation that political acts do not fall within the definition of piracy, or as confirmation that political acts are not excluded from criminal liability.

in Part IV(C) below, the answer to which determines how the *SUA Convention* is interpreted.¹⁷⁸

2 *Judicial Precedents and International Incidents*

Despite the fact piracy has existed ‘since the early days of mankind’s adventure into the seas’,¹⁷⁹ the discussion of case law must be limited for numerous reasons. As mentioned above in Part II, municipal piracy cases need to be excluded. National courts are tasked with the prosecution of all pirates, but only those based on international piracy are examined.¹⁸⁰ Secondly, the concern is the modern definition of piracy. Therefore, only cases subsequent to codification and definition of piracy, or those that played a crucial role in defining private ends, will be examined. The Harvard drafters already conducted thorough research into case law and academic literature at the time, the results of which were discussed above in Part IV(A)(2). There is also some suggestion the boundaries of customary piracy prior to codification were unclear, allowing states to exercise wide discretion.¹⁸¹ Prior to the *Harvard Draft*, states agreed ‘an international crime granting them universal jurisdiction’ existed, but not its definition.¹⁸² The complex task of defining piracy prior to the codification process is beyond the limits of this article, and therefore such jurisprudence cannot be relied upon.¹⁸³

¹⁷⁸ However, if one adopts the view that purely political violence does not constitute piracy because it is not for private ends, then both interpretations of the *SUA Convention* can be reconciled. The fact political violence does not constitute grounds for the exercise of the special jurisdictional grounds of international piracy does not mean such violence is condoned. Such action is always unjustifiable; it is just not dealt with via the piracy provisions.

¹⁷⁹ Jesus, above n 42, 364.

¹⁸⁰ This occurs where the Court’s jurisdiction rests on the universal jurisdiction found in international law, or the national definition is defined by international law or the law of nations (as the US law in the *Sea Shepherd* case is).

¹⁸¹ [I]t was through their codification for the first time in the 1958 *HSC* that a clear and uniform definition was retained of piracy, putting an end to the quite wide discretion of states in their qualification of acts of piracy, for until the precise wording is written down in the codification instrument there are really no exact boundaries in existing customary law.

Jesus, above n 42, 375. See also Direk et al, above n 21, 238.

¹⁸² Penny Campbell, ‘A Modern History of the International Legal Definition of Piracy’ in Bruce A Elleman, Andrew Forbes and David Rosenberg (eds), *Piracy And Maritime Crime: Historical and Modern Case Studies* (Naval War College Press, 2010) 19, 23. States have however been exercising universal jurisdiction over pirates on the high seas since the 16th Century — Annemarie Middelburg, *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast* (Wolf Legal Publishers, 2011) 29.

¹⁸³ ‘To use the notion of “piracy” to achieve results which had nothing to do with classical piracy at all became an established international practice’: Jacob W F Sundberg, ‘Piracy: Air and Sea’ (1971) 20 *DePaul Law Review* 337, 340.

The seminal case *Re Piracy Jure Gentium*¹⁸⁴ is consistently referenced both in academic literature and case law. It was heavily relied upon in *United States of America v Dire*,¹⁸⁵ which in turn was one of the few cases referenced in *Sea Shepherd*.¹⁸⁶ The case involved a failed robbery attempt upon another ship. In a special reference, the English Privy Council reasoned actual robbery was not an essential element of piracy under the law of nations.¹⁸⁷ ‘Vengeance ... anarchistic or other ends’¹⁸⁸ could equate to piracy, should violence be committed on the high seas between two ships. The Court emphasised the lack of state sanctioning,¹⁸⁹ and endorsed piracy as ‘any armed violence at sea which is not a lawful act of war’ as the definition ‘nearest to accuracy’.¹⁹⁰ This landmark case, having referenced the *Matsuda Draft* and *Harvard Draft* approvingly,¹⁹¹ concluded lack of state sanctioning and liability was the key to piracy.¹⁹²

However, that court explicitly refused to endorse a general definition of piracy after discussing the *Matsuda Draft* and the question of armed takeovers by crew.¹⁹³ The decision appears silent on the issue of politically motivated violence.¹⁹⁴ The question asked was whether actual robbery was a necessity of piracy; ‘All that their Lordships propose to do is to answer the question put to them’.¹⁹⁵ Thus, whilst history demonstrates ‘gradual widening of the earlier definition of piracy’¹⁹⁶ in response to new or

¹⁸⁴ [1934] UKPC 54.

¹⁸⁵ 680 F 3d 446 (4th Cir, 2012).

¹⁸⁶ *Sea Shepherd*, 708 F 3d 1099, 1101 (9th Cir, 2013).

¹⁸⁷ The reference asked ‘whether actual robbery is an essential element of the crime of piracy jure gentium or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium’: *Re Piracy Jure Gentium* [1934] AC 586, 588. Special references do not affect the court ruling; the decision of the Hong Kong Court was final.

¹⁸⁸ *Re Piracy Jure Gentium* [1934] AC 586, 600.

¹⁸⁹ Referencing the definition of Wheaton, the Court said, ‘[t]his enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act performed by a person sailing the high seas without the authority or commission of any State’: *Re Piracy Jure Gentium* [1934] AC 586, 595.

¹⁹⁰ *Re Piracy Jure Gentium* [1934] AC 586, 598, quoting Courtney Stanhope Kenny and J W Cecil Turner (eds), *Kenny’s Outlines of Criminal Law* (Cambridge University Press, 14th ed, 1847–1930) 332. Although noting it was far too expansive to include violence on-board a single ship.

¹⁹¹ *Re Piracy Jure Gentium* [1934] AC 586, 599.

¹⁹² Bahar, above n 39, 31; Halberstam, above n 91, 273; Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 119.

¹⁹³ *Re Piracy Jure Gentium* [1934] AC 586, 600.

¹⁹⁴ Keven Jon Heller, ‘Comment 6’ on Julian Ku, ‘Whale Wars, Round II! US Court of Appeals Issues Preliminary Injunction Against Sea Shepherd “Pirates”’ on *Opinio Juris* (27 February 2013) <<http://opiniojuris.org/2013/02/27/whale-wars-round-ii-u-s-court-of-appeals-issues-preliminary-injunction-against-sea-shepherd-pirates/>>.

¹⁹⁵ *Re Piracy Jure Gentium* [1934] AC 586, 600.

¹⁹⁶ *Ibid.*

unconsidered situations, the case *only* reflects that attempted robbery is also piracy, not that the lack of state sanctioning is the necessary test in all cases.

The 1960s *Santa Maria* incident involved the seizure of a Portuguese *merchant* ship by Captain Henrique Galvão and his men posing as passengers.¹⁹⁷ This was claimed in the interest of the Independent Junta of Liberation.¹⁹⁸ The action was branded as piracy by the Portuguese, which requested assistance from the US, the Netherlands and the UK.¹⁹⁹ British refusal to the use of force,²⁰⁰ and House of Commons discussions,²⁰¹ suggested doubt for the case of piracy, whilst the US had no hesitation in branding the act piracy. This soon changed, however, and the US declared it was unclear whether piracy had occurred.²⁰² The incident was a publicity stunt to achieve political change in Portugal, much like Sea Shepherd's harassment, which is largely a media event aimed at political change in Japan. The many legal commentaries upon the case 'almost without exception, declined to label Galvão a pirate'.²⁰³ Although some commentaries were based on the two-ship requirement,²⁰⁴ others felt political aims were not considered private ends.²⁰⁵

Bahar saw the case as one in which the international community classified the attackers as Portuguese insurgents attacking Portuguese shipping, and therefore within the limited exception. Political motives alone were insufficient; it was the political decision of states on their international status that absolved them from piracy.²⁰⁶

But given the attack involved an innocent third party merchant vessel, involving interests of many states, one could also adopt the reasoning of Jesus and conclude

¹⁹⁷ In-depth facts available, see: Samuel Pyeatt Menefee, 'Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective' in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, 1990) 43, 56–58. Also Zwanenberg, above n 171, 799–801.

¹⁹⁸ General Humberto Delgado who had lost the Portuguese Presidential election led the group from Brazil. The group had no politically organised presence within Portugal, only those in exile in Brazil. See Zwanenberg, above n 171, 816.,

¹⁹⁹ Menefee, above n 197 57.

²⁰⁰ Ibid.

²⁰¹ The comments by the Civil Lord of the Admiralty rest on the request for assistance and did not suggest the incident was piratical. Zwanenberg, above n 171, 800.

²⁰² Menefee, above n 197, 58.

²⁰³ Ibid.

²⁰⁴ Halberstam discusses Whiteman's interpretation that such action was for private ends, but not involving two ships. Halberstam, above n 91, 287, quoting M Whiteman, *Digest of International Law* (US Government Printing Office, 1965) vol 4, 666.

²⁰⁵ Klein, above n 192, 119. Green and Franck are quoted by Halberstam to argue such political acts are not for private ends. Halberstam, above n 91, 287, quoting L C Green, 'The *Santa Maria*: Rebels or Pirates' (1961) 37 *British Yearbook of International Law* 496, 503; T M Franck, "'To Define and Punish Piracies' — The Lesson of the *Santa Maria*: A comment' (1961) 36 *New York University Law Review* 839, 840.

²⁰⁶ Bahar, above n 39, 35.

that the political objectives of Galvao and his men would be excluded under the traditional definition.²⁰⁷ Piracy rules were developed for particular situations and acts. The Portuguese definition of piracy was a stretch in definition and application beyond the traditional rule.²⁰⁸ In the words of the Privy Council, history demonstrated a ‘gradual widening’ of the definition.²⁰⁹ Stretching the definition to cover political activists and terrorists would be beyond ‘gradual widening’. It may, therefore, be evidence of practice that such political ends are excluded, but notably only by a few states, and with other possible explanations as to why the attack did not constitute piracy.

Modern day piracy in the Gulf of Aden has demonstrated the limits of piracy and the need for novel approaches.²¹⁰ Although case law has helped develop the understanding of other piracy requirements,²¹¹ few have evaluated private ends. This is because such pirates are driven by the classic example of financial gain.²¹²

The Supreme Court of the Seychelles discussed ‘private ends’ in relation to Somali pirates under customary law, but with mixed results. The decision of *Republic v Dahir* reasoned: ‘piracy deals with illegal acts of violence committed for *private ends* ... and does not include acts with governmental objectives’.²¹³ The ‘private ends’ requirement conflicted with political motivation underlying terrorism, and therefore each crime was to be dealt with in the alternative.²¹⁴ The more recent

²⁰⁷ Jesus, above n 42, 378.

²⁰⁸ Ibid.

²⁰⁹ *Re Piracy Jure Gentium* [1934] AC 586, 600.

²¹⁰ See the various UN Security Council resolutions, the adoption of prosecution agreements with local countries (notably Kenya) and the formation of international warship patrols. Other less favoured approaches include the allowance of private security firms, and the proposal by the Netherlands for the establishment of an international tribunal. Discussed in Middelburg, above n 182, 29–74. The use of private security firms has raises a host of other legal issues, see, eg, Oscar Rickett, ‘Piracy Fears Over Ships Laden With Weapons in International Waters: Private Security Companies Rely on Unregulated ‘Floating Armouries’ in Red Sea, Gulf of Aden and Indian Ocean’, *The Guardian* (online), 10 January 2013 <<http://www.guardian.co.uk/world/2013/jan/10/pirate-weapons-floating-armouries>>.

²¹¹ See the issue of a high seas requirement for inciting and facilitating piracy (*UNCLOS*, art101(c)) and its recent rejection in *US v Ali*, 718 F 3d 929 (CA DC, 2013). See debate: Douglas Guilfoyle, ‘Committing Piracy on Dry Land: Liability for Facilitating Piracy’ on *Blog of the European Journal of International Law (EJIL: Talk!)* (26 July 2012) <<http://www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/>>.

²¹² Direk et al, above n 21, 241.

²¹³ *Republic v Dahir* [2009] SCSC 81 (25 July 2010) 18 [37] (emphasis in original). ‘Governmental objectives’ does not appear to be in reference to any state sanctioning as this was clearly missing in the case. Rather it refers to political ends of private individuals. This can be seen with the contrast to terrorism that followed, which involves the influence of Governments for ‘political ends’: 18 [37].

²¹⁴ Gardner, above n 21, 811.

decision of *Republic v Ahmed*, however, rested on interpreting ‘private ends’ as all violence, depredation or detention on the high seas ‘without authorization by public authority’.²¹⁵ But discussions within that case continued, making it unclear whether ‘authorization’ and ‘ends’ were different issues, or equivalent.²¹⁶ Modern case law has done little to clarify the position of politically motivated violence.

Finally, perhaps the most important decision on piracy and environmental activists is *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*.²¹⁷ The 9th Circuit in *Sea Shepherd*²¹⁸ and academic writers take the ruling as evidence purely political acts by private actors are private acts.²¹⁹ Environmentalists from Greenpeace boarded, occupied and damaged two vessels attempting to discharge waste on the high seas (the *Wadisy Tanker* and the *Falco*).²²⁰ Just like Sea Shepherd’s campaign, and the *Santa Maria* incident, the goal of Greenpeace was to alert public opinion. In this case, to inform the public of dangers in discharging waste into the sea, a goal set out in Greenpeace’s articles of association.²²¹ The Belgian Court of Cassation held that such acts were therefore committed for personal ends:

The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather *than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective* ... the Court of Appeal was entitled to decide that the acts at issue were committed for *personal ends* within the meaning of Article 15(1) of the Convention.²²²

²¹⁵ *Republic v Ahmed* [2011] (Unreported, Supreme Court of Seychelles, Criminal Side No 21, 30 June 2011) 15[21] (emphasis in original):

On the second query of the element of ‘*private ends*’, we should bear in mind that according to the definition provided in law, one will notice that piracy is a war-like act committed by *non-state actors* (private parties not affiliated with any government) against other parties at sea. So, in common parlance, piracy is generally understood as violence or depredation or detention on the seas for private ends *without authorization by public authority*.

²¹⁶ *Ibid*. ‘Private ends without authorization by public authority’ was followed by a discussion of privateers, who also acted for their ‘own ends’ but not under their own will — they had state sanctioning. Yet the lack of any state sanctioning for Ahmed was taken as evidence the ‘accused were acting on their own *and* for their own private ends’: 16 [22] (emphasis added).

²¹⁷ (1986) 77 ILR 537 (Court of Cassation, Belgium) (‘*Castle John*’).

²¹⁸ *Sea Shepherd*, 708 F 3d 1099, 1102 (9th Cir, 2013).

²¹⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 38; Brown, above n 39, 301–2.

²²⁰ *Castle John* (1986) 77 ILR 537, 537. More extensive facts are found in Samuel Pyeatt Menefee, ‘The Case of the *Castle John*, Or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law’ (1993) 24(1) *California Western International Law Journal* 1, 11.

²²¹ *Castle John* (1986) 77 ILR 537, 539.

²²² *Ibid* 540 (emphasis added).

The Court clearly equated private ends to personal ends. Action in support of non-state goals would be personal ends, and ‘more personal motivation such as hatred, the desire for vengeance and the wish to take justice into their own hands are not excluded in this case’.²²³ Thus, environmental violence, like Sea Shepherd’s campaigns or those of Greenpeace, may qualify as piracy if the Belgian Court is followed. Although the case was a restraining order application, and not the exercise of criminal jurisdiction, it is interesting the Netherlands (Greenpeace’s flag state) did not protest.

However, some reservations must be made. Firstly, the decision still does not stand for defining a ‘private end’. The ruling stands for the potential that acts of violence by private parties, against other private parties, will not be public ends — even if manifesting political views.²²⁴ What would be committed ‘in the interest or to the detriment of a State or a State system’ and thus constitute ‘public ends’ is not clear.²²⁵ Thus, if a private party targeted a governmental vessel to compel changes in public policy, would that be to the detriment of a state?

Secondly, Menefee called the decision ‘evolutionary’,²²⁶ given it is not based on any judicial precedent. Belgium has been described as the ‘world capital of universal jurisdiction’,²²⁷ with the *Arrest Warrant*²²⁸ case demonstrating over-application of universal jurisdiction and necessity for subsequent legal revisions.²²⁹ If the *Castle John* decision’s acceptance in international law is based on, (a) similar decisions being possible with similar situations arising, and (b) it being generally held that such action is piratical,²³⁰ then clearly one cannot say such acceptance has been reached. Apart from the *Sea Shepherd* decision, no other case law has followed *Castle John*.²³¹

²²³ Ibid 538–9, quoted in Menefee, above n 220, 13.

²²⁴ ‘In retrospect, the court might have given more useful guidance in *defining what was* a private end rather than doing this *indirectly by* saying what was *not* a “public” end. Muddled definitions do not, in the long term, make for clear and consistent court decisions’: Menefee, above n 220, 15 (emphasis in original).

²²⁵ Ibid 14.

²²⁶ Ibid.

²²⁷ Diane F Orentlicher, ‘Universal Jurisdiction After Pinochet: Prospects and Perils’ (Paper presented at Symposium Series — ‘Prosecuting Perpetrators: International Accountability for War Crimes and Human Rights Abuses’, University of California, 21 February 2003) 3.

²²⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3.

²²⁹ Middelburg, above n 182, 33.

²³⁰ Menefee, above n 220, 14.

²³¹ Amanda M Caprari, ‘Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean’ (2010) 42(5) *Connecticut Law Review* 1493, 1514; Middelburg, above n 182, 33; Klein, above n 192, 141 refers to a Dutch court ruling on Greenpeace, but this is a typographical error.

*C Squaring the Rationale of Universal Jurisdiction with the Definition of
'Private Ends'*

As Bahar points out, the rationale of universal jurisdiction over acts of piracy may be useful in shedding light on whether political acts *should be*, and are, covered by piracy.²³²

Piracy provisions are part of the high seas regime and should not be viewed in isolation. 'The legal regime of piracy should be viewed in the context of the general principles of international law governing jurisdiction'.²³³ The high seas regime is founded upon the freedoms of the high seas; evidenced by its prominence in *UNCLOS* art 87. Freedom, coupled with denial of any sovereignty claims, means the general principle of jurisdiction is that of flag state exclusivity.²³⁴ Any jurisdictional claim over another vessel, unless provided for under international law, would be tantamount to a high seas sovereign right claim, which is detrimental to all states.²³⁵ Exclusive flag state jurisdiction is found in both customary law and *UNCLOS* art 92:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.²³⁶

Universal jurisdiction over pirates under *UNCLOS* art 105²³⁷ is one such exception to flag state exclusivity.²³⁸ As an exception it should thus be restrictively interpreted and cautiously extended in scope. A restrictive approach is demonstrated by state practice, which has not followed piracy in granting universal jurisdiction over

²³² Bahar, above n 39, 30.

²³³ Beckman, above n 26, 18.

²³⁴ Ibid 19.

²³⁵ 'No State may validly purport to subject any part of the high seas to its sovereignty': *UNCLOS* art 89.

²³⁶ The famous *SS Lotus Case* put the principle in similar words: 'It is certainly true that — apart from certain special cases which are defined by international law — vessels on the high seas are subject to no authority except that of the State whose flag they fly', *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 25 [64].

²³⁷ On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

UNCLOS art 105. The same text is found in *HSC* art 19.

²³⁸ Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *Texas Law Review* 785, 793. See, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 38[5], 42[12] (President Guillaume).

other threats to high seas interests,²³⁹ such as illegal fishing or passenger hijacking. Indeed flag state exclusivity encroachments are permitted to the ‘minimum extent possible’.²⁴⁰ Thus, one must ask what the rationale for universal jurisdiction over piracy is, and does it extend to politically motivated violence?

1 *Piracy as an Exception to Exclusive Flag State Jurisdiction*

A number of theories have been advanced on why piracy is a crime of universal jurisdiction. The oldest, and once popular, theory argued that once someone became involved (or a ship used) in piracy,²⁴¹ they were denationalised,²⁴² and hence open to the jurisdiction of all states.²⁴³ This is based on pirates being enemies of all mankind.²⁴⁴ By such action a pirate rejects ‘the authority of that to which he is properly subject’,²⁴⁵ and therefore no state can be held accountable.²⁴⁶ If the flag state cannot be held to account, but such action threatens the interest of all states, then it should be open to all states to exercise jurisdiction.²⁴⁷ This self-imposed

²³⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 25. States have rather followed an approach based on ‘consensual interdiction’ to deal with other threats which need to be tackled on the high seas.

²⁴⁰ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 24, quoting Natalie Klein, ‘Legal Limitations on Ensuring Australia’s Maritime Security’ (2006) 7 *Melbourne Journal of International Law* 306, 334.

²⁴¹ Or, following *Re Piracy Jure Gentium* [1934] AC 586, once someone became involved in an attempted piracy attack, or, following HSC art 103, if the ship is intended to be used so.

²⁴² ‘Some writers stress the important fact that a pirate ship on the high sea is not under the excluding jurisdiction of any state, by asserting that the ship is “denationalized” as a legal consequence of piracy. Some assert that the pirates are “denationalized” also’: *Harvard Draft*, above n 19, 825.

²⁴³ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 28. They could be equated with those ships falling within UNCLOS art 110(d), whereby ships ‘without nationality’ are open to visit by any state. However for piracy ships it goes much further — they are open to arrest, detention, national courts and seizure. Ironically in traditional piracy cases denationalisation wouldn’t add much given that the ships do not enjoy the protection of any flag state and are already open to boarding under art 110(d). ‘[T]he boats used by pirates very often are not registered in any State’: Wendel, above n 29, 22.

²⁴⁴ *Hostis humani generis*.

²⁴⁵ *Harvard Draft*, above n 19, 818.

²⁴⁶ Natalie Klein, ‘The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’ (2007) 35 *Denver Journal of International Law and Policy* 287, 298.

²⁴⁷ Universal jurisdiction becomes a necessity if piracy prosecution is desired. The active personality principle would not provide jurisdiction, given the pirate vessel may no longer be a national of any state. Nor would there be territorial jurisdiction, as the act must be committed on the high seas. See Geiss and Petrig, above n 17, 146. Prosecution would be left to only the victim state under the contested passive personality principle. However its development occurred after that of the need to prosecute pirates

denationalisation would, as quoted by the Harvard drafters, take pirates ‘out of the protection of all laws and privileges’.²⁴⁸ Without nationality and flag state protection, pirates could be subject to the ancient and well-established universal jurisdiction existent since the 17th century.²⁴⁹

However, this theory has been widely rejected.²⁵⁰ Under *UNCLOS*, denationalisation is not an automatic or necessary step, but rather left to flag states under art 104. Arguably the same exists under customary law, with universal jurisdiction existing whatever the position on nationality.²⁵¹ *Piracy jure gentium* is indifferent to a ship’s nationality, and whether it is kept or lost. Denationalisation clearly cannot be the rationale.²⁵²

Another possibility is to compare piracy to other crimes of universal jurisdiction such as genocide or crimes against humanity. These are the most heinous crimes under international law and therefore subject to universal jurisdiction.²⁵³ Judges Higgins, Kooijmans and Buergenthal follow such reasoning, stating it ‘is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community. Piracy is the classical example’.²⁵⁴ Thus, universal jurisdiction was extended beyond piracy to these other crimes, given the interest of all states in repressing such heinous activity.

and therefore universality was the only established option. Even today the use of the principle beyond prosecuting terrorists is contested — see Vaughan Lowe and Christopher Staker, ‘Jurisdiction’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010) 313, 330.

²⁴⁸ *Harvard Draft*, above n 19, 819, quoting *Sir L Jenkins Works*, ii, 714.

²⁴⁹ Randall, above n 238, 791 n 28, citing L Oppenheim, *International Law — Volume I: Peace* (Longmans, Green & Co, 8th ed, 1955) 609; Middelburg, above n 182, 29 — suggests that this has existed since the 16th century. Furthermore: ‘Because no state has any greater connection to pirates and their vessels than any other state, every state therefore has universal jurisdiction to capture and punish pirates’: Randall, above n 238, 793.

²⁵⁰ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 28.

²⁵¹ It could be that customary law differed on this point, and denationalisation was a necessary result of piratical acts — but no arguments have been found to this effect. The *HSC* sought to codify customary international law and if one looks to art 18 of the *HSC*, then art 104 of *UNCLOS* can be seen to be a verbatim copy of that article. Therefore the indifference to nationality is well established under customary law.

²⁵² Another interesting and persuasive point advanced by the Harvard drafters is simply that the pirates are still subject to the legislative, executive and judicial jurisdiction of the flag state: *Harvard Draft*, above n 19, 825. If a pirate were denationalised, she would have as much persuasion to follow the safety regulations of the old flag state, as any other state in the world. Yet pirates clearly do not lose all their other obligations just because they have committed piratical acts.

²⁵³ Lowe and Staker, above n 247, 326.

²⁵⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 81 [60]–[61] (Judges Higgins, Kooijmans and Buergenthal). This point is highlighted by, Geiss and Petrig, above n 17, 145.

However, this seems equally unconvincing and piracy is certainly not comparable to other universal crimes in terms of severity.²⁵⁵ Piracy as defined in *UNCLOS* art 101 is broad enough to capture minor violence or depredation that could never be described as heinous. One would expect if it were based on heinousness it would be restricted to uses of force that could be classified as heinous. Equally, other more heinous crimes such as murder would have developed into universal jurisdiction.²⁵⁶ What is more, if seafarers were to rape and pillage ships less than three nautical miles (nm) off the coast,²⁵⁷ these would be crimes just as heinous and would similarly make such actors enemies of mankind as if they were to do so 15 nm off the coast. Only for the second instance would universal piracy jurisdiction become applicable — an arbitrary restriction unexplained by the heinousness rationality.

Rather, the correct rationale for universal jurisdiction over piracy is the common interest of all states. This involves two elements. Firstly, piratical attacks, particularly as a whole,²⁵⁸ threaten the common interest of all states in high seas freedoms, notably the freedom of navigation.²⁵⁹ Secondly, despite the threat of piracy to states’ common interests, the *locus delicti* (the high seas) leads to a lack of state jurisdiction and the possibility such crime goes unpunished.²⁶⁰ Because piracy can target any state, and every state benefits from maritime commerce, ‘every State has an interest in its own safety, but none has jurisdiction’.²⁶¹ Modern day shipping complexities only broaden the possible states threatened.²⁶² Such theory is more compatible with a territorial waters distinction whereby activity within 12 nm is not classified as piracy.²⁶³

²⁵⁵ Geiss and Petrig argue piracy is more ‘comparable to property offenses or hostage taking committed at land’ than say genocide, Geiss and Petrig, above n 17, 145.

²⁵⁶ Lowe and Staker, above n 247, 327.

²⁵⁷ Falling within territorial waters, whether based on the old ‘cannon-shot rule’, or 12 nm as now established in *UNCLOS* art 3. International piracy law does not extend to action within territorial waters.

²⁵⁸ Randall, above n 238, 794. Piracy can even threaten the economic development of an entire region as seen with the Horn of Africa. See Wendel, above n 29, 20.

²⁵⁹ *UNCLOS* art 87(a). See Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 28. Of course there are other shared interests threatened by piracy — such as the economic value of shipping, the freedom of fishing, the freedom of scientific research and, as seen by attacks on military vessels around the Gulf of Aden, even military vessel passage. Whether the threat is real, or only potential (as currently the attacks on warships are), a threat exists which needs to be repressed. See Crockett, above n 104, 81.

²⁶⁰ Lowe and Staker, above n 247, 326–327.

²⁶¹ Geiss and Petrig, above n 17, 147.

²⁶² ‘[C]argo ships are often owned by a corporation in a State, fly the flag of a second State, carry cargo destined for multiple other States and ships are often crewed by people from still other States’: Middelburg, above n 182, 30, quoting N J Arajärvi, *Universal Jurisdiction: End of Impunity or Tyranny of Judges?* (Master Thesis, University of Helsinki, 2006) 7–8.

²⁶³ Seen as an extension of the state’s territory and control, primacy is given to the territorial jurisdiction of the coastal state: *UNCLOS* art 2. Therefore such crimes can be equated with land-based crimes and the traditional heads of jurisdiction that

Such rationality, as raised by Geiss and Petrig,²⁶⁴ can also be witnessed in states' attempts to build a working international regime in response to the Gulf of Aden situation and the difficulties to international law enforcement presented by the coastal state Somalia, which lacks maritime enforcement capabilities.²⁶⁵ Both elements of 'common interest' rationality are found within the Security Council resolutions building the unique regime. Resolution 1846 provided temporary authorisation to 'cooperating' states to use all necessary means within Somalian territorial waters to repress piracy.²⁶⁶ Such authorisation was based on the first element of 'common interest' rationality, the threat posed to the common interest of international navigation and commerce.²⁶⁷ The *locus delicti* differs, it being Somalian territorial waters, yet the same threat of serious crimes going unpunished due to a lack of effective state jurisdiction prevails.²⁶⁸ Modern efforts are guided by 'common interest' rationality just as the original justifications for universal jurisdiction were.

However, one can disagree with Guilfoyle's interpretation that rather than being an exception to exclusive flag-state jurisdiction, piracy is best seen 'as a case where states, through customary or conventional rule, have given comprehensive permission in advance to foreign states' assertion of law enforcement jurisdiction over their vessels resulting in the *absence* of any flag state immunity from boarding'.²⁶⁹ Guilfoyle argues this by examining the extent of powers granted over pirate ships, which go beyond the other limited exceptions such as the right to visit.²⁷⁰

theoretically prevents crimes going unpunished — nationality (the flag state) and a territorial link (the coastal state).

²⁶⁴ Geiss and Petrig, above n 17, 147.

²⁶⁵ Often referred to as a 'failed state'. The term however seems to be falling out of fashion, see William Easterly and Laura Freschi, 'Top 5 Reasons Why "Failed State" Is a Failed Concept' on *Aid Watch Blog* (13 January 2010) <[http://aidwatchers.com/2010/01/top-5-reasons-why-"failed-state"-is-a-failed-concept/](http://aidwatchers.com/2010/01/top-5-reasons-why-)>.

²⁶⁶ SC Res 1846, UN SCOR, 6026th mtg, UN Doc S/RES/1846 (2 December 2008) para 10.

²⁶⁷ Ibid Preamble para 2: 'gravely concerned by the threat that piracy and armed robbery at sea against vessels pose ... to international navigation and the safety of commercial maritime routes'.

²⁶⁸ SC Res 1851, UN SCOR, 6046th mtg, UN Doc S/RES/1851 (16 December 2008) Preamble para 5 (emphasis added):

taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia, including the international sea lanes and Somalia's territorial waters.

²⁶⁹ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 29 (emphasis in original).

²⁷⁰ Ibid 28. A state can seize the ship and any property on-board. They can also arrest those on-board and punish them under national law. See *UNCLOS* art 105. The right to visit under art 110 however is much more limited and subject to a step-by-step process.

Instead, flag-state jurisdiction exclusivity still applies, but once piratical acts have been committed, attempted or intended, exclusivity *in terms of piracy law enforcement only* is relinquished. There is not an absence of ‘any flag state immunity from boarding’ when you look at the results piracy jurisdiction does not have. Piracy does not affect exclusive flag state jurisdiction over navigation rules, safety regulation or nationality requirements. Piracy does not affect exclusive flag-state prescriptive, executive or judicial jurisdiction in relation to any other issues; it only represents a limited waiver in relation to piracy law enforcement.

We can conclude universal jurisdiction over piracy results from a balance of competing navigational interests. In upholding freedom of the seas, the principal starting point is exclusive flag-state jurisdiction. However, once an activity presents a threat to the common interest of states in the freedom of the seas, the rationality points to an exception.²⁷¹ An exception which ensures the activity goes punished and freedom is restored for all users. Bearing this rationality in mind, does the policy justification for universal jurisdiction point to an interpretation of ‘private ends’ that excludes political ends? Do political ends fit within the ‘motives behind the establishment of universal jurisdiction’?²⁷²

2 Balancing Flag State Sovereignty and the Collective Interests in the Freedoms of the Seas

Should purely political ends not extend to the acts of non-state sanctioned private parties pursuing political objectives, then Sea Shepherd will be subject to the universal jurisdiction to seize and prosecute pirates.²⁷³ As an exception, however, the starting point is *UNCLOS* art 92 and the exclusive flag-state jurisdiction.²⁷⁴ Holding political activists who use violence at sea as subject to universal piracy jurisdiction has a significant effect.²⁷⁵ Firstly, an enforcement jurisdiction exception is provided allowing warships of any state to arrest those aboard and seize the

²⁷¹ Crockett, above n 104, 81.

²⁷² Bahar, above n 39, 30.

²⁷³ Excluding the other requirements of the piracy definition.

²⁷⁴ As the general principle upholding the freedom of the seas this should be the starting point in every situation of violent political activism, no matter the level of violence used or the distaste of the ‘political’ goal pursued.

²⁷⁵ Beckman, above n 26, 20. ‘UC Law Expert Disagrees With US Court Decision’ on *University of Canterbury Communications* (4 March 2013) <<http://www.comsdev.canterbury.ac.nz/rss/news/?feed=news&articleId=735>>. University of Canterbury Law Professor Karen Scott argues the effects of holding Sea Shepherd as a pirate goes beyond what is supported by international law, but sadly doesn’t expand. This Part of the article attempts to answer her argument and look to whether the significant effects can be supported. Matsuda pointed to the ‘important consequences’, when first justifying the ‘purely political motives’ exception: *Matsuda Draft*, above n 68, 224.

ship and its contents.²⁷⁶ For adjudicative jurisdiction an exception is provided allowing jurisdiction to prosecute in any court of the world where the pirate is under lawful custody.²⁷⁷ If it is now conclusively stated that political ends are private ends subject to universal jurisdiction, the threat of this jurisdiction alone will significantly deter such activity. The serious legal results explain why in such contentious cases, where states have not established beyond doubt the applicability of universal jurisdiction, the ‘presumption is against the legitimacy of any exception and the burden of proof in contentious cases rests with the state asserting the exception’.²⁷⁸

Firstly, it is plainly evident politically motivated violence is as much a threat to the common interests of navigational freedom and freedom of the seas as any other motivated high seas violence, depredation or detention. It matters little to victims,²⁷⁹ potential victims and the shipping sector as a whole whether violence is pursued in the interest of a political objective or a personal end. Even if it were conceded that an ‘indifference of target’²⁸⁰ was required for such action to threaten the common interest, the justification would still exist. The action of Sea Shepherd is not ‘directed against a particular state’,²⁸¹ but rather ‘all [illegal] whaling by any people, anywhere for any reason’.²⁸² Any ship conducting what Sea Shepherd deems ‘illegal’ could

²⁷⁶ This also includes the right to create the law applicable, within the boundaries of the International definition of piracy in *UNCLOS* art 101. See *UNCLOS* art 105: ‘[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed’.

²⁷⁷ It is debated whether art 105 restricts prosecution to the country of seizure, or whether art 100 (the ‘Duty to co-operate in the repression of piracy’) and the *SUA Convention* allow jurisdiction to be established in other states. This is beyond the scope of this article, see further: Middelburg, above n 182, 69. It may however be that under customary international law in relation to universal jurisdiction, mere subsequent presence of the pirate within the territory is sufficient to allow the exercise of jurisdiction — see Douglas Guilfoyle, ‘Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes’ (Working Paper, 3rd Meeting of Working Group 2 on Legal Issues: The Contact Group on Piracy off the Coast of Somalia, 26–27 August 2009) 5 <<http://ssrn.com/abstract=1537272>>.

²⁷⁸ Klein, above n 192, 108 quoting Robert C F Reuland, ‘Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction’ (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, 1167. See also Atsuko Kanehara, ‘So-Called “Eco-Piracy” and Interventions by NGOs to Protest against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position’ in Clive R Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, 2011) 195, 219.

²⁷⁹ Both those targeted by the piratical style action and those who are indirectly affected, such as other users or the insurers.

²⁸⁰ Kanehara, above n 278, 210.

²⁸¹ Halberstam, above n 91, 279.

²⁸² Sea Shepherd Conservation Society, *Whaling Around the World*, <<http://www.seashepherd.org/whales/whaling-around-the-world.html>>.

be targeted.²⁸³ Such action threatens universal open access of the oceans — the principle of *ius communicationis*.²⁸⁴

Furthermore, cases such as *Sea Shepherd* demonstrate political violence threatens high seas freedom beyond unhindered navigation. Flag-state jurisdiction embodies freedom by ensuring ships are not subject to restrictions other than those imposed by their flag state and international law.²⁸⁵ This goes beyond preventing other states from exercising jurisdiction. As seen in *Le Louis*, ‘[i]n places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another’.²⁸⁶ To allow subjects to exercise control over ships on the high seas which in their personal opinion have violated international conservation law would be a significant watering down of the principle of exclusive flag-state jurisdiction, perhaps to non-existence.²⁸⁷ Such a possibility poses as much a threat to freedom of navigation as the traditional idea of restricting unhindered access.²⁸⁸

Finally, freedom of the high seas also includes the freedom to carry out scientific research. Once an implicit freedom under the *HSC*,²⁸⁹ the freedom of scientific research is now reflected in *UNCLOS* art 87(f). Targeting research vessels threatens the common interest of scientific research.²⁹⁰

²⁸³ This becomes more evident when you consider other theoretical environmental activists. Klein defines these as not pursuing private ends, but ‘marine environmental protection’, Klein, above n 192, 141. Theoretically the prevention of oil vessel passage would be in the interest of the marine environment, given the significant threat it poses, not just from spillage but also use. There would be no question that a group preventing the transport of oil would target all states and threaten the common interests of commerce.

²⁸⁴ The freedom of entry and unhindered navigation extends beyond the interference by states to interference by all entities, including *Sea Shepherd*. Wendel, above n 29, 5–6.

²⁸⁵ ‘It is the very fact that the high seas are open to all states that no one state is then able to exert control or authority over the vessels traversing the oceans unless that vessel has a tie to that particular state’: Klein, above n 246, 292.

²⁸⁶ *Le Louis*, High Court of Admiralty (1817) 2 Dods 210; 165 ER 1464, 1479 (emphasis added), quoted in Klein above n 246, 292 n 25.

²⁸⁷ *Sea Shepherd* appears to justify their action based on the upholding of international law. *Sea Shepherd Conservation Society, International Laws and Charters* <<http://www.seashepherd.org/who-we-are/laws-and-charters.html>>.

²⁸⁸ Freedom of navigation on the high seas is upheld by (1) *ius communicationis* (2) exclusive flag state jurisdiction. Wendel, above n 29, 6. Indiscriminate citizen justice on the high seas against an entire industry threatens both aspects.

²⁸⁹ Klein, above n 246, 294 n 37 — pointing to the International Law Commission conclusion such a freedom existed.

²⁹⁰ Kanehara, above n 278, 210. Unless it was decided the activity was not good faith research under the *International Convention for the Regulation of Whaling*: see *UNCLOS* art 240(d). Or if the Australian Antarctic Exclusive Economic Zone was

However, it is important to note the freedoms of the high seas are not absolute. They must be exercised consistently with international law,²⁹¹ and with ‘*due regard*’ to ‘the interests of other States in their exercise of the freedom of the high seas’.²⁹² In certain situations the exercise of Japanese authorised researchers’ freedom of navigation could be balanced against the general right of others to exercise their freedom.²⁹³ Yet if political ends are pursued by an organisation it is difficult to see what interest the flag state could have which would legitimise action as a necessary restriction on others. Piracy requires an act of violence, detention or depredation, which would take any such ship outside the realm of exercising freedom of navigation. The high seas are ‘reserved for peaceful purposes’,²⁹⁴ restricting any flag-state interest to only unobstructed peaceful navigation of its subjects. Similar reasoning can be applied to any suggestion that political parties are upholding the common interest of states in environmental protection.²⁹⁵ Sea Shepherd has claimed they are an environmental law enforcement organisation.²⁹⁶ Not only is there no authority to use force in upholding marine protection within *UNCLOS*, but also any enforcement ability (and therefore foreseeable restrictions on other users) falls exclusively upon states parties.²⁹⁷

Politically motivated violence on the high seas is therefore an unjustifiable threat to the common interests of all states. However, it is further required that without universal jurisdiction the crimes would go unpunished. Maritime violence motivated by political ends is still a minor threat compared to economically

internationally recognised: see *UNCLOS* art 246. Both provisions are found within Part XIII of *UNCLOS* and place a significant restriction on the freedom of marine scientific research.

²⁹¹ *UNCLOS* art 87(1).

²⁹² *UNCLOS* art 87(2) (emphasis added).

²⁹³ Rothwell and Stephens, above n 42, 155.

²⁹⁴ *UNCLOS* art 88.

²⁹⁵ This is arguably another common interest of all states, given pt XII of *UNCLOS* on the protection and preservation of the marine environment applies to all uses of the high seas. In relation to living resources, the right of all states to fishing is subject to pt VII, s 2. More specifically in relation to the current research question, all states are to co-operate in the conservation of marine mammals including those found in the high seas. See *UNCLOS* arts 65, 120.

²⁹⁶ G Plant, ‘International Law and Direct Action Protests at Sea: Twenty Years On’ (2002) 33 *Netherlands Yearbook of International Law* 75, 80.

²⁹⁷ This can be seen in for example in *UNCLOS* art 117. It *only mentions state action* in conserving the living resources of the high seas. It also *only mentions co-operation with other states* leaving no room for private parties. Similarly *UNCLOS* art 192 places the obligation of protecting and preserving the marine environment on *states*. Although discussing the Sea Shepherd sinking of the ‘*Sierra*’, Plant’s observations about a lack of a private individual’s ability to uphold ‘international rights of states’ are equally applicable to the case between the Japanese whalers and Sea Shepherd. Glen Plant, ‘Civilian Protest Vessels and the Law of the Sea’ (1983) 14 *Netherlands Yearbook of International Law* 133, 139.

motivated pirates.²⁹⁸ Jurists also point to the existence of the *SUA Convention*, which provides extradition and jurisdiction possibilities, as evidence maritime terrorists will not go unpunished.²⁹⁹ Even the UN Secretary-General described the *SUA Convention* as ‘another more useful vehicle for prosecution than the nineteenth century piracy statutes’,³⁰⁰ one justification being ‘[a]cts of piracy for political motives are not covered by article 101’.³⁰¹ In the contentious case of politically motivated violence there seems little need to apply the piracy regime, despite the threats posed to the common interest.³⁰² Sufficient jurisdictional basis exists.³⁰³

However, the *SUA Convention* has not entered customary law and is dependent on flag states’ membership.³⁰⁴ Treaty law is only binding upon contracting parties, including the *SUA Convention*’s obligations to make such activity punishable,³⁰⁵ and subject to a ‘prosecute or extradite’ procedure.³⁰⁶ Should one register and flag their political organisation’s vessels to a non-signatory state, then the jurisdictional position reverts back to a position similar to when piracy provisions historically developed.³⁰⁷ The fears of Crockett will once again become apparent if political ends are excluded.³⁰⁸

²⁹⁸ ‘Despite the terrorist threat, most maritime violence continues to be perpetrated by those who are motivated by economic rather than political considerations’: Scott Davidson, ‘International Law and the Suppression of Maritime Violence’ in Richard Burchill, Nigel D White and Justin Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge University Press, 2005) 265, 268. ‘[T]errorism at sea ... has [not] been a long-standing and pervasive practice’: Jesus, above n 42, 387.

²⁹⁹ Jesus argues that the original lack of international agreement to punish such terrorists pushed states and authors to qualify such actors incorrectly as pirates. With the adoption of the *SUA Convention* ‘the first international legal instrument on a specific legal regime covering sea terrorist acts’ came into being: Jesus, above n 42, 388.

³⁰⁰ *Oceans and the Law of the Sea: Report of the Secretary-General*, UN GAOR, 53rd sess, Agenda Item 38(a), UN Doc A/53/456 (5 October 1988) 25 [151].

³⁰¹ Ibid 25 [153].

³⁰² Davidson, above n 298, 273–274.

³⁰³ Crimes falling under the *SUA Convention* will arguably be better suppressed than those under the piracy regime, given the prosecute or extradite clause — compared to the co-operation to the ‘fullest possible extent’ of the piracy regime and the optional exercise of jurisdiction by courts. See Jesus, above n 42, 399.

³⁰⁴ ‘Thus, it is still of limited application and, for those persuaded that the strictures contained in *UNCLOS* are unsavory, *SUA* does not offer much relief’: Lawrence Azubuike, ‘International Law Regime Against Piracy’ (2009) 15(1) *Annual Survey of International & Comparative Law* 43, 56.

³⁰⁵ *SUA Convention* art 5.

³⁰⁶ See ibid arts 6, 10.

³⁰⁷ Although examples of ‘extreme’ political organisations, the groups al-Qaeda and The Tamil Tigers are said to have maritime fleets. ‘Flags of Convenience: Brassed Off — How the War on Terrorism Could Change the Shape of Shipping’, *The Economist* — Business (online) 16 May 2002 <<http://www.economist.com/node/1136592>>.

³⁰⁸ Crockett, above n 104, 95.

‘Flags of convenience’³⁰⁹ present a particular problem in that large merchant fleets are reliant on states with little power, whether militarily or political. ‘Assuming that negotiations fail in such cases, the acts of violence might go unredressed’.³¹⁰ Furthermore, the *SUA Convention* only deals with adjudicative jurisdiction. It does not ‘affect in any way the rules of international law pertaining to the competence of States to exercise *investigative or enforcement jurisdiction* on board ships not flying their flag’.³¹¹ Thus no jurisdiction to stop, search, arrest or seize is added for such offences.³¹²

The motivation of actors does not affect whether the rationale for applying universal jurisdiction applies.³¹³ Freedom of the seas requires *all* non-state sanctioned high seas piratical-style activity to be defined as piracy, subject to universal jurisdiction. But is there any justification under international law as to why ‘private ends’ should be interpreted as narrowing universal jurisdiction to exclude politically motivated acts?³¹⁴ One cannot simply rely on the reasoning used to exclude insurgent acts.³¹⁵ It was seen above that repeated codification efforts have not been accompanied by extensive discussion. Yet for the large part the suggestion political ends are excluded faces similar problems, with the conclusion repeatedly reached without reasoning provided.³¹⁶

³⁰⁹ ‘Flags of convenience’ include those states unwilling or unable to enforce international law: International Transport Workers’ Federation, *What are Flags of Convenience?* <<http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>>.

³¹⁰ Crockett, above n 104, 95.

³¹¹ *SUA Convention*, art 9 (emphasis added). Article 8bis, added by the 2005 Protocol, provides a notification procedure, but this still leaves flag-state exclusivity intact.

³¹² Guilfoyle, ‘Written Evidence’, above n 31, Annex II (*‘The SUA Convention – Treaty Provisions and Explanatory Note’*) Ev 97 [49]; Stuart Kaye, ‘Threats From the Global Commons: Problems of Jurisdiction and Enforcement’ (2007) 8 *Melbourne Journal of International Law* 185, 192–193. Thus if political ends do not fall within the piracy definition, such actors benefit from the exclusive enforcement jurisdiction of their flag state.

³¹³ Halberstam reached the same conclusion in relation to ‘terrorists’: ‘Both the theoretical justification and the pragmatic necessity for universal jurisdiction apply to such acts’, Halberstam, above n 91, 289.

³¹⁴ As, according to Garmon, *UNCLOS* art 101 does — Garmon, above n 42, 265.

³¹⁵ Briefly stated, insurgents may use such attack in order to achieve and secure their independence — ie the action is part of the process of statehood, and thus a limited form of public power. With such attacks also limited to state vessels of one state the insurgents cannot be seen as an enemy of all, threatening the common interests of all, but rather the enemy of one state threatening exclusively their sovereignty. Halberstam, above n 91, 282–283; Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 21, 35.

³¹⁶ For example Direk et al are unconvinced by the arguments ‘private ends’ do not exclude political ends. Despite pointing to state practice and the historical sources described above, no rationality for excluding political activity of private parties is provided. Direk et al, above n 21, 234–239.

One suggestion was ‘for private ends’ originates in the concern to protect commercial shipping that traditionally had only been the subject of state jurisdictional claims.³¹⁷ Politically motivated acts without a ‘commercial aspect’ were either not subject to piracy claims,³¹⁸ or the possibility of such activists was not considered.³¹⁹ It ‘made sense’³²⁰ to exclude politically motivated acts. Such reasoning can also be seen in recent state positions such as Malaysia, Indonesia and Singapore who have held the view crimes of terrorism (political motivation) and piracy (in the traditional sense) should be kept separate.³²¹

However, whilst ‘private ends’ may be seen as further evidence the piracy regime exists to protect the common interest of all states in the freedom of the seas, and particularly commerce, that alone does not demonstrate a need to exclude *all* politically motivated acts. At most it supports the position politically motivated actors could be excluded if their activity was free of any ‘commercial aspect’ — if their activity was to have no direct effect on freedom of commerce. The only action that could, therefore, be excluded would be politically motivated activity exclusively targeting ships in public service.³²² It would not cover activists who target other non-state actors or private ships and thus the commercial shipping industry as a whole. Authors appear to have extended the reasoning to all politically motivated acts based on the incorrect conclusion that intent to rob was also a requirement of private ends following *UNCLOS*.³²³

In conclusion, acts motivated by political ends fit the rationality of the piracy exception as much as acts motivated by personal ends. It is said ‘[t]he non-interference principle merits respect, but only to the extent that it remains a valuable and effective tool in

³¹⁷ Barrios, above n 18, 153. Garmon argues it also made sense to exclude political acts at the time because following the end of World War II the colonial empires were being dismantled — a transitional era in which a restricted scope of the definition of piracy would necessarily restrict the scope of the signatories’ obligations. The suggestion is that states didn’t want the burden of enforcing the law of the sea against possible politically motivated attackers emerging at the time, Garmon, above n 42, 263. This does not seem very convincing though, given the fact there is no duty on states to enforce prescriptive or adjudicative jurisdiction, piracy law only gives those states the possibility to do so.

³¹⁸ Azubuike, above n 304, 52–53.

³¹⁹ Garmon, above n 42, 263.

³²⁰ Ibid.

³²¹ Dana Dillon, ‘Maritime Piracy: Defining the Problem’ (2005) 25(1) *SAIS Review* 155, 155, quoting the Deputy Prime Minister of Malaysia, Datuk Seri Mohd Najib Tun Razak. Dillon continues: ‘Each category of maritime crimes requires different resources, methods of approach and agencies, and the lack of distinction in defining the problem complicates targeting resources and disperses efforts to *unrelated and inconsequential issues*’, 155 (emphasis added).

³²² A ship ‘owned or operated by a State and used only on government non-commercial service’ — *UNCLOS* art 96.

³²³ Garmon, above n 42, 265; Barrios, above n 18, 153.

promoting the general welfare of the international system and all its participants'.³²⁴ It is argued that to allow political protest beyond peaceful purposes threatens at least three fundamental principles of the freedom of the seas,³²⁵ without advancing any corresponding freedom.³²⁶ Upholding claims of exclusive flag-state jurisdiction would be contrary to the common interests of states, place far-reaching restrictions on inclusive use of the oceans by other states and will not serve to protect ocean use 'critical for a particular state'.³²⁷

V CONCLUSION

So despite the antiquity of piracy, the term 'private ends' remains unclear and ill-defined, contrary to the clear-cut positions taken by Guilfoyle or Heller. Within the drafting history private ends were not equated with state sanctioning. *Purely* political acts would be excluded from 'private ends', and it was left open whether this extended beyond acts of insurgents to include acts committed by private individuals/groups in pursuit of political agendas. Thus, subsequent state practice and judicial precedents became extremely important in determining the limits of the exception and defining what purely political acts entail.³²⁸ However, subsequent state practice demonstrates continued confusion, which has failed to delimitate the boundaries of 'private ends'. Positive action by states has been limited, with conflicting opinions. In relation to political activists, and particularly eco-activists, practice has largely been one of omission and inaction. A number of political reasons could drive inaction, and it is difficult to find *opinio juris* that would demonstrate action was not taken because, as a matter of law, action could not be taken.

Therefore, one is left with an international law definition of piracy for which states have failed to conclusively define the term 'private ends', and define whether the 'public end' exception of 'purely political ends' extends beyond insurgents to other non-state actors. Instead there exists the limited judicial precedent of one Belgian

³²⁴ Michael A Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46(1) *Harvard International Law Journal* 131, 230, quoted in Klein, above n 192, 143 n 604.

³²⁵ *Ius communicationis*, exclusive flag state jurisdiction, and the freedom of scientific research in the case of Sea Shepherd. Other theoretical political activism could equally threaten the other freedoms — overflight, the laying of submarine cable and pipelines, artificial islands, fishing and any other subsequently recognised freedoms.

³²⁶ Such activity is not a legitimate exercise of navigational freedom or marine protection.

³²⁷ No state claims such use of the oceans by private parties is of critical importance to them. These three requirements are those listed by Klein when assessing if an exclusive claim (such as jurisdiction) should prevail. Myres Smith McDougal and William Thomas Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) 749, quoted in Klein, above n 246, 292 n 23.

³²⁸ See, eg, *VCLT* art 31(3).

injunction case, which moved towards a definition of piratical acts as lacking state sanction. One can now add a US preliminary injunction case to the same effect.

Both these cases can be robustly defended on policy grounds, as Part (IV)C demonstrated. The policy and rationale clearly point towards a definition of piracy that includes all acts of violence on the high seas, between two ships, whatever the motivation of those involved. Profound changes seen with the rise of non-state actors, particularly following the ‘9/11’ attacks, only confirm the unsuitability of allowing the idea that pursuing political goals should excuse activity from being piracy.³²⁹ Thus, although current precedents are insufficient to establish a recognised definition of ‘private ends’ under international law, it is hoped they will be followed and therefore not exclude violent acts perpetrated by individuals from effective punishment merely because such actors were motivated by political goals.

³²⁹ Isanga points out the increasing number of violent acts committed that are linked to political claims, and the rising power of non-state actors who could potentially challenge some states themselves, Joseph M Isanga, ‘Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes’ (2010) 59 *American University Law Review* 1267, 1283.

***NORDENFELT V MAXIM-NORDENFELT:* AN EXPANDED READING**

ABSTRACT

The 1894 House of Lords decision of *Nordenfelt v Maxim-Nordenfelt* is talked about in terms of being the start of the modern doctrine regarding restraint of trade clauses in contracts. This article considers the decision, both within the context of the other 19th century decisions in the area, and those that were decided before and after that time, in order to better contextualise it within the overall history of the doctrine. Key aspects to be examined include the shifting use of the term ‘reasonable’, the excision of the ‘general’ versus ‘particular’ restraints distinction from the law and the trend towards finer-grained categories in legal understandings. *Nordenfelt*, therefore, can be best understood as a point of inflection in the law, rather than the new dawn that it is often now seen to be.

I INTRODUCTION

Covenants that have sought to bind one individual from working in a given geographic region in a particular area of endeavour have been a feature of the common law for centuries. One decision, *Nordenfelt v Maxim-Nordenfelt*,¹ stands out amongst the hundreds of such cases as almost revolutionary in its recitation of the law. A recent decision from the Supreme Court of Western Australia, for example, included the statement that ‘the modern law in relation to restraints of trade began with the speech of Lord Macnaghten’ in *Nordenfelt*.² The research presented here shows that *Nordenfelt* shared much with its antecedents and did not, as a result, offer a significant break from the law as it had been previously understood.

* Associate Professor, School of Law, Murdoch University. This Research forms part of a larger project funded by an Australian Research Council Discovery Grant DP0987637. The author would also like to thank the efforts of the Melbourne Law School Library Research Service who chased up some of the less legal material as well as the anonymous reviewers of this work.

¹ [1894] AC 535 (*‘Nordenfelt’*).

² *Emeco International v O’Shea (No 2)* (2010) 225 IR 423, 427–8. Commentators, such as Trebilcock, consider *Nordenfelt* to be the ‘case that ... ushered in the modern era in England’: Michael Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Carswell, 1986) 43. For Heydon, the decision included the first ‘statement of the doctrine in modern form’: J D Heydon, *Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed, 2008) 21. Finally, in the opinion of two barristers,

This article considers that, instead of seeing *Nordenfelt* as the beginning of the modern doctrine, it is better seen as a marker in the doctrine's overall history — at most, a point of inflection and at least, an efficient summation of what had gone before that meant earlier decisions no longer needed to be addressed. None of the histories of the doctrine of restraint of trade to date have engaged with the position of *Nordenfelt* within both the wider case law of that century and the overall doctrine. This contribution offers a step or two in that direction — first considering the links between *Nordenfelt* and the more than 80 decisions that preceded it in the 19th century;³ and second, engaging with how it relates to both the case law before it — notably the decision of *Mitchel v Reynolds*⁴ — and to the decisions that followed *Nordenfelt* in the 20th century. The value of this research is to provide a more nuanced understanding of the doctrine's history. Three aspects of the case law will be engaged with: the range of covenants covered (for example, sale of business as opposed to post-employment restraints); the distinction between general and particular restraints; and a divergent perspective on the test of 'reasonableness' that is at the heart of *Nordenfelt* and of more recent decisions.⁵

II NORDENFELT AS A 19TH CENTURY DECISION

The matters raised by the Law Lords in the *Nordenfelt* decision do not vary, to any considerable extent, from those raised by other 19th century judges. This is evident in both the different aspects of the legal tests and the application of public policy to the cases. To be clear, the decisions considered here are mostly restraint of trade decisions — that is, they adjudicate purported agreements between individuals in which one of the individuals covenants to not work, or compete, in a given area or trade in return for some benefit. This Part discusses the similarities in the legal approaches applied throughout the 19th century — though there is no suggestion that there were no changes in judicial thinking in that period.

A Assessment of Relevant Interests

The oft-quoted test in *Nordenfelt* is, in part, that:

[r]estraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient

the 'doctrine finds its clearest modern voice' in Lord Macnaghten's judgment: Tomaso Di Lallo and Glen McGowan, 'The Restraint of Trade Doctrine: Macnaghten Said it Best' (2007) 81 *Law Institute Journal* 52, 53.

³ Matthews and Adler list 83 19th century restraint of trade decisions that predate *Nordenfelt*: Joseph Matthews and Herbert Adler, *The Law Relating to Covenants in Restraint of Trade* (Sweet & Maxwell, 1907) 219–25.

⁴ (1711) P Wms 181; 24 ER 347 ('*Mitchel*').

⁵ For a current overview of the doctrine of restraints of trade, and an engagement with its history, see Rob Jackson, *Post-Employment Restraint of Trade* (Federation Press, 2014). For the record, Jackson refers to *Nordenfelt* as the 'classic textbook case' in the area: at 8, and considers *Mitchel* to be the 'first modern common law case on post-employment restraint of trade': at 4.

justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.⁶

That this statement is seen as the start of the modern era suggests that it is a new understanding of the law; and yet there are many earlier 19th century decisions that include the word ‘reasonable’ in their judgments and that weigh up the interests of the parties and the public.

To take a couple of examples,⁷ as far back as 1831, the Court held:

we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public.⁸

In 1869, it was held ‘that all restraints of trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract’.⁹ The final example here is that ‘agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable’.¹⁰ These quotes suggest that the courts in the period 1831–1894 considered similar things in terms of assessing the reasonableness of a given restraint: the interests of the parties themselves and the interests of the wider public.

1 *Interests of the Parties*

There are, of course, two specific parties whose interests were considered by the courts — the covenantee and the covenantor. The interests of the covenantees were considered expansively by the judges of the time. For example, unless the restraint was ‘larger and wider than the protection of the party ... can *possibly* require’,¹¹ the restraint may be seen as reasonable. In *Horner v Graves*, a reasonable covenant

⁶ [1894] AC 535, 565 (Lord Macnaghten).

⁷ See, eg, *Hitchcock v Coker* (1837) 6 Ad & E 438; 112 ER 167; *Whittaker v Howe* (1841) 3 Beav 383; 49 ER 150; *Pilkington v Scott* (1846) 15 M & W 657; 153 ER 1014; *Saintier v Ferguson* (1849) 7 CB 716; 137 ER 283; *Avery v Langford* (1854) Kay 663; 69 ER 281; *Dendy v Henderson* (1855) 11 Ex 194; 156 ER 800; *Rousillon v Rousillon* (1880) LR 14 Ch D 351; *Jacoby v Whitmore* (1883) 49 LT 335; *Parsons v Cotterill* (1887) 56 LT 839; *Mills v Dunham* [1891] 1 Ch 576; *Moenich v Fenestre* (1892) 61 LJ (Ch) 737.

⁸ *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ).

⁹ *Leather Cloth v Lorsant* (1869) LR 9 Eq 345, 353–4 (James VC).

¹⁰ *Collins v Locke* (1879) 4 App Cas 674, 686 (Lord Smith).

¹¹ *Hitchcock v Coker* (1837) 6 Ad & E 438, 454; 112 ER 167, 173 (Tindal CJ) (emphasis added).

was held to be one that provided for the ‘necessary protection’ for the covenantee.¹² This test was adopted as the appropriate one by Lord Herschell in his speech in *Nordenfelt*.¹³ That said, this apparent ‘test’ of reasonableness was not the only one used in the 19th century. There were two cases that referred to the ‘fair protection’ of interests.¹⁴ Though, as one of them was *Horner v Graves*, ‘fair’ protection was being equated with ‘necessary protection’.¹⁵

Unsurprisingly, the dominant interest of the covenantees that was raised by the judges was their protection from competition. The purposes of such covenants were, for example, described as to prevent the covenantor ‘depriving’ the covenantee of customers.¹⁶ Chief Justice Best characterised the covenantor as a ‘rival’ of the covenantee¹⁷ — and in *Nordenfelt*, Lord Herschell considered that Mr Nordenfelt, if not restrained, could set up a ‘rival business’.¹⁸ More fully, it was stated that it is ‘not unreasonable ... to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there’.¹⁹ This last example fits the modern paradigm of an employee, when entering into an employment contract, agreeing to not work for anyone else for a given time and within a specified geographical area after the end of the formal employment contract. This is not to suggest that all the 19th century restraint cases were in the master-servant context;²⁰ in all cases, however, there was at least the allegation of an agreement that the covenantor would not compete with the covenantee.²¹

What is noteworthy is the fact that much of the discussion around the protection of the covenantees’ interests focused on the knowledge of the covenantors. For example, the limited number of potential customers for the machine guns, and Mr Nordenfelt’s knowledge of them, was a factor considered by the Law Lords in *Nordenfelt*.²²

¹² (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ). In *Archer v Marsh* (1837) 6 Ad & E 959, 967; 112 ER 366, 369 (Lord Denman CJ), the Court supported a restraint that offered ‘full protection’ to the plaintiff.

¹³ [1894] AC 535, 549.

¹⁴ *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ); *Rogers v Maddocks* [1892] 3 Ch 346, 355 (Lindley LJ).

¹⁵ In *Nordenfelt*, Lord Ashbourne also referred to the validity of restraints in terms of the ‘fair protection’ of the interests of the covenantee. See *Nordenfelt* [1894] AC 535, 556.

¹⁶ *Proctor v Sargent* (1840) 2 Man & G 20, 36; 133 ER 647, 653 (Coltman J).

¹⁷ *Homer v Ashford* (1825) 3 Bing 322, 327; 130 ER 537, 539 (Best CJ).

¹⁸ [1894] AC 535, 550.

¹⁹ *Hitchcock v Coker* (1837) 6 Ad & E 438, 454–5; 112 ER 167, 174 (Tindal CJ).

²⁰ The range of circumstances in which restraints were applied will be discussed in more detail below.

²¹ It may be noted that this range of circumstances fits the same categories of restraints indicated by Smith: Stephen Smith, ‘Reconstructing Restraint of Trade’ (1995) 15 *Oxford Journal of Legal Studies* 565, 567.

²² See [1894] AC 535, 559, Lord Ashbourne.

This may make it appear to be a modern decision. However, it was not unusual for other 19th century judges, when assessing the validity of the restraint, to look at the knowledge of the covenantor.

In most cases, the knowledge of concern was what would now be referred to as the customer connections of the business. This was the case even where the trade or profession had a ‘monopoly’ on its knowledge.²³ In a dispute involving chemical manufacturers, the court focused on the

knowledge of their customers and their requirements, and of the prices charged to them, and generally of those details which would make the defendants dangerous competitors when the connection was severed.²⁴

Even where the ‘skill’ of a covenantor was referred to, the personal connection with the customer was also emphasised.²⁵ For completeness, agreements in the apparently less skilful trades also made reference to clients: a covenant involving a ‘cow-keeper’ was, for example, upheld so that the covenantor did not ‘appropriate’ the covenantee’s ‘customers to himself’.²⁶

Turning to the interests of the covenantor, one aspect of the *Nordenfelt* decision that does not explicitly appear in the ratio of the case, as it is now understood, is that of the consideration received by Mr Nordenfelt in exchange for his agreement to not work in the field, anywhere in the world, for 25 years.²⁷ That is not to say that the House of Lords did not refer to the issue of consideration. Lord Herschell, for example, incorporated three quotes from earlier cases²⁸ — each cited with approval — that referred to the consideration gained by the covenantor as important to the assessment of the validity of the restraint. He did not, however, refer to consideration in his application of the law to the facts of the *Nordenfelt* case. Further, Lord Ashbourne repeated, with approval, the finding of the Court of Appeal in *Nordenfelt*: ‘the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee’.²⁹ Lord Macnaghten also cited *Mitchel*’s reference to consideration with approval without using the term ‘consideration’ in his application of the law. Lord Macnaghten, nonetheless, emphasised the

²³ Such knowledge was protected in the 19th century. See *Makepeace v Jackson* (1813) 4 Taunt 770; 128 ER 534; *Yovatt v Winyard* (1820) 1 Jac & W 394, 395; 37 ER 425; *Leather Cloth v Lorsant* (1869) LR 9 Eq 345; *Merryweather v Moore* [1892] 2 Ch 518.

²⁴ *Badische Anilin v Schott* [1892] 3 Ch 447, 453 (Chitty J).

²⁵ *Horner v Graves* (1831) 7 Bing 735, 744; 131 ER 284, 288 (Tindal CJ).

²⁶ *Proctor v Sargent* (1840) 2 Man & G 20, 34; 133 ER 647, 653 (Bosanquet J).

²⁷ *Maxim-Nordenfelt v Nordenfelt* [1893] 1 Ch 630, 635. As he signed the covenant when he was 46, the restraint basically kept him from that area of endeavour for the rest of his working life.

²⁸ [1894] AC 535, 541–2, 544.

²⁹ *Ibid* 559.

£200 000 received by Mr Nordenfelt in his summation of his reasons.³⁰ As a result, the matter of the consideration received by the covenantor is, at the very least, implicit in the ratio of *Nordenfelt*.

Given Lord Herschell's reference to earlier cases, in terms of the issue of consideration, it is unsurprising to see the matter included in many other 19th century cases.³¹ That said, the consideration gained by the covenantor was, in many cases, simply the opportunity to work for the covenantee.³² It may be noted, however, that there was, according to the judges, a shift over the course of the century in the understanding of the consideration needed to support a restraint of trade. According to Baron Parke:

[t]he agreement is good if there be a sufficient consideration in law to support a contract; and the entering into a partnership, from which the party derives a benefit, is of itself a sufficient consideration to support any promise of this nature, which he may choose to make ... and it is clear, since the case of *Hitchcock v Coker*, that the court cannot inquire into the extent or adequacy of the consideration.³³

At one level, this change only brought this aspect of assessing contracts in line with judgments in contract law;³⁴ it also did not indicate a decline in the relevance of consideration to the extent that the issue had disappeared by the end of that century.

One interest of the covenantor that was not given any great judicial consideration was the impact of the restraint on his life.³⁵ There was, admittedly, a small amount of discussion of how the covenantor will make a living if the restraint is enforced. Lord Abinger, for example, noted the 'right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment'.³⁶ Another judge considered that 'every man has a right to the fruits of his own unrestricted exertions'.³⁷

³⁰ Ibid 574.

³¹ See *Horner v Graves* (1831) 7 Bing 735; 131 ER 284; *Leighton v Wales* (1838) 3 M & W 545; 150 ER 1262; *Ward v Byrne* (1839) 5 M & W 548; 151 ER 232; *Proctor v Sargent* (1840) 2 Man & G 20; 133 ER 647; *Price v Green* (1847) 16 M & W 346; 153 ER 1222; *Gravelly v Barnard* (1874) LR 18 Eq 518; *Collins v Locke* (1879) 4 App Cas 674. It may be noted that consideration was not discussed in all 19th century cases. See, eg, *Rannie v Irvine* (1844) 7 Man & G 969; 135 ER 393; *Harms v Parsons* (1862) 32 Beav 328; 55 ER 129; 69 ER 281; *Davies v Davies* (1887) 36 Ch D 359.

³² See *Homer v Ashford* (1825) 3 Bing 322; 130 ER 537; *Young v Timmins* (1831) 1 C & J 331; 148 ER 1446; *Hitchcock v Coker* (1837) 6 Ad & E 438; 112 ER 167; *Whittaker v Howe* (1841) 3 Beav 383; 49 ER 150; *Sainter v Ferguson* (1849) 7 CB 716; 137 ER 283.

³³ *Leighton v Wales* (1838) 3 M & W 545, 551; 150 ER 1262, 1264.

³⁴ For discussion on this point, see P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 448–451.

³⁵ All of the covenantors in the 19th century decisions were male.

³⁶ *Ward v Byrne* (1839) 5 M & W 548, 560; 151 ER 232, 237.

³⁷ *Young v Timmins* (1831) 1 C & J 331, 340; 148 ER 1446, 1451 (Bayley B).

and finally, it was held that the covenantor 'should' be able to 'gain his livelihood'.³⁸ It has to be emphasised that all three of these quotes come from decisions in which the restraint was held to be void; it was, on the other hand, those that held the impugned restraints to be valid that did not express such concerns. Arguably, therefore, the impact of the restraint on the covenantor was only an additional factor to be raised if the courts were looking to strike the restraint down as being unreasonable.

2 *Interests of the Public*

While the courts did not have great concern for the need for individuals to work,³⁹ they did appear to consider other aspects of the public interest when deciding restraint cases. According to Tindal CJ, 'whatever is injurious to the public is void, on the ground of public policy'.⁴⁰ At its most simple, the public benefit was stated as 'the law favours trade for the sake of the public, and not for the sake of the parties engaged in it'.⁴¹ More expansively:

[t]he first object of the law is to promote the public interest; the second to preserve the rights of individuals. The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place, proper.⁴²

So, according to Best CJ, the public interest in such contracts should outweigh the interests of either party to the restraint covenant; if that was the case, then the public interest was very much aligned with the covenantees and not the covenantors.

These public interests were characterised in the 19th century cases in a couple of ways. Chief Justice Best, for example, went on to suggest that:

Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of

³⁸ *Horner v Graves* (1831) 7 Bing 735, 744; 131 ER 284, 288 (Tindal CJ).

³⁹ It may simply be that, by the middle of the 19th century, the benefits of having a 'labour market', that is, a pool of labour available to new and expanding businesses (or, as one historian put it, a 'reserve army of labour': Francois Bédarida, *A Social History of England 1851–1975* (Methuen, 1976) 60) was seen to be good thing.

⁴⁰ *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287. Another judge said that 'if the contract be made on sufficient consideration, and the public gain some advantage, it will be good': *Wallis v Day* (1837) 2 M & W 273, 281; 150 ER 759, 762 (Lord Abinger CB).

⁴¹ *Rannie v Irvine* (1844) 7 Man & G 969, 978; 135 ER 393, 397 (Erle J).

⁴² *Homer v Ashford* (1825) 3 Bing 322, 326; 130 ER 537, 538 (Best CJ).

such contracts is to encourage, rather than cramp the employment of capital in trade, and the promotion of industry.⁴³

Unsurprisingly, this quote comes from a decision that supported the covenant in question. The perspective of a judge that ruled the agreement before him to be void was that the ‘restraint is prejudicial to the individual restrained, and to the rights of the public; for ... the public have a right to the benefit which they may derive from such exertions’ of the worker.⁴⁴

It was also suggested that the covenantor was ‘only doing justice, and no more than justice’ to the covenantee⁴⁵ — in other words, upholding the restraint was simply a matter of fulfilling the public policy of the courts themselves: that of justice. Interestingly, this quote comes from a decision that held a restraint to be void. The public policy reason given by one of the concurring judges was that:

[T]he general policy of the law is against these restrictions, and it is only in deference to the convenience of the trading part of the community that certain exceptions to the general rule have been allowed. Those exceptions have always left things in this state, that, when allowed, a portion of the public is not injured at all; that portion of the public to which the restriction does not extend remains exactly as it did before the restriction took place. But in this case the whole of the public is restrained during the period in question ...⁴⁶

Where a restraint is valid, it was considered that the:

public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business.⁴⁷

⁴³ *Homer v Ashford* (1825) 3 Bing 322, 327; 130 ER 537, 539 (Best CJ). A later judgment suggested that it has been thought that ‘the more any trade is encouraged the more people will be induced to embark their capital in it’: *Proctor v Sargent* (1840) 2 Man & G 20, 37; 133 ER 647, 654 (Maule J). Thereby implying that restraints restricted the investment of capital. The decision in *Proctor v Sargent*, however, supported the covenant in question.

⁴⁴ *Young v Timmins* (1831) 1 C & J 331, 340–1; 148 ER 1446, 1451 (Bayley B).

⁴⁵ *Ward v Byrne* (1839) 5 M & W 548, 559; 151 ER 232, 237 (Lord Abinger CB).

⁴⁶ *Ward v Byrne* (1839) 5 M & W 548, 563; 151 ER 232, 238–9 (Rolfe B). There was no geographical limitation on the covenant in question and, therefore, was easily characterised as affecting the whole country.

⁴⁷ *Mallan v May* (1843) 11 M & W 653, 666; 152 ER 967, 972 (Parke B). Chief Justice Erle expressed it similarly by stating that ‘if the law discouraged agreements such as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity’: *Mumford v Gething* (1859) 7 CB(NS) 305, 319; 141 ER, 834, 840.

The public interest in ‘choice’ also was argued to extend to the merchandise that would have been available to the public if a restraint was held to be void. In the case of *Tallis v Tallis*, that interest was insufficient to void the covenant.⁴⁸

It should be noted, however, that the descriptions of the public’s interest in allowing, or invalidating, restraints became less common as the century progressed. It may even be suggested that ‘lip service’ was given to the notion of the interests of the public while the issue was decided in terms of the impact on the interests of the covenantee.⁴⁹ To take an example, in *Rogers v Maddocks*, Lindley LJ included a lengthy quote from *Horner v Graves* that ended with the assertion that ‘[w]hatever is injurious to the interests of the public is void, on the grounds of public policy’.⁵⁰ What immediately followed that quote was:

[c]an we say here that the restraint is greater than is reasonably necessary to afford fair protection to the interest of this employer when we consider what his interest is? I see no difficulty in coming to the conclusion that, construing the prohibition literally, as I think we ought, it does not exceed the reasonable limit.⁵¹

In *Badische Anilin v Schott*, the issue of the public was limited to cases involving general restraints of trade:

[w]here the restraint is general, that is, without qualification, it is bad as being unreasonable and contrary to public policy; where it is partial, that is subject to some qualification either as to time or space, the question is whether it is reasonable, and, if reasonable, it is good in law.⁵²

In *Nordenfelt* itself, the Law Lords were not that dismissive of the public interest, though the one characterisation of such interest was more restricted than that which was acknowledged in earlier cases: it ‘has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of a business or calling’.⁵³ In other words, the law should limit competition in order to give the seller of a business a better price (as a return for the effort she or he put in the process of building the business up).

One other aspect of public interest that was raised by the Law Lords in *Nordenfelt*, but that has been ignored by all the commentary since, has been that of Mr Nordenfelt’s machine guns as instruments of war. Lord Macnaghten stated that ‘it can hardly

⁴⁸ *Tallis v Tallis* (1853) 1 El & Bl 391; 118 ER 482.

⁴⁹ One commentator has suggested that the ‘public interest test’, as expressed in the *Nordenfelt* decision, ‘merely paid lip service to the notion of free competition’: David Meltz, ‘Happy Birthday Mr Nordenfelt! – The Centenary of the Nordenfelt Case’ (1994) 2 *Trade Practices Law Journal* 149, 153.

⁵⁰ [1892] 3 Ch 346, 355.

⁵¹ *Ibid.*

⁵² [1892] 3 Ch 447, 451 (Chitty J).

⁵³ [1894] AC 535, 548 (Lord Herschell).

be injurious to the public, that is, the British public, to prevent a person from carrying on a trade in weapons abroad'.⁵⁴ Lord Watson was even more blatant:

I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare.⁵⁵

In the relative peace of 21st century Australia, it is easy to forget the militaristic mindset, and the aggressive foreign policy stance, of late 19th century Britain.⁵⁶

At the time the decision was handed down, the country was engaged in three wars: the Ekumeko, the Mahdist and the First Matabele War. Further, since 1850, Britain had been engaged in 33 other conflicts. Most of these may be characterised as skirmishes aimed at furthering policies of colonial expansionism;⁵⁷ however, there was also a growing fear of another European war after the emergence of the German Empire in 1871.⁵⁸ In addition, there were debates in Parliament over Britain's readiness for a war in Europe⁵⁹ and a slew of newspaper stories around the potential conflicts (including the possibility of invasion).⁶⁰ While it cannot be proven that the fear of

⁵⁴ [1894] AC 535, 574 (Lord Macnaghten).

⁵⁵ [1894] AC 535, 554. Lord Watson had characterised the potential customers of the respondent as 'governments and potentates, great and small, civilised and savage, who for purposes *offensive* or defensive, desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition': [1894] AC 535, 552 (emphasis added).

⁵⁶ As an aside, it may be pointed out that the importance of the threat of war in the late nineteenth century is also evident in other area of law. The *Patents, Designs and Trade Marks Act 1883*, for example, includes an extensive section (s 44), with 12 sub-sections, that authorises the assignment of patents over 'instruments or munitions of war' to the Secretary for War. Such assignments did not appear to require that the country be at war at the time; and, unsurprisingly, the section also allowed for the patent, including the description of the invention, to be kept secret.

⁵⁷ For a discussion of the British mindset of expansionism, see Michael Howard, 'Empire, Race and War in pre-1914 Britain' in H Lloyd-Jones, V Pearl and B Worden (eds) *History and Imagination: Essays in Honour of H. R. Trevor-Roper* (Duckworth, 1981).

⁵⁸ Or, as it has been described, 'the Germans had egotistically upset the balance of power in 1870': G Wawro, *Warfare and Society in Europe, 1792–1914* (Routledge, 2000) 124.

⁵⁹ For example, there was a House of Commons debate in which the Member for Galway said that increase in estimates in expenditure 'does not mean that the Government is thinking of war, but that Great Britain's preparations cannot be allowed to fall too far behind those of other Powers: United Kingdom, *Parliamentary Debates*, House of Commons, 11 March 1889, vol 302, col 1457 (John Pinkerton).

⁶⁰ See, 'The Real Defence of England' *The Pall Mall Gazette* (London 16 September 1870); 'Threatened Prussian Invasion of England' *Reynolds's Newspaper* (London) 8 January 1871; 'Defence of England' *The Morning Post* (London) 23 October 1872; 'How England might be Invaded' *The Penny Illustrated Paper and Illustrated Times* (London) 17 February 1877; 'The Defence of Great Britain' *Times* (London) 2 March

war did direct the minds of the Law Lords,⁶¹ this evidence does suggest that the prospect of war was very much in the minds of the public.⁶²

B 'Reasonable' Covenants in the 19th Century

It is clear that a range of interests were considered by the judges of that century. It is almost time to consider how they applied the test of reasonableness to the competing interests. First, however, an overview of the outcomes of the 19th century restraint decisions should be considered. According to Matthews and Adler, only 24 per cent of the pre-*Nordenfellt* 19th century decisions held the covenant to be void.⁶³ Even in the five cases where the covenantor was 'an infant' (ie, under the age of majority) at the time of the covenant, only one contract incorporating a restraint was ruled against.⁶⁴ In these cases, it may be that the judges considered it to be more in the public interest that these young people received training, and a position in the workforce, than it was for them to have greater freedom of work at the end of the contract.⁶⁵

Given this bias, the issue becomes whether a 'reasonable' covenant in the 19th century equates to what a 'reasonable' restraint would now be. It was not, for example, a restraint that a reasonable person would consider to be appropriate;⁶⁶ nor was it a 'reasoned' weighting of the interests of the two parties and the broader public. Instead, the reasonableness of a covenant in that century focused on the protection of

1889, 'The Defence of London and England' *The Morning Post* (London) 8 May 1886; 'Naval Defence of England' *Lloyd's Weekly Newspaper* (London) 5 August 1888; 'Speculation as to the Invasion of Britain' *Aberdeen Weekly Journal* (Aberdeen) 26 December 1892; 'Invasion of England' *The Bristol Mercury and Daily Post* (Bristol) 21 April 1894.

⁶¹ It may also be noted that there was another restraint of trade decision that had a military aspect: *Harvey v Corpe* (1885) 79 LT 246. In that decision, the defendant was held to a covenant that prevented operation of a business, anywhere in Europe, to supply of concentrated meat. The plaintiff was a supplier of concentrated meat to the army. It is possible, therefore, that the defendant was, in fact, being prevented from supplying any European armies with concentrated meat.

⁶² See generally Michael Paris, *Warrior Nation: Images of War in British Popular Culture, 1850–2000* (Reaktion Books, 2000) ch 1.

⁶³ Matthews and Adler, above n 3, 224–5. This figure is calculated from the information that 12 of the 83 decisions they list were decided in favour of the covenantor.

⁶⁴ *Francesco v Barnum* (1889) 43 Ch D 165. See also Matthews and Adler, above n 3, 191. Matthews and Adler note that this is not, properly, a restraint of trade decision but one that focused on the law of apprenticeships.

⁶⁵ It may also be that the judges considered, without explicitly stating the fact, that the younger people were more mobile than older workers or business owners. There is little discussion in the decisions as to the capacity of covenantors to move locations. This may be because it was seen as accepted that people move for work or that the judges were not looking for reasons to hold the restraints invalid.

⁶⁶ This may not be surprising when it is acknowledged that the individual *qua* individual was only entering into the tests of the legal discourse near the end of the nineteenth century. For example, the

the interests of the covenantee and not the covenantor. This is evident in the contemporaneous assessment of *Nordenfelt* as holding the ‘test of the validity of a contract in restraint of trade is its reasonableness in the interests of the covenantee, to which the proviso is added that the covenant must not otherwise offend against public policy’.⁶⁷

It has to be acknowledged, however, that the protectable interests of the covenantee did depend on a range of factors. These factors included the ‘nature of the trade or profession [and] the populousness of the neighbourhood’;⁶⁸ and further, restraints that were not limited to a particular trade were considered general restraints, and therefore, void. That said, one aspect of the restraints that was not discussed, in any of the cases, was the length of the restraint in question.⁶⁹ That is, there was no argument whether a shorter, or longer, term would have been better. A range of durations were upheld — the shortest was for six months,⁷⁰ another 26 cases had no limit of time specified and a further 12 were limited to the life of the covenantor.⁷¹ The test of reasonableness, therefore, does not seem to be an assessment of what a reasonable person would consider to be an appropriate restraint on the covenantor. This is unsurprising if the use of the word ‘reasonable’ in different legal contexts is considered.

There has been little analysis of the history of the term ‘reasonableness’ across the different areas of law. Work has, of course, been done into the history of the

use of the word “fruit salt” by Dunn is calculated, and I think designed, to create a confusion in the minds of those persons to whom Mr Dunn’s advertisements are addressed, and to lead the ordinary run of such persons to suppose that this baking powder is in some way or other connected with Mr Eno’s preparation.

Eno v Dunn (1890) 15 App Cas 251, 263.

⁶⁷ Matthews and Adler, above n 3, 39–40.

⁶⁸ *Hitchcock v Coker* (1837) 6 Ad & E 438, 454; 112 ER 167, 174 (Tindal CJ).

⁶⁹ It was suggested in one treatise that the ‘duration of the restraint may ... sometimes be material in deciding upon the unreasonableness of a contract of this kind: S M Leake, *The Elements of the Law of Contracts* (Stevens, 1867) 390. The case cited, however, merely noted that, where a covenant was unreasonable due to its geographic scope, the duration of the restraint could not make it reasonable: *Proctor v Sargent* (1840) 2 Man & G 20; 133 ER 647.

⁷⁰ *Watts v Smith* (1890) 62 LTR 453.

⁷¹ This was typical of the justifications for the lengthy restraints:

If ... it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear unreasonable that the restriction should go so far as to secure to the master the enjoyment of the same trade to his purchaser, or legatee, or executor.

Hitchcock v Coker (1837) 6 Ad & E 438, 454–5; 112 ER 167, 174 (Tindal CJ).

‘reasonable man’;⁷² however, as a legal construct that gained currency after the assessment of ‘reasonable’ restraints of trade,⁷³ it may be of lesser relevance than the concept of the reasonableness of ‘doubt’ in the criminal law.⁷⁴ The histories of that concept indicate that there was a strong moral aspect to the assessment of guilt in the criminal law of the 19th century and before. This means that the use of the term ‘reasonable’ was not an indicator of a rational understanding of the doubt — reasonable doubt was any doubt that would ‘preclude the jurors from being morally certain’.⁷⁵

That being said, there was also a tendency to use the application of ‘reason’ in the context of assessing probabilities: reason ‘can throw light upon [the] comparative probability’ of particular views or events.⁷⁶ I would suggest, however, that the application of the word ‘reasonable’ in 19th century restraint of trade cases may be better understood from a moral perspective than one of balancing probabilities. A reasonable restraint, then, would be a restraint that a judge could assess, with a ‘satisfied conscience’,⁷⁷ as being proper in the circumstances of the case.

Such an assessment accommodates the high rate at which restraints were upheld. It was seen as proper that the investors in the business (where a company was being sold) or the owner of the business (where the restraint applied to a worker) were given the protection of the law on the basis that restraints ‘encourage, rather than cramp the employment of capital in trade, and the promotion of industry’.⁷⁸ Therefore, the general restraint in *Nordenfelt*, may be seen as ‘reasonable’ in the 19th century

⁷² See, eg, Ronald Collins, ‘Language, History and the Legal Process: A Profile of the “Reasonable Man”’ (1977) 8 *Rutgers-Camden Law Journal* 311.

⁷³ One of the first uses of the phrase ‘reasonable man’ is in *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784; 156 ER 1047, 1049 (Alderson).

⁷⁴ It appears that one of the first uses of the phrase ‘reasonable doubt’, in a criminal law context (albeit in Boston, Massachusetts), was in the judge’s address to the jury in *Rex v Wemm*. The address, by Oliver J, is included in L K Wroth and H Zobel, *Legal Papers of John Adams*, vol 3 (Belknap Press, 1965) 309. In England, the phrase was in use by, at least, 1784; and there were earlier examples of phrases such as ‘reasonable cause for doubt’: James Whitman, *The Origins of Reasonable Doubt* (Yale University Press, 2008) 198–9.

⁷⁵ Steve Sheppard, ‘The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof have Weakened the Presumption of Innocence’ (2003) 78 *Notre Dame Law Review* 1165, 1201, 1196. This quote is in reference to a US articulation of the test; however, Starkie also ‘equated moral certainty with absence of reasonable doubt’. See also James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008).

⁷⁶ James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Liberty Fund Indianapolis, first published 1873, 1993 ed), 212.

⁷⁷ For Shapiro, ‘by the late eighteenth century, the satisfied conscience and beyond reasonable doubt standards had become explicitly linked: Barbara J Shapiro, “Beyond Reasonable Doubt” and “Probable Cause”: Historical Perspectives on the Anglo-American Law of Evidence (University of California Press, 1991) 25.

⁷⁸ *Homer v Ashford* (1825) 3 Bing 322, 327; 130 ER 537, 53 (Best CJ).

understanding of the word — it was, in fact a ‘proper’ restraint given the circumstances. The decision, as a result, should better be seen as one very much rooted in the 19th century and not a modern one.

C Other Aspects of Restraints of Trade in the 19th Century

In addition to the similarities in terms of the substantive law, the *Nordenfelt* decision shares, with the other 19th century decisions, a particular perspective on the operation of restraints as contractual obligations.⁷⁹ It may be noted, first, that the general approach of the judges for much of that century may be understood in terms of the ‘sanctity’⁸⁰ of contracts.⁸¹ It has, however, been suggested that, by 1870, this laissez-faire approach of the English judges had waned.⁸² An analysis of the judgments in this area shows that covenants in restraint of trade do not appear to have been treated as a distinct subset of contracts.⁸³

As noted above, that three quarters of the disputes ended with the covenant being upheld suggests that the judges did not wish to interfere. However the fact that relatively small-scale disputes still made their way to the courts could suggest that either the parties, their lawyers, or both, did not think the cases to be pre-determined.

⁷⁹ The intention here is not to assert a theory of contract that united the judges but to distil a general perspective on the nature of agreements that is evident in the judgments. For a rigorous examination of the development of theories of contract, see James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon, Oxford, 1991).

⁸⁰ That being, ‘contracts when entered into freely and voluntarily shall be held sacred and shall be enforced’: *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465, (Jessel MR).

⁸¹ A justification for the privileging of contracts was provided by Jessel MR:

I have always thought, in those cases where the Court is satisfied of the bona fides of a transaction, and its entire freedom from the mischief which the established principle of law was intended to prevent, that the Court should lean on the side of fair dealing, and should not so apply the principle of law so as to make it comprise a case not within the mischief which it was intended to prevent without absolute necessity, the necessity being that of preserving the principle untouched for the guidance of mankind in their ordinary transactions.

Albion Steel and Wire Company v Martin (1875) 1 Ch D 580, 584–5.

⁸² P S Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th ed, 1995) 15. For a discussion of the laissez-faire approach to restraints of trade, see Trebilcock, above n 2, 18–29. It may, however, be better to see the issue, with respect to restraints of trade, as the courts protecting the advantage that comes from the being the ‘first-mover’ in a given area. That is, the courts are protecting those individuals who have been successful in starting, or maintaining a business. Expressed differently, it may be seen as the courts protecting the ‘entrepreneur’ as the ‘ideal citizen for the bulk of the middle class’: Harold Perkin, *The Origins of Modern English Society 1780–1880* (Routledge & Kegan Paul, 1969) 221.

⁸³ It may be noted that the courts themselves have highlighted the role that the laissez-faire approach to contracts had on the development of the doctrine of restraints of trade: *Attwood v Lamont* [1920] 3 KB 571, 581 (Younger LJ).

A dispute over a six-month restraint was litigated⁸⁴ — despite the fact that restraints for periods of 20 years,⁸⁵ 21 years⁸⁶ and even those unlimited by time⁸⁷ were upheld. Further, there were a number of disputes involving carriers⁸⁸ and milkmen⁸⁹ which suggest that litigation was not just the province of the middle and upper classes. This, in itself, may separate this area of law out from the other areas of private law.⁹⁰

Two other features of 19th century restraints need to be considered. First, it is worth emphasising the nature of the disputes being adjudicated under the broad heading of restraints of trade. As noted above, the covenants arose in a range of contractual relationships. The *Nordenfelt* decision, as an example, related to the sale of the plaintiff's business. Other agreements that included restraints of trade were based around an agreement to provide goods at a set price,⁹¹ the sale of goodwill with a business,⁹² an agreement to divide up a given area between different manufacturers and their agents,⁹³ or the dissolution of a partnership.⁹⁴ And, of course, in a relatively small number of cases, the restraint bound an employee from working for any competitor of the covenantee for a specified amount of time.

This range of fact situations has a couple of consequences for the understanding of the law of the time. First, as most of these examples reflect situations in which negotiations were undertaken by equals, it is not surprising that the judgments did not highlight any impact of unequal bargaining power. In other words, in the majority of cases, the negotiations took place between business people. On the one hand, this may explain the fact that the closest the judges came to this acknowledgement was an assessment that one agreement could be seen to be a 'hard bargain'.⁹⁵ On the other hand, it is possible that given the interest the judges appear to have had in protecting contracts as mutually agreed upon obligations, they may have been less than keen to highlight any concerns about the nature of the contracts.

⁸⁴ *Watts v Smith* (1890) 62 LTR 453.

⁸⁵ *Whittaker v Howe* (1841) 3 Beav 383; 49 ER 150.

⁸⁶ *Dendy v Harrison* (1855) 11 Exch 194.

⁸⁷ *May v O'Neill* (1875) 44 LJ(Ch) 660.

⁸⁸ *Wallis v Day* (1837) 2 M & W 273; 150 ER 759; *Archer v Marsh* (1837) 6 Ad & E 959; 112 ER 366.

⁸⁹ *Benwell v Inns* (1857) 24 Beav 307; 53 ER 376; *Cornwall v Hawkins* (1872) 41 LJ(Ch) 435; *Baines v Geary* (1887) 35 Ch D 154; *Evans v Ware* (1892) 3 Ch 502.

⁹⁰ According to Simpson, the 'working classes' were 'very rarely' in the courts as litigants; and that the 'private common law of the Victorian period emerges out of conflicts between the affluent, or [the] relatively affluent': A W B Simpson, 'Victorian Law and the Industrial Spirit' in *Selden Society Lectures 1952–2001* (William S Hein & Co, 2003) 619.

⁹¹ *Gale v Reed* (1806) 8 East 80; 103 ER 274.

⁹² *Harrison v Gardner* (1817) 2 Madd 198; 56 ER 308.

⁹³ *Wickens v Evans* (1829) 3 Y & J 318; 148 ER 1201.

⁹⁴ *Tallis v Tallis* (1853) 1 El & Bl 391; 118 ER 482.

⁹⁵ *Kimberley v Jennings* (1836) 6 Sim 340, 350; 58 ER 621, 625 (Shadwell VC).

The second consequence of the range of contracts that incorporated a restraint is that the test of ‘reasonableness’ was applied broadly enough to cover the different types of agreement. This, of course, is similar to the breadth of application of the test in negligence cases;⁹⁶ however, when tortious liability is assessed, the circumstances of the case are explicit. In 19th century restraint decisions, judges were not talking about ‘reasonable’ sale of business covenants, nor ‘reasonable’ post-employment restraints. It is possible that, given the range of circumstances to which it would have to be applied, the test was set low — so low that only the more egregious covenants were held to be invalid — so that the standard was applicable across the board. This meant that what was reasonable for an independent former business owner to tolerate as a restraint was not differentiated, in law, from what was reasonable for a milk seller employee to suffer.

The final aspect of the discussion of the operation of covenants as contractual obligations was evident in the distinction between general and particular restraints of trade. Lord Justice Bowen provided a clear definition of the distinction:

[C]ontracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade. ... An agreement in ‘particular’ or ‘partial’ restraint of trade may be defined as one in which the area of restriction is not absolute, but in which the covenantor retains for himself the right to still carry on his trade either in some place, or for the benefit of some person, or in some limited or prescribed manner.⁹⁷

In addition, there were a small number of decisions that may be read to define a general restraint as being one that was unlimited as to the nature of the business that the covenantor was not to work in.⁹⁸

Throughout the 19th century, there were references to this issue. In 1822, for example, it was held that the ‘policy of the law will not permit a general restraint of trade’ yet will allow a more restricted restraint.⁹⁹ Expressed more fully, the

rule of law is, that a contract in general restraint of trade is void, as being against the policy of the law; but if the contract be made on sufficient consideration, and the public gain some advantage, it will be good.¹⁰⁰

⁹⁶ Though, it should not be forgotten that the test of ‘reasonableness’ was not quite so ubiquitous in 19th century negligence cases as it is today.

⁹⁷ *Maxim-Nordenfelt v Nordenfelt* [1893] 1 Ch 630, 651–4.

⁹⁸ For example, in the case of *Baker v Hedgecock* (1887) 39 Ch D 520, 522, the restraint was for a period of two years and had a geographical reach of only one mile. But, as the covenant was unlimited as to the nature of employment, even the plaintiff admitted that restriction, as written, was void.

⁹⁹ *Bryson v Whitehead* (1822) 1 Sim & St 74, 77; 57 ER 29, 31 (Leach VC) See also *Morris v Colman* (1812) 18 Ves Jun 437; 34 ER 382; *Wickens v Evans* (1829) 3 Y & J 318; 148 ER 1201.

¹⁰⁰ *Wallis v Day* (1837) 2 M & W 273, 281; 150 ER 759, 762 (Lord Abinger CB).

Yet despite the Court of Appeal in the *Nordenfelt* case spending time debating the distinction, in the end, Lord Herschell considered the distinction ‘somewhat academic’.¹⁰¹

It is arguable that this distinction, despite having limited practical value,¹⁰² may be used to flesh out the courts’ attitudes to contracts in this area. The prohibition on general restraints can be understood to be a mechanism through which public policy could enter the adjudication process without impacting on the courts’ assessments of the interests of the parties. In other words, the asserted prohibition on general restraints in the 19th century allowed the judges to pay lip service to the public interest by limiting, in most cases, the relevance of policy to those cases in which a general restraint was trying to be asserted. That is, the broad prohibition allowed the courts to permit a range of restraints because they could say that there is a much worse category of restraints that are banned.¹⁰³ This prohibition had a purpose until the *Nordenfelt* decision upheld a 25-year restraint with, on paper at least, a global reach.

III NORDENFELT AS A POINT OF INFLECTION IN THE LAW OF RESTRAINTS

Given that reasonableness was at the heart of the restraint of trade doctrine both before and after *Nordenfelt*, and given that there was a shift in the use of the general–particular distinction, it may not be that the decision represented a clean break in the doctrine. Instead, *Nordenfelt* may be best seen as a point of inflection in the history of restraint of trade cases. To argue this point, recourse needs to be made to both what came before the 19th century and what followed it.

¹⁰¹ *Nordenfelt* [1894] AC 535, 547, 571. Lord Herschell justified the distinction as being academic on the basis of the changes in English society that had taken place in the 19th century — changes that were summarised by Lord Macnaghten as the ‘discoveries of science and the practical results of those discoveries’. The implication to be drawn is that, because technology has changed, they were then justified in upholding one of the most punitive restraints possible — that is, general restraints were no longer contrary to law because of the advances of science — an outcome that would not occur in a (more) modern world in which the technological advances are vastly in excess of those seen by the Lords Herschell and Macnaghten.

¹⁰² It was noted that there had been ‘several cases in which covenants in restraint of trade have been held valid, although the restraint extended over the whole of England: *Maxim-Nordenfelt v Nordenfelt* [1893] 1 Ch 630, 649 (Lindley LJ). Lord Justice Lindley cited five decisions; one of these, however, may be understood as a trade secrets case: *Leather Cloth v Lorsant* (1869) LR 9 Eq 345.

¹⁰³ It may be noted that, of the 12 19th century decisions that held the restraint to be void, four had no limit of space, one had a range of 200 miles from York and two had no limit as to the nature of the business. Of the remaining five, one was held void because the agreement was verbal: *Davey v Shannon* (1879) LR 4 Ex 81; one was void for being too vague: *Davies v Davies* (1887) 36 Ch D 359; and one failed because it was contained in an apprenticeship deed: *De Francesco v Barnum* (1889) 43 Ch D 165.

A Mitchel v Reynolds

The history of restraint of trade law is sometimes said to extend back into the medieval period. There is, however, a shortage of source material to examine that was produced before the Elizabethan period. There was, fortunately, one pre-19th century restraint of trade decision that may be seen to also operate as a point of inflection in the history of this area of law — *Mitchel* in 1711. That decision summarises the relevant early modern law and purports to offer a statement as to the extent of the law at that time. The ratio of *Mitchel*, as repeated by the 19th century cases, was:

that voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon good and adequate consideration, so as to be a proper and useful contract are good.¹⁰⁴

As an aside, it may be noted that the Chief Justice in that decision equated a ‘proper and useful contract’ with a ‘reasonable restraint’.¹⁰⁵

More significantly, it was the *Mitchel* decision that was the conduit through which the distinction between general and particular restraints entered the 19th century jurisprudence. It is not clear why Parker CJ in *Mitchel* carried out a survey of the case law in the area when ruling on a restraint that bound a baker to not work within a single parish; however, the Chief Justice produced a taxonomy that included voluntary agreements and involuntary restraints. Key here is the fact that, while general restraints are discussed as being void, the only examples cited that cover the whole of England are those that emanate from the Crown.¹⁰⁶ It is possible, therefore, that the prohibition on general restraints was merely a reminder of the common law’s power to limit the exercise of the royal prerogative.¹⁰⁷ This perspective also explains the occasional references to the Magna Carta as a basis for limiting the use of restraints¹⁰⁸ — as the purpose of that document was the curtailing of the King’s

¹⁰⁴ *Horner v Graves* (1831) 7 Bing 735, 741–2; 131 ER 284, 287 (Tindal CJ).

¹⁰⁵ *Horner v Graves* (1831) 7 Bing 735, 742; 131 ER 284, 287.

¹⁰⁶ The judgment cites, as general restraints, decisions such as *Prugnell v Gosse* (1649) Aleyn 67; 82 ER 919 and *Franklin v Green* (1610) 1 Bulst 11; 80 ER 717. The former decision, however, related to a restraint covering Basingstoke only and the latter only covered London. Jackson, above n 5, mentions Coke’s potential impact on the decision in *Mitchel*, with Coke being a strident opponent of the royal prerogative in the early modern period. For a discussion of Coke’s role in critiquing monopolies, see C Dent, ‘“Generally Inconvenient”: The 1624 *Statute of Monopolies* as Political Compromise’ (2009) 33 *Melbourne University Law Review* 415, 442.

¹⁰⁷ Unsurprisingly given this interpretation, one of the decisions cited as authority for this point is *Darcy v Allen* (1603) 11 Co Rep 84b; 77 ER 1260.

¹⁰⁸ See, eg, *Chamberlain of London’s Case* (1590) 3 Leonard 264; 74 ER 674; *Claygate v Batchelor* (1601) Owen 143, 143; 74 ER 961, 961; *Barrow v Wood* (1643) March NR 191, 193; 82 ER 470, 471; *Mitchel v Reynolds* (1711) 1 P Wms 181, 183; 24 ER 347, 348; *Ward v Byrne* (1839) 5 M & W 548, 559; 151 ER 232, 237.

powers.¹⁰⁹ Further, those particular restraints, referred to in *Mitchel*, that were held to be valid included those relating to the rights of the guilds and cities to regulate workers;¹¹⁰ arguably, then, the application of law to restraints in the early modern period was aimed at protecting those entities that held economic power at the time.¹¹¹

Chief Justice Parker's survey of the earlier cases also facilitates a view of the range of circumstances in which the covenants were used. Obviously, these included exercises of Crown prerogative — such as the restriction around the production of playing cards in *Darcy v Allen*.¹¹² There were also restraints under the ordinances of the City of London (for example, relating to the sale of cloth)¹¹³ and of guilds (for example, relating to the sale of silk)¹¹⁴ and also under the custom of the City (for example, relating to those who had the right to trade in London).¹¹⁵ Finally, there were a number of decisions that bound an individual — such as the case in which one blacksmith 'took a bond of another ... that he should not exercise his trade or art'

¹⁰⁹ The section of the Magna Carta, cap 39, that is cited in this context states that:

no free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way; nor shall we attack him or send men to attack him, except by the lawful judgment of his peers and the law of the land.

For a discussion of the clause, see P Vinogradoff, 'Magna Carta, C. 39' in *Magna Carta Commemoration Essays* (Royal Historical Society, London, 1917). Of course, any benefit of the Magna Carta only flowed to the free men of the Kingdom and not to the majority of the workers of the land: Robert Bartlett, *England under the Norman and Angevin Kings 1075–1225* (Clarendon Press, 2000) 65. Further, it has been argued that the Barons, when negotiating that clause, only had thoughts for themselves: R Powicke, 'Per Iudicium Parium Vel Per Legem Terrae' in *Magna Carta Commemoration Essays* (Royal Historical Society, London, 1917) 96.

¹¹⁰ See, eg, *Chamberlain of London's Case* (1590) 5 Co Rep 62b; 77 ER 150; *City of London Case* (1610) 8 Co Rep 121b; 77 ER 658; *Mayor and Commonality of Colchester v Goodwin* (1667) Carter 68; 124 ER 829. For a discussion of the role of guilds in the history of the doctrine of restraint of trade, see Harlan M Blake, 'Employee Agreements not to Compete' (1960) 73 *Harvard Law Review* 625, 631–7. It may be noted that Blake's take on the history of restraints is not the same as the one here.

¹¹¹ Examples of cases acknowledging or protecting the interests of the city corporations include *Chamberlain of London's Case* (1590) 5 Co Rep 62b; 77 ER 150; *City of London Case* (1610) 8 Co Rep 121b; 77 ER 658; *Mayor and Commonality of Colchester v Goodwin* (1667) Carter 68; 124 ER 829. That only one case: *Masters, Wardens and Assistants of Silk Throusters v Fremantee* (1669) 2 Keb 309; 84 ER 193, seems to support the power of the guild to enforce controls over workers suggests that these entities were losing power to the cities and the trading corporations. It may be noted that the cities and corporations (and not the guilds) were the subject to an explicit exception in the *Statute of Monopolies 1624* that limited the grant of patents by the Crown.

¹¹² (1602) Noy 173; 74 ER 1131.

¹¹³ *Chamberlain of London's Case* (1590) 5 Co. Rep 62b; 77 ER 150.

¹¹⁴ *Wardens and Corporation of Weavers v Brown* (1601) Cro Eliz 803; 78 ER 1031.

¹¹⁵ *Case of the City of London* (1610) 8 Co Rep 121b; 77 ER 658.

within the same town,¹¹⁶ a sale of business case that bound a joiner¹¹⁷ and another that bound a mercer.¹¹⁸ The range of covenants considered in the nineteenth century was, therefore, narrower than the range considered in *Mitchel*. While Parker CJ did discuss the different decisions in terms of certain categories,¹¹⁹ the discussion was broader than just the agreements between two individuals that became the focus of the restraint of trade doctrine over the last two centuries.¹²⁰

Reference may also be made to the use of the term ‘reasonable’ in *Mitchel*. It is even less clear how the term was meant then than it was in the 19th century. The word (or its antonym) was used eight times in the judgment and in a variety of contexts. For example, it was held to be ‘reasonable for the parties to enter into’ the agreement;¹²¹ there was also reference to a ‘reasonable by-law’;¹²² a characterisation of the law as ‘not so unreasonable’;¹²³ a reference to a ‘reasonable and useful contract’;¹²⁴ and the assessment that ‘what makes this more reasonable is, that the restraint is exactly proportioned to the consideration’.¹²⁵ The term, therefore, was used more loosely than it was later.

Arguably, there are two senses of the word being used. The first relates to a sense of ‘fairness’ — for example, the law being seen as ‘not so unreasonable’. The second sense is one of an almost quantitative ‘balancing’ of interests. This is most evident in the reference of the restraint being ‘exactly proportioned to the consideration’ and in the reference to the ‘reasonable by-law’. The by-law in question was the focus of the *Chamberlain of London’s Case*,¹²⁶ and in Coke’s version of the report, it was held that:

¹¹⁶ (1587) 2 Leonard 210, 210; 74 ER 485, 485. The report does not give the names of either the plaintiff or the defendant.

¹¹⁷ *Rogers v Parrey* (1614) 2 Bulst. 136; 80 ER 1012.

¹¹⁸ (1641) March NR 77; 82 ER 419. Again, no names were attached to the report.

¹¹⁹ The categories he used were grants from the Crown, customs, by-laws and those that were either voluntary or involuntary.

¹²⁰ It may be noted too, that Parker CJ’s discussion of voluntary restraints does not cite any cases that would now be considered to be post-employment restraints (though it may be noted that he refers to one — Perk 228 — that is not reprinted in either the English or Revised Reports). Despite this, he makes the claim that:

[a]nother reason is the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantage in trade, and to reduce it to as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account.

Mitchel (1711) 1 P Wms 181, 190; 24 ER 347, 350. Even in the 18th century, claims were made about bad practices without recourse to evidence.

¹²¹ (1711) 1 P Wms 181, 182; 24 ER 347, 348.

¹²² (1711) 1 P Wms 181, 185; 24 ER 347, 348.

¹²³ (1711) 1 P Wms 181, 191; 24 ER 347, 351.

¹²⁴ (1711) 1 P Wms 181, 196; 24 ER 347, 352.

¹²⁵ (1711) 1 P Wms 181, 197; 24 ER 347, 352.

¹²⁶ (1590) 5 Co Rep 62b; 77 ER 150.

1d. for hallage was good, because it was *pro bono publico*, and it was competent and reasonable, having regard to the benefit which the subject enjoyed by reason of the said ordinances, and such assessments being for the maintenance of the public good, and not *pro privato lucro*, were maintainable by the law.¹²⁷

It, therefore, appears that Parker CJ in *Mitchel* was using the word 'reasonable', at least some of the time, in the same sense that Coke employed it. If this is the case, then Parker CJ held the restraint to be 'reasonable' because the period of the restraint, five years, matched the period of the lease granted by the covenantor to the covenantee. Such a balancing is not evident in the case law of the 19th century.

Finally, it may be pointed out that, in contrast to much of the 19th century case law, there was, in the 17th century, significant discussion around the impact of the restraint on those bound by it. In Noy's record of *Darcy v Allen*, for example, there is the assessment that this particular grant was 'contrary to the laws of the realm, contrary to the laws of God, hurtful to the commonwealth and in no part good or allowable'.¹²⁸ The law of God he refers to is 'every man should live by labour, and he that will not labour, let him not eat'.¹²⁹ Also, in Coke's report of the *Ipswich Tailors Case*, he stated that:

at common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil ... and especially in young men, who ought in their youth to learn lawful sciences and trades which are profitable to the commonwealth.¹³⁰

The language used to justify the findings include statements such as: restraints of trade are 'against the law, and ... void, for it is against the liberty of a free-man';¹³¹ monopolies 'tend to the impoverishment of diverse artificers and others who, before, by the labour of their hands ... had maintained themselves ... who now will of necessity be constrained to live in idleness and beggary';¹³² and the Crown 'cannot make a monopoly for that is to take away free trade, which is the birthright of every subject'.¹³³ The strength of this

¹²⁷ Ibid 151–2.

¹²⁸ (1602) Noy 173, 174; 74 ER 1131, 1133.

¹²⁹ 2 Thessalonians 3: 8–10.

¹³⁰ (1614) 11 Co Rep 53a, 53b; 77 ER 1218, 1219.

¹³¹ *Claygate v Batchelor* (1610) Owen 143, 143; 77 ER 961, 962.

¹³² *Darcy v Allen* (1602) 11 Co Rep 84b, 86b; 77 ER 1260, 1263. It was also argued in a later case that a restraint, 'being the encouragement of idleness' was void: *Ferby v Arrosmyth* (1669) 2 Keb 377, 377; 84 ER 236, 236. The court did not rule as to whether the restraint was void for that reason.

¹³³ *Cloth-workers of Ipswich Case* (1614) Godbolt 252, 253; 78 ER 147, 148. These statements appear to reflect an understanding that, in the 17th century, work was fundamental to life in England. For Sacks, at the time it was understood that 'every free man had a godly obligation (not just a right) to earn his bread, a duty which could not be bridged without his consent': David Sacks, 'The Countervailing of Benefits: Monopoly, Liberty and Benevolence in Elizabethan England' in Dale Hoak (ed), *Tudor Political Culture* (Cambridge University Press, 1995) 275.

language was not evident in the 19th century judgments — this either could reflect a lack of concern on the part of the late Georgian and Victorian courts or a particular level of passion, against the power of the Crown, of the early modern judges.

B 20th and 21st Century Restraint Cases

To complete the understanding of *Nordenfelt* as a point of inflection in the law requires that reference be made to what followed it. Four aspects of the later law will be considered. The first is how the judgment was received in the early 20th century case law and treatises. Secondly, there will be a brief discussion of the interests that can be seen to be protected now. Thirdly, in a related matter, a discussion of the current meaning of the term ‘reasonable’ in this context. Finally, there will be a discussion of the particularised nature of the circumstances in which the doctrine is applied.

As befitting its status as the first House of Lords decision that ruled on a restraint of trade, the *Nordenfelt* decision was not ignored by later courts. However Lord Macnaghten’s speech was not immediately seen as containing the ratio of the judgment. It took 20 years for ‘Lord Macnaghten’s test [to] become the touchstone of the matter’,¹³⁴ with the decision of *Mason v Provident Clothing and Supply Co*¹³⁵ marking the change in reading of the *Nordenfelt* decision.¹³⁶ For example, one 1908 treatise included extracts from the decisions of Lord Herschell and Lord Watson but not Lord Macnaghten.¹³⁷ Further, an article summarising the decision for the United States market only quoted from the speeches of Lords Herschell, Ashbourne and Morris.¹³⁸ Of course, post the *Mason* decision, it has been Lord Macnaghten’s judgment that has ‘appeared in virtually every case since’.¹³⁹ As the House of

¹³⁴ *Attwood v Lamont* [1920] 3 KB 571, 586 (Younger LJ).

¹³⁵ [1913] AC 724 (*‘Mason’*).

¹³⁶ A survey of a number of the cases decided between 1894 and 1913, however, suggests that Lord Macnaghten’s judgment was influential before *Mason*. In a number of decisions, Lord Macnaghten’s speech was the only judgment from *Nordenfelt* that was referred to: see, eg, *Haynes v Doman* [1899] 2 Ch 13, 26 (Lindley LJ); *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co* [1913] AC 781, 795 (Lord Parker). In one decision, Lord Macnaghten’s speech was referred to, as well as that of Lord Herschell: *Underwood & Sons v Barker* [1899] 1 Ch 300, 310, 311 (Vaughan Williams LJ). Other restraint of trade decisions did not refer to *Nordenfelt* at all: see, eg, *William Robinson & Co. v Heuer* [1898] 2 Ch 451; *Townshend v Jarman* [1900] 2 Ch 698; *Edmundson v Render* [1905] 2 Ch 320; *Henry Leetham & Sons v Johnstone-White* [1907] 1 Ch 322.

¹³⁷ Sir John Macdonell, *The Law of Master and Servant* (Stevens & Sons, 2nd ed, 1908) 102–3. The Matthews and Adler treatise devotes an entire chapter to the decision, and as a result, discusses the speeches of all five Law Lords: Matthews and Adler, above n 3, ch 2.

¹³⁸ J Knowlton, ‘The New Doctrine Concerning Contracts in Restraint of Trade’ (1909–10) 8 *Michigan Law Review* 298, 299–301.

¹³⁹ Meltz, above n 49, 152.

Lords decision in *Nordenfelt* was unanimous, there is little, in principle, difference between the findings of each of the Law Lords and their reasons for them. That said, a distinction has been made between the findings of the Law Lords with respect to the continued relevance of the rule between general and particular restraints.¹⁴⁰ This, however, does not go to the understanding of matters such as the reasonableness of, or the interests to be protected by, the covenant.

What did change over the course of the 20th century was the understanding of the basis upon which restraint cases should be decided. As a reminder, shortly after the *Nordenfelt* judgment, one judge expressed the regret that:

the doctrine, unhappily I think, prevailed that in questions between employer and employed the interests of the employer alone are to be considered, and that no agreement is invalid, however oppressive and however fatal it may be to the possibility of the employee earning his own living in this country.¹⁴¹

This assessment would not be accepted now. One recent article has suggested that:

the current law calls for several judgments to be made: whether the employer has a legitimate interest, how the employee threatens that interest, whether the interest needs immediate protection, whether the protection needs to go so far, and whether the detriment to the employee and the public interest is too great.¹⁴²

A more complete description is offered in the decision *Stacks Taree Pty Ltd v Marshall [No 2]*.¹⁴³ In that decision, 12 ‘principles relevant to the validity of restraint of trade clauses’ were listed. A number of these are:

(1) The Court gives considerable weight to what parties have negotiated and embodied in their contracts, but a contractual consensus cannot be regarded as conclusive, even where there is a contractual admission as to reasonableness; (2) an employer is not entitled to require protection against mere competition; (3) an employer is entitled to protection against the use by the employee of knowledge obtained by him of his employer’s affairs in the ordinary course of trade; and (4) an employer’s customer connection is an interest which can support a reasonable restraint of trade, but only if the employee has become, vis-à-vis the client, the human face of the business, namely the person who represents the business to the customer.¹⁴⁴

This understanding is much broader than the approach found in *Nordenfelt* or in the cases immediately after that decision was handed down by the House of Lords.

¹⁴⁰ Matthews and Adler, above n 3, 63–4.

¹⁴¹ *Henry Leetham & Sons v Johnstone-White (No 2)* [1906] 1 Ch 189, 194 (Neville J).

¹⁴² C Arup et al, ‘Restraints of Trade: The Legal Practice’ (2013) 36 *University of New South Wales Law Journal* 1, 2.

¹⁴³ [2010] NSWSC 77 (1 March 2010).

¹⁴⁴ *Ibid* [44].

More specifically, there are a number of aspects of the modern understanding of the labour market that informs the law in the area. Current understandings of restraints include an acceptance of the need to protect the knowledge of the employer while enabling the employee to retain some knowledge to enhance her or his future employability.¹⁴⁵ This understanding, therefore, allows for an acceptance and perhaps the facilitation of employee mobility.¹⁴⁶ Such an understanding also permits a conception of the worker as being active in her or his own professional development. Further, the literature in the area at least considers the importance of the unequal bargaining power of employer and employees.¹⁴⁷ These perspectives offer a much more nuanced understanding of employers, workers and the employment relationship than was evident in the 19th century.

With respect to the issue of reasonableness now, the current law is that:

[t]he test of reasonableness is measured by reference to the interests of the parties concerned and the interests of the public ... The requirement that the restraint be reasonable in the interests of the parties means that the restraint must afford no more than adequate protection to the party in whose favour it is imposed.¹⁴⁸

The shift highlighted in this quote is from the 19th century ‘necessary protection’ of the covenantee¹⁴⁹ to her or his ‘adequate protection’. Whereas now, in the case of post-employment restraints, ‘an employer is not entitled to require protection against mere competition’,¹⁵⁰ in the *Nordenfelt* decision, it was the threat of competition that gave the House of Lords a basis for enforcing the restraint. Admittedly, the current test has been described as ‘extremely elastic’.¹⁵¹ However given the facts that Australian practitioners consider that a six-month restraint would have a good chance of success whereas a ‘year would usually be too long unless the employee was a senior manager’,¹⁵² it is clear that what is considered reasonable now is significantly different to what was considered reasonable in the 19th century.¹⁵³

¹⁴⁵ See, eg, Christopher Arup, ‘What/Whose Knowledge? Restraints of Trade and Concepts of Knowledge’ (2012) 36 *Melbourne University Law Review* 369.

¹⁴⁶ See, eg, William van Caenegem ‘The Mobility of Creative Individuals, Trade Secrets and Restraints of Trade’ (2007) 14 *Murdoch E-Law Journal* 265.

¹⁴⁷ See generally Joellen Riley, *Employee Protection at Common Law*, Federation Press, Sydney, 2005.

¹⁴⁸ *Stacks Taree Pty Ltd v Marshall [No 2]* [2010] NSWSC 77 (1 March 2010) [44].

¹⁴⁹ *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ)

¹⁵⁰ *Stacks Taree Pty Ltd v Marshall [No 2]* [2010] NSWSC 77 (1 March 2010) [44].

¹⁵¹ David J Brennan, ‘Springboards and Ironing Boards: Confidential Information as a Restraint of Trade’ (2005) 21 *Journal of Contract Law* 71, 85.

¹⁵² Arup et al, above n 140, 13. These days, the 30-month restraint applied in *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1, is seen as a very long restraint.

¹⁵³ There were, for example, two 20th century Australian decisions that allowed restraints that would not be upheld today: *Hamilton v Lethbridge* (1912) 14 CLR 236 (unlimited duration — within 50 miles of Toowoomba) and *Brightman v Lamson Paragon* (1914) 18 CLR 331 (10 years — all of Australia and New Zealand).

To round out this discussion of the recent law in this area, mention must be made of the range of circumstances in which restraints of trade are considered. Heydon, in his text, refers to employee covenants, restraints protecting goodwill after the sale of a business, non-ancillary vertical restraints (such as supply contracts) and non-ancillary horizontal restraints (he refers to cartels and trade unions).¹⁵⁴ Jackson, in his text, focuses on post-employment restraints, has a chapter on ‘Restraints of Trade Provisions in Sale of Business Agreements’ and states that restraints in ‘leases, franchises and so forth [are] outside the scope of this work’.¹⁵⁵ Unlike for most of the 19th century, the law differentiates between these categories. Heydon, for example, highlights the ‘leading case’ for sale of business restraints as *Trego v Hunt*¹⁵⁶ and not *Nordenfelt*, and begins his discussion of exclusive supply contracts with *McEllistrim v Ballymacelligott*.¹⁵⁷ Further, *Nordenfelt* is not referred to at all in his discussion of non-ancillary vertical and non-ancillary horizontal restraints. The law in this area, therefore, has fractured since the time of *Nordenfelt*. In part, this is not surprising given the increase in litigation since then. It is also worth noting that, additionally, it mirrors the processes of categorisation that occurred in other areas of law.¹⁵⁸ Again, *Nordenfelt* is best seen as a way-marker in the overall story of the doctrine rather than the sign-post for a radical shift in direction.

IV CONCLUSION

This expanded view of *Nordenfelt* shows it to be a 19th century decision that conformed to the approach adopted for much of that century.¹⁵⁹ Of course, that assessment does not explain why it is seen as the beginning of the modern doctrine — though that could simply be the result of the fact that it was the first such case to make it all the way to the House of Lords and it was decided just before that forum ‘considered

¹⁵⁴ Above n 2. Employee restraints take up three chapters of the book; however, he devotes a chapter to each of the last three categories.

¹⁵⁵ Above n 5, 118. At one level, Jackson’s decision is not surprising given the title of the book. The point here is, however, that this fine-grained level of differentiation has occurred in the doctrine since the 19th century.

¹⁵⁶ [1896] AC 7; J D Heydon, *Restraint of Trade Doctrine* (LexisNexis Butterworths, 2nd ed, 1999) 146.

¹⁵⁷ [1919] AC 549; Heydon, above n 156, 172.

¹⁵⁸ See, eg, Chris Dent, ‘The Privileged Few and the Classification of *Henwood v Harrison*: Foucault, Comment and Qualified Privilege’ (2005) 14 *Griffith Law Review* 34.

¹⁵⁹ As noted by Trebilcock, ‘it is far from clear that Lord Macnaghten himself considered that his judgment marked any significant break’ from the earlier case law: Trebilcock, above n 2, 43–4. Sanderson takes it further and suggests that the ‘modern test now approved by the House of Lords (in *Nordenfelt*) is practically an application of the principles laid down in *Mitchel v Reynolds*’: W Sanderson, *Restraint of Trade in English Law* (Law Book, 1926) 47 – thereby implying that the law expressed in *Nordenfelt* was nothing new and, in fact, reinforced the position of the early 18th century.

itself absolutely bound by its past decisions'.¹⁶⁰ That it was a decision of the Law Lords meant that it set in stone its articulation of reasonableness¹⁶¹ and the side-stepping of the particular–general restraints divide that had persisted since *Mitchel*.

Understood more broadly however, *Nordenfelt* is only a point of inflection in the doctrine. Reasonableness did exist both before and after it, but the test's application changed (but not as a result of Lord Macnaghten's use of the test). With respect to the particular-general restraint distinction in the law, the House of Lords, by enforcing a (general) restraint that covered the extent of the House of Lords' jurisdiction (as well as, on paper, the rest of the world), allowed the courts to move beyond that framing of the problem that had persisted since *Mitchel*. Finally, *Nordenfelt* was a marker in the trend towards particularisation in law. That is, the range of cases covered in *Mitchel* was broader than in *Nordenfelt*, and the range covered in *Nordenfelt* is wider than the more focused legal categories of restraints used today. None of this is to say that *Nordenfelt* was not important – it just may not deserve the 'love' it gets in the cases and commentary today.

¹⁶⁰ R Cross and J W Harris, *Precedent in English Law* (Clarendon Press, 4th ed, 1991) 5.

¹⁶¹ It could be, too, that Lord Macnaghten's articulation of the test was particularly pithy (despite the quote used above coming in at 93 words). If that is the case, then its use may be the result of the 'repeatability' of legal statements in the perpetuation of the law: see also Chris Dent and Ian Cook, 'Stare Decisis, Repetition and Understanding Common Law' (2007) 16 *Griffith Law Review* 131.

PROTECTING THE RIGHTS OF THOSE WITH DEMENTIA THROUGH MANDATORY REGISTRATION OF ENDURING POWERS? A COMPARATIVE ANALYSIS

ABSTRACT

Australian laws on legal capacity are currently being reviewed by both the Commonwealth and several state and territory jurisdictions. Compliance of existing frameworks with obligations arising under the *Convention on the Rights of Persons with Disabilities* is a focal point of several reviews, specifically the provisions governing substituted decision-making, and protection of vulnerable people. Formalised registration procedures for enduring powers of attorney appointments are one proposal that has received support, notably in Victoria; however, there are several different ways such a procedure could be implemented.

This article offers a comparative analysis of selected common law and civil law regimes regarding enduring powers of attorney and guardianship in relation to people who suffer from dementia. It highlights questions about mandatory registration of those powers and the effectiveness of non-registration in terms of promoting the autonomy of the individual and protection of that person's personal and financial interests. It critiques principle and practice regarding privacy in relation to mandatory registration of enduring powers of attorney. The article argues that proposed reforms in Victoria are deficient with respect to protection of both the privacy and the welfare of the individual with dementia and highlights some potential pitfalls other jurisdictions should be aware of when undertaking their own reviews of the law in this field.

* Assistant Professors, University of Canberra.

I INTRODUCTION

The World Health Organization regards dementia as ‘one of the greatest societal challenges for the 21st century.’¹ At present, it is estimated that there more than a quarter of a million Australians living with dementia.² Because the prevalence of dementia is much higher at older age groups, that figure is projected to quadruple by 2050 as a consequence of Australia’s ageing population.³ While research has identified a number of potential risk factors and therapeutic targets for intervention, it is likely that clinically validated strategies for preventing or treating Alzheimer’s Disease and other dementias remain decades away.⁴ From a policy perspective, therefore, it is worth turning attention to interim strategies to mitigate some of the effects of the disease.

Loss of sense of self or identity is a phenomenon commonly associated with dementia.⁵ A manifestation of loss of self or identity — particularly in latter stages of the disease — is loss of capacity, the ability to make decisions which are recognised as valid at law. While there are variations in the test of capacity contained in legislation in each of the Australian jurisdictions,⁶ most are derived from the test of testamentary capacity established in *Banks v Goodfellow*.⁷ These reflect requirements that the person must understand the effect of the decisions they are making, which may prove unachievable for a person with advanced dementia, and difficult to measure due to

¹ World Health Organisation, *Dementia: A Public Health Priority* (2012), 90 <http://www.who.int/mental_health/publications/dementia_report_2012/en/>.

² Deloitte Access Economics, ‘Dementia Across Australia: 2011-2050’ (Report, Alzheimer’s Australia, 2011) 14 <https://fightdementia.org.au/sites/default/files/20111014_Nat_Access_DemAcrossAust.pdf>.

³ Ibid 15.

⁴ See Sam Gandy and Steven T DeKosky, ‘Toward the Treatment and Prevention of Alzheimer’s Disease: Rational Strategies and Recent Progress’ (2013) 64 *Annual Review of Medicine* 367.

⁵ See Lisa S Caddell and Linda Clare, ‘The Impact of Dementia on Self and Identity: a Systematic Review’ (2010) 30 *Clinical Psychology Review* 113.

⁶ For example, the capacity to create an enduring power of attorney is defined in *Powers of Attorney Act 2006* (ACT) s 18; *Powers of Attorney Act 1998* (Qld), sch 1 s 1; *Powers of Attorney Act 2000* (Tas) s 30(2)(a) and (3); and *Instruments Act 1958* (Vic) s 118. In other Australian jurisdictions, the test is found in the common law, for example *Gibbons v Wright* (1954) 91 CLR 423, 438. There are different tests for capacity in adult guardianship legislation: see *Guardianship and Administration Act 2000* (Qld) s 12(1)(a), sch 2 s 2 and sch 4; *Guardianship and Administration Act 1986* (Vic) s 22(1)(b); *Guardianship and Administration Act 1993* (SA) s 3; *Guardianship and Administration Act 1995* (Tas) s 20(1)(b); *Guardianship and Administration Act 1990* (WA) s 43(1)(b)(ii) and *Adult Guardianship Act 1988* (NT) s 3; *Guardianship Act 1987* (NSW) s 3. The different tests for different types of transaction reflect the modern view that capacity is task and decision specific, that is functional rather than status-based: Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) [6.12.1.2].

⁷ (1870) LR 5 QB 549, 565 (*Banks v Goodfellow*).

the fact capacity may fluctuate from day-to-day for those with conditions such as Alzheimer's Disease. A particularly attractive strategy for attempting to ameliorate the impact of loss of capacity is promotion of pre-emptive or anticipatory recorded decisions, such as advanced health directives and, more broadly, enduring powers of attorney. Through these legal tools, a person who still has legal capacity (the *principal*) can record his or her wishes for management of their healthcare, welfare and finances and appoint a decision-maker to act on his or her behalf in accordance with those wishes in the event of loss of that decision-making capacity, either as a result of short-term trauma, or longer-term cognitive impairment such as dementia. Enduring powers are creatures of statute that developed from long-standing common law doctrine permitting the appointment of agents to act on behalf of a principal. Legislation was used to address the situation arising when a principal lost legal capacity, an event that traditionally invalidated a common law power of attorney. Enduring powers of attorney — appointments that survive loss of the capacity of the principal — cover that eventuality, providing a convenient legal vehicle for recording the principal's wishes in anticipation of that loss of capacity.⁸

It is unclear how many people currently have executed a valid enduring power of attorney in Australia. Many Australian solicitors offer them when they are preparing wills for clients, however templates are also widely available, including as downloadable documents from government websites.⁹ There are usually no statutory requirements that the powers be conferred by way of an officially-approved document¹⁰ and no requirements that they be registered with any central authority. Consequently, quantitative data on their prevalence and levels of community awareness of them is limited.¹¹ Furthermore, the essentially private nature of the instruments means that they draw little judicial or academic attention, unless the instrument has been challenged in consequence of a legal defect, or a breakdown in the relationship between concerned parties. Historically there have been significant differences in the legislative regimes for enduring powers of attorney in Australian jurisdictions. In recent times, law reform has moved towards greater harmonisation, however, idiosyncrasies between jurisdictions remain. Elsewhere globally, other jurisdictions have begun to integrate enduring powers into adult guardianship law more broadly; in some jurisdictions, this has included introduction of mandatory registration for enduring powers of attorney.¹²

⁸ See Berna Collier and Chris Coyne, 'An Overview of the Relevant Legal Principles' in Berna Collier, Chris Coyne and Karen Sullivan (eds), *Mental Capacity Powers of Attorney and Advance Health Directives* (Federation Press, 2005) 1.

⁹ See, eg, Public Advocate of the ACT, *Forms, Fact Sheets and Publications* <<http://www.publicadvocate.act.gov.au/page/view/958>>.

¹⁰ Some jurisdictions do require the use of an 'approved' or 'prescribed' form, for example under *Powers of Attorney Act 2006* (ACT) s 96 (see AF2007-52); *Powers of Attorney Regulation 2011* (NSW) reg 4A.

¹¹ Cheryl Tilse et al, *Enduring documents: Improving the Forms, Improving the Outcomes* (University of Queensland ePrint, 2011) is an exception as it reports levels of awareness within Queensland Indigenous communities.

¹² See Part IV below.

Registration has become popular as a way of ensuring the effectiveness of enduring powers of attorney as a vehicle for recording a principal's wishes. A common issue arising is confusion in determining whether a valid enduring power of attorney exists and, if so, who the appointees are and what are the wishes of the principal the instrument reflects. Registration is perceived as a way of ensuring that all valid enduring powers of attorney are accessible by those who need to know whether or not they exist.¹³ Examples include financial institutions, government agencies and public authorities, and others who would otherwise be in breach of privacy legislation and potentially other laws if they shared information about a client or patient with a third party, or permitted that third party to act on the principal's behalf in the absence of lawful authorisation.

The establishment of a registration system for enduring powers in Victoria was one of the recommendations made by the Victorian Parliament Law Reform Committee ('VPLRC') in 2010.¹⁴ Registration of enduring powers and tribunal-appointed guardians was endorsed by the Victorian Law Reform Commission ('VLRC') in 2012.¹⁵ The reports detected widespread community support for registration.¹⁶ VPLRC argued that a convenient online register would promote private appointments of representatives, which would relieve some of the public cost of tribunal-appointed guardianships. Furthermore, while both reports were pessimistic about the prospects of a national registration scheme being implemented in the near future, VPLRC recommended that to promote cross jurisdictional recognition of enduring powers, Victoria should 'to the maximum extent possible' recognise powers registered in other Australian jurisdictions.¹⁷ Victoria is not the only jurisdiction in Australia that has seen proposals to establish a registration scheme for enduring powers. Tasmania already has such a scheme and the issue has been considered by the Commonwealth, New South Wales, Queensland and South Australia.¹⁸ But the Victorian proposals are the most detailed and the Victorian Government has expressed its support in

¹³ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 225–7.

¹⁴ *Ibid* 233.

¹⁵ Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012).

¹⁶ Law Reform Committee, Parliament of Victoria, above n 13, 234; Victorian Law Reform Commission, above n 15, 57.

¹⁷ Law Reform Committee, Parliament of Victoria, above n 13, 253.

¹⁸ See House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 99; New South Wales Land and Property Management Authority, *Review of the Powers of Attorney Act 2003* (2009) 12; Government of South Australia Department of Health Advance Directives Review Committee, *Planning ahead: your health, your money, your life. Second Report of the Review of South Australia's Advance Directives: Stage 2—Proposals for implementation and communication strategies* (2008) 39; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability*, Report No 49(1) (1996) 158.

principle for a mandatory registration scheme.¹⁹ Within the federation, Victoria therefore represents the most likely opportunity to test the merits of mandatory registration and learn from its design and implementation. As with guardianship tribunals, Victoria may also be a pathbreaker toward mutual recognition and uniformity across jurisdictions. Additionally, other Australian jurisdictions are progressively reviewing their laws and may adopt any schemes seen to be working well in Victoria.

With the aim of contributing to both the reform process and the academic literature surrounding enduring powers, guardianship, privacy and legal structures for governance in an information society, this article evaluates the proposed reforms using a number of other jurisdictions for comparison, conceding that caution must be exercised to avoid simplistic comparisons given important contextual differences among jurisdictions. It focuses on registration as a form of regulation of representatives and on the regulation of access to registers.²⁰ This article is structured as follows. Part II provides some background information to enduring powers and lists the possible advantages and disadvantages of registration. Part III introduces proposals for reform in Victoria, focusing on registration, activation, protection of third parties and access to the register. Part IV introduces the key components of enduring powers registration systems in other comparable jurisdictions from both the common law and civil law traditions, namely Tasmania, the Northern Territory, the United Kingdom, Germany and Japan. Part V analyses the significance of the different variables adopted in these jurisdictions and how they reflect distinct assumptions about how competing values such as efficiency, functionality, certainty of transactions, autonomy, protection and privacy should be prioritised within any system of registration. Part VI concludes that viewed comparatively, the proposed Victorian model reveals a bias toward certainty of transactions and may lose sight of the vulnerable individuals enduring powers are ultimately designed to serve.

II WHAT ARE ENDURING POWERS AND WHY SHOULD THEY BE REGISTERED?

Enduring powers can take many forms. Broadly speaking, ‘enduring power(s)’ is a term for authority given voluntarily to a representative (or ‘donee’) to make decisions on behalf of the represented person (‘principal’ or ‘donor’) in relation to financial, personal, or medical-consent matters, or a combination of these, in relation to specified matters or comprehensively, at a future date when the representative has diminished decision-making capacity. In an ageing society, a greater number of adults with

¹⁹ Government of Victoria, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (2011) 30. Issues that the response flagged for further consideration included whether registration should be mandatory, what types of powers should be registrable, the timing of registration, access to information on the register, fees, location of the register, the potential screening role of the registering body, notice and objections upon registration and recognition in other jurisdictions.

²⁰ For reasons of space, the article does not cover the obligations and principles regarding the maintenance and accuracy of personal information.

dementia require such representation or support in making decisions ranging from complex financial matters to everyday personal affairs.²¹ In common law jurisdictions, the relationship has its roots in agency, which is a fiduciary relationship created by equity. Yet the enduring powers relationship is a creation of statute, which remedied a perceived deficiency of general (that is, non-enduring) powers of attorney, namely that a principal with diminished capacity may become unable to direct and supervise an agent.²² As explained below, civil law jurisdictions have functional equivalents such as ‘mandate’, sometimes comprising a hybrid common law import. Even among common law jurisdictions, terminology differs and includes ‘enduring’, ‘durable’, or ‘lasting’ power of attorney and ‘enduring guardianship’ (for personal matters only).²³ Enduring powers may be ‘activated’ through the order of a court or tribunal, or automatically pursuant to an event such as a loss of decision-making capacity as assessed by the representative, often reliant on medical advice in practice. They may replace a separate, pre-existing power of attorney or, in some jurisdictions, they may even be permitted to take effect immediately upon execution of the underlying instrument.²⁴

Despite differing terminology and forms, it is possible to trace a convergence among jurisdictions toward more intensive regulation of enduring powers. This reflects in part growing awareness of the potential for this convenient legal instrument to be abused by the very representatives entrusted to wield authority over the affairs of persons with dementia. Furthermore, for reasons including myopic planning, the urging of family members who desire the legitimisation and convenience that formal arrangements bring, and downright fraud and coercion, enduring powers may be issued where there are doubts about the capacity and voluntariness of principals and therefore the validity of the powers granted.²⁵ This might be remedied by strengthened witnessing requirements,²⁶ such as those proposed for Victoria,²⁷ and disciplinary hearings or liability for professional witnesses who have been remiss in assessing capacity and voluntariness.²⁸

²¹ Law Reform Committee, Parliament of Victoria, above n 13, 1.

²² Jennifer L Rhein, ‘No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals’ (2009) 17 *Elder Law Journal* 165, 173.

²³ This article uses ‘enduring powers’, ‘principal’ and ‘representative’ to cover all of the different permutations.

²⁴ Japan, for example, though this is controversial: Makoto Arai, ‘Reconsidering the Voluntary Guardianship System and its Raison D’être (nin’i kouken seido no sonzaiigi, saikou)’ (2013) 45 *Jissen Seinenkouken* 4, 11.

²⁵ Yasuhiro Akanuma, ‘Issues Surrounding the Voluntary Guardianship System and Directions for Reform and Revision (nin’i kouken seido no kadai to kaizen kaisei no houkousei)’ (2013) 45 *Jissen Seinenkouken* 78, 80.

²⁶ Law Reform Committee, Parliament of Victoria, above n 13, 73.

²⁷ One of the two witnesses should be a medical practitioner or a person authorised to witness affidavits: Victorian Law Reform Commission, above n 15, 106.

²⁸ See, eg, *Legal Practices Tribunal v Ford* [2008] LPT (22 August 2008) 12. See the discussion in Barbara Hamilton and Tina Cockburn, ‘Capacity to make a Will and Enduring Power of Attorney: Issues new and old’ (2008) 28(2) *Queensland Law Society Journal* 14, 14.

The introduction of registers is part of the convergence among jurisdictions toward more intensive regulation of enduring powers. It may play an important role in monitoring and certifying the validity of initial appointments and their subsequent activation and exercise. The absence of registers in some jurisdictions reflects the fact that enduring powers originated as a purely private arrangement. It has therefore been difficult to assess the extent of alleged abuses. However, based on those instances that have been detected, it seems that many vulnerable persons with dementia have suffered financial and other abuse and are poorly placed to obtain remedies for this.²⁹ Given the private nature of enduring powers, much of the commentary on the extent of the problem of financial abuse is anecdotal. This includes the view expressed by a participant in one study of ‘abuse of powers of attorney as the biggest fraud problem facing older people in our community at the present time.’³⁰ In the UK, estimates are that up to 15 per cent of registered powers of attorney are exploited for financial gain.³¹ In New Zealand, one study put this figure as high as 24 per cent.³² In Victoria, of about 400 applications per year to the Victorian Civil and Administrative Tribunal (‘VCAT’) relating to enduring powers of attorney, the majority concern financial abuse.³³ One study emphasises the prevalence of financial and other abuse of the elderly regardless of whether enduring powers are in place.³⁴ In Japan, the extent of the problem as reported in the media seems to have played a significant chilling effect on the uptake of enduring powers.³⁵

The role of a representative is not an unregulated one nor is the representative’s power unfettered. Many jurisdictions have codified legal and ethical responsibilities such as obligations to act honestly and with reasonable diligence; to exercise powers according to the terms of the instrument and the ascertainable wishes of the principal; to avoid conflict transactions; to keep records; and to keep property separate.³⁶ Independently or upon the application of a wide range of concerned parties, courts and tribunals can enforce these duties, which can entail criminal sanctions, dismissal, or

²⁹ Law Reform Committee, Parliament of Victoria, above n 13, 26–7.

³⁰ Ibid 26.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Cheryl Tilse, Deborah Setterlund and Jill Wilson, ‘The Mismanagement of the Assets of Older People: the Concerns and Actions of Aged Care Practitioners in Queensland’ (2003) 22(1) *Australasian Journal on Ageing* 9, 11, 13.

³⁵ Arai, above n 24, 4.

³⁶ For examples of the requirement to act honestly and with reasonable diligence, see *Powers of Attorney Act 1998* (Qld) s 66; *Powers of Attorney and Agency Act 1984* (SA) s 7; *Guardianship and Administration Act 1990* (WA) s 107(1)(a); and *Powers of Attorney Act 2000* (Tas) s 32A(1). For examples of the requirement to exercise powers according to the terms of the power of attorney, see *Powers of Attorney Act 2003* (NSW) s 9; *Powers of Attorney Act 1998* (Qld) s 77; and *Powers of Attorney Act 2000* (Tas) s 30(1)(b) and (c). For examples of the requirement to avoid conflict transactions, see *Powers of Attorney Act 1998* (Qld) s 73 and *Powers of Attorney Act 2006* (ACT) s 42.

reporting requirements. A range of decisions, such as consent to marriage, are also beyond the scope of the appointee and require the approval of a court or tribunal. Nonetheless, much of this regulation is post facto, which can rely on egregious abuses for detection and result in remedies that are too late to provide adequate compensation.

Accordingly, so-called ‘second-generation’ enduring powers involve a degree of ex-ante tribunal or court oversight,³⁷ such as where a representative has been ordered to furnish accounts to the NSW Civil and Administrative Tribunal.³⁸ ‘Third-generation’ enduring powers, such as those that exist in Japan, are located within a comprehensive regulatory structure involving screening and monitoring by a court, public authority, or third party.³⁹ Both second and third generation enduring powers may involve registration of enduring powers either when they are made or when they are activated.

There are a number of potential benefits of registration, both as a regulatory tool and as a convenient repository of information. The first is that registration notifies interested parties of the existence of enduring powers, their scope and their currency.⁴⁰ Second, registration ensures that the enabling document is readily accessible and secure.⁴¹ Third, registration promotes acceptance of enduring powers, for example by financial institutions, because registration allows verification from an authoritative source.⁴² Anecdotally, the lack of understanding and recognition of enduring powers — including on the part of financial institutions — detracts from their functionality for many users.⁴³ Dealing with representatives is typically discretionary, which explains why a third party may choose to err on the side of caution and not rely on the veracity of a representative’s claim to authority without recourse to an authoritative register.⁴⁴ Fourth, registration may assist in cross jurisdictional recognition of enduring powers.⁴⁵ Fifth, some argue that registration creates valuable data about the number and nature of enduring powers in a jurisdiction.⁴⁶

A sixth potential benefit, in light of the apparent extent of intentional and unintentional financial abuse, is that registration can play a monitoring and educational role with regard to representatives with the ultimate aim of protecting the interests of

³⁷ Arai, above n 24, 8.

³⁸ *Powers of Attorney Act 2003* (NSW) s 36(4)(e)(i).

³⁹ *Ibid.*

⁴⁰ Law Reform Committee, Parliament of Victoria, above n 13, 225–7.

⁴¹ *Ibid.* 226.

⁴² *Ibid.*

⁴³ Naohiro Noguchi, ‘The Situation of Voluntary Guardianship Appointments (nin’i kouken juninsha no joukyou)’ (2013) 45 *Jissen Seinenkouken* 16, 17.

⁴⁴ Victorian Law Reform Commission, above n 15, 370.

⁴⁵ Law Reform Committee, Parliament of Victoria, above n 13, 227.

⁴⁶ *Ibid.*

vulnerable principals with dementia.⁴⁷ An example of monitoring is where registration of enduring powers at either the stage of creation or activation automatically generates notification to interested parties, such as family members or an appointed third party monitor. Similarly, parties may be alerted through registration to the fact that a purported representative seeks to rely on a revoked power or authority beyond what has been granted. The question of whether such monitoring leads to a decrease in financial abuse is an empirical one. Some commentators are sceptical that the mere fact of registration has a restraining effect on abuse.⁴⁸ Nevertheless, others are more optimistic⁴⁹ and presumably much depends on the design and consequences of registration.

In addition to these potential benefits, there are a number of possible disadvantages of a registration scheme. First, despite possible long term gains in the security of transactions and a reduction in financial abuse, maintaining a registration system would represent an immediate additional cost burden to governments already seeking immediate savings by encouraging individuals out of the more formal guardianship regime.⁵⁰ Second, registration requirements may have a negative impact on the uptake of enduring powers due to registration fees, the procedural burden and aversion to public exposure of such agreements (and perhaps to state intervention generally).⁵¹ A related concern may be based on the administrative inconvenience of revoking or amending enduring powers documents once they have been registered. Third, in addition to the possible effect on uptake, protection of privacy is a concern in its own right. Personal data on any register that is accessible to the public can be collected alongside other information and misused, for example, for the purposes of identity fraud.⁵² A principal or representative may wish to preserve family harmony by keeping an appointment secret until activation becomes necessary.⁵³ A principal may have written instructions for the disposition of financial assets of a sensitive nature.⁵⁴ Furthermore, like other mental impairments, dementia carries with it a

⁴⁷ Ibid.

⁴⁸ Such as the Chief Executive Officer of the Public Trustee of Tasmania, a State that has mandatory registration of enduring guardianship and powers of attorney: Letter from Chief Executive Officer, Public Trustee, Tasmania to Chair, Law Reform Committee, Parliament of Victoria, 3 November 2009, 2 in Law Reform Committee, Parliament of Victoria, above n 13, 229.

⁴⁹ Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 22 October 2009 (John Chesterman, Manager, Policy and Education, Office of the Public Advocate) 5; Peter MacCallum Cancer Centre, Submission No 20 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 20 August 2009, 2; Law Institute of Victoria, Submission No 41 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 24 August 2009, 15.

⁵⁰ Law Reform Committee, Parliament of Victoria, above n 13, 230.

⁵¹ Ibid 229.

⁵² Victorian Law Reform Commission, above n 15, 358.

⁵³ Ibid 356.

⁵⁴ Ibid.

long legacy of stigma. Surveys reveal that both dementia sufferers and their carers perceive and fear discrimination and ostracisation from the community.⁵⁵

In summary, while registration of enduring powers may enhance the functionality and regulatory capacity of the enduring powers framework, there are a number of inter-related disadvantages surrounding the burden of registration and exposure of these sensitive agreements. The question thus becomes one of whether the advantages can be maximised and disadvantages managed. The following section describes Victoria's proposed reforms in light of this delicate balancing act.

III PROPOSED REFORMS IN VICTORIA

A Registration, Activation and Protection of Third Parties

The process of registration and activation envisaged by VPLRC and VLRC is as follows. First, enduring powers of attorney (for financial and personal matters) would be registered at or soon after the time of creation. This would be mandatory.⁵⁶ As a result, powers that are not registered would have no legal effect.⁵⁷ Registration would be free or for a minimal fee.⁵⁸ The principal would be issued a certificate of registration, which could be validated online by institutions using a subscription service such as CertValid, a 24-hour certificate validation service hosted by the New South Wales Registry of Births, Deaths and Marriages.⁵⁹ After registration, representatives would be required to activate the enduring powers by notifying the registration body in

⁵⁵ Phillipson et al, 'Exploring Dementia and Stigma Beliefs: A Pilot Study of Australian Adults Aged 40 to 65 Yrs' (Report No 28, Alzheimer's Australia, June 2012) 5 <https://fightdementia.org.au/sites/default/files/20120712_US_28_Stigma_Report.pdf>; see also Megan Fong Liu, *Perceived Stigma in Caregivers of Persons with Dementia and Its Impact on Depressive Symptoms* (2011) Iowa Research Online <<http://ir.uiowa.edu/etd/3491>>.

⁵⁶ Victorian Law Reform Commission, above n 15, 365, which also advocated registration of tribunal appointments; Law Reform Committee, Parliament of Victoria, above n 13, 236, which also suggested that general (non-enduring) power of attorney could be registered voluntarily.

⁵⁷ Law Reform Committee, Parliament of Victoria, above n 13, 239; Victorian Law Reform Commission, above n 15, 365; to encourage prompt registration, VLRC recommended that a time limit of 90 days within execution (ie signing the enabling document) should be imposed: Victorian Law Reform Commission, above n 15, 367, albeit with some flexibility for VCAT to extend time limits.

⁵⁸ With regard to registration fees, VPLRC simply recommended that they be 'kept to a minimum, with concession rates or fee waivers available': Law Reform Committee, Parliament of Victoria, above n 13, 246; VLRC recommended that there be no fee unless multiple appointments are made during a calendar year: Victorian Law Reform Commission, above n 15, 369.

⁵⁹ Victorian Law Reform Commission, above n 15, 367–8; see New South Wales Registry of Births, Deaths and Marriages, *CertValid service* (25 February 2015) <<http://www.bdm.nsw.gov.au/Pages/apply-for-certificates/certvalid.aspx>>.

writing when ‘they reasonably believe the principal lacks capacity to make decisions and the representative proposes to commence using their powers.’⁶⁰ This might be done online,⁶¹ which would also facilitate activation and deactivation in a way suited to modern notions of fluctuating capacity.⁶² The representative would then be able to use the certificate to undertake financial transactions on the principal’s behalf or parties could access the register online, as described below.

Two issues relating to the protection of the principal emerge from this process of registration and activation. The first issue is how to ensure that the powers are exercised properly and activated at the proper time. The second issue is what role, if any, the registering body has in ensuring the powers are validly granted (that is, where the principal consented and had capacity to do so at the time). With regard to the first issue, VPLRC recommended that principals be encouraged to appoint a personal monitor, who supervises the representative in a manner stipulated in the enduring powers document.⁶³ With regard to the second issue, VLRC and VPLRC recommended that the registration body ensure that applications meet the minimum formal requirements and be empowered to reject applications or require resubmission, but have no role in assessing matters such as capacity and consent.⁶⁴ VLRC recommended codifying that registration was ‘presumptive evidence’ of the validity and scope of the powers.⁶⁵ To combat the problem of forged or forgotten enduring powers, the registration body would be required to notify the principal (or any personal monitor) if a new, separate application for registration of enduring powers were made.⁶⁶ The principal, monitor, or any other interested person would be able to object to the registration, to be ruled upon by VCAT.⁶⁷ Other than this, VPLRC recommended that the registration authority play a minimal monitoring and educative role by providing information rather than support (for example, individual advice on how to exercise enduring powers), which is better provided by the Victorian Office of the Public Advocate.⁶⁸

⁶⁰ Victorian Law Reform Commission, above n 15, 369–70; the VPLRC took essentially the same view: Law Reform Committee, Parliament of Victoria, above n 13, 204.

⁶¹ Victorian Law Reform Commission, above n 15, 370.

⁶² *Ibid.* However, it also observed that frequent changes may pose difficulties for some institutions and recommended that such cases be referred to VCAT.

⁶³ Law Reform Committee, Parliament of Victoria, above n 13, 200.

⁶⁴ Victorian Law Reform Commission, above n 15, 367; Law Reform Committee, Parliament of Victoria, above n 13, 248.

⁶⁵ Victorian Law Reform Commission, above n 15, 370–1.

⁶⁶ Law Reform Committee, Parliament of Victoria, above n 13, 199, 250.

⁶⁷ *Ibid.* 250.

⁶⁸ *Ibid.* 251. More generally, VPLRC makes some tentative suggestions for how the registration system might be promoted, for example campaigns to educate ‘key professionals’.

B Access to Register

With regard to third party access to information on the register, VPLRC and VLRC emphasised the importance of balancing functionality and protection of privacy.⁶⁹ To this end, they recommended a ‘layered approach’ of different levels of online access depending on need. VPLRC argued that such applicants should be required to have a ‘clearly demonstrated interest’ in information before access is granted.⁷⁰ The Public Advocate’s submission to VLRC recommended more specifically that access to the register be limited to parties named in the document and others who need to ‘verify the document’s existence in order to implement a decision made under it.’⁷¹ For the immediate parties, VLRC noted broad support for the creation of access PIN numbers.⁷² This would allow the principal or representative to check the register at any time and demonstrate the scope of authority to third parties.⁷³ For a third party, such as a bank, it may only be necessary to verify that a hard copy certificate provided by a purported representative corresponds to an entry in the register (ie, a top-level validity check only).⁷⁴ For other parties, such as government agencies, legal and health professionals, a deeper-level search may be necessary, for example, where a decision must be made, to determine the identity and location of a representative and the scope of that representative’s authority.⁷⁵ VLRC recommended that all users should be required to pay a one-time access fee or, for professional and institutional users, an annual licence fee.⁷⁶

VLRC listed a number of measures that could be implemented to safeguard privacy. The first was the selection of a secure and reliable repository for the register. After considering potential candidates for this role, including the Office of Public Advocate and VCAT, both reports determined that the Registry of Births, Deaths and Marriages would be the best choice.⁷⁷ VLRC highlighted the Registry’s experience in dealing with sensitive private information and the National Proof of Identity Framework designed to combat fraud.⁷⁸ Second, VLRC suggested that an independent gatekeeper could also be nominated, such as the Office of the Public Advocate, which could assess the merits of applications for access and issue licences to institutional actors.⁷⁹ Third, hard and soft regulatory measures could be adopted such

⁶⁹ Law Reform Committee, Parliament of Victoria, above n 13, 245; Victorian Law Reform Commission, above n 15, 371.

⁷⁰ Law Reform Committee, Parliament of Victoria, above n 13, 245.

⁷¹ Office of the Public Advocate, Submission No CP 19 to Victorian Law Reform Commission, *Guardianship*, 17 May 2011, quoted in Victorian Law Reform Commission, above n 15, 359.

⁷² Victorian Law Reform Commission, above n 15, 359.

⁷³ *Ibid* 368.

⁷⁴ *Ibid* 371–2.

⁷⁵ *Ibid*.

⁷⁶ *Ibid* 372–3.

⁷⁷ Victorian Law Reform Commission, above n 15, 366; Law Reform Committee, Parliament of Victoria, above n 13, 248.

⁷⁸ Victorian Law Reform Commission, above n 15, 366.

⁷⁹ *Ibid* 372.

as penalties for access to areas of the register without a legitimate interest in those areas⁸⁰ and making access conditional on a signed privacy agreement.⁸¹

In summary, VLRC and VPLRC have sought to address some of the potential disadvantages and obstacles to creating a registration system for enduring powers. For registration, activation, validation and access to the register, the recommendations emphasize ease of use and charges based on ability to pay. For monitoring of capacity and the timeliness and propriety of activating and exercising enduring powers, the recommendations suggest measures that place little burden on the state and instead encourage family members or civil society to play a monitoring role. With regard to certainty of transactions, the recommendations adopt the principle of protecting third parties without notice. The reports also suggest measures to address concerns about privacy.

The next section considers a number of common law and civil law jurisdictions to place the Victorian proposals in a context that allows comparative evaluation. The picture that emerges is that the proposals reflect a move toward more intensive regulation of enduring powers, but not to the extent implemented in certain other jurisdictions. It will be argued that comparison reveals a set of values underpinning the Victorian proposals that prioritise functionality and efficiency over protection of the welfare and privacy interests of those with dementia.

IV REGISTRATION SCHEMES IN OTHER JURISDICTIONS

Registration schemes across jurisdictions differ according to a number of variables. Some variables are related to the regulation of enduring powers and the representatives who wield them. One such variable is the authority responsible for maintaining the register. This may be a quasi-public body or it may be a public authority that has traditionally maintained registers over land or over births, deaths and marriages. The responsible body may be an independent agency with advocacy responsibilities, such as the Office of the Public Guardian in the UK. The choice of body that maintains the register is significant due to institutional capacities, expertise (such as assessing decision making capacity or managing sensitive information) and possibly competing duties such as advocacy.⁸² A dedicated, independent agency is correlated with higher degrees of regulation of enduring powers. A second 'regulatory' variable, considered in more detail below, is the screening role of the registration authority at registration or activation over matters such as consent and capacity. A third variable is who can apply to register enduring powers and on what conditions. Some jurisdictions allow anybody to apply to register at little cost. In some jurisdictions, such as Japan, the application is undertaken by a notary public, ie, a state-appointed official, reflecting stronger regulation, but also greater costs passed on through higher fees.

⁸⁰ Ibid 371.

⁸¹ Noting the submission of Seniors Rights Victoria, Submission No CP 71 to *ibid*, 358.

⁸² Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-making for People Lacking Capacity* (2010) 175.

Other variables are not necessarily of a regulatory nature, but reveal assumptions about priorities nonetheless. The variable that most affects the privacy of representatives and principals (considered in greater detail below) is access to the register. The more open and convenient a register, the more vulnerable it is to data breaches. Access fees can offset this problem, as they create a hurdle to trawling for personal information. However, this must be balanced against the functionality of the register. Another variable, the protection afforded to third parties, can reveal policy assumptions about the value of certainty of transactions relative to the protection of the vulnerable.

A Australia

Most Australian jurisdictions require registration of general powers of attorney for dealings in land and have systems of voluntary registration for other dealings.⁸³ While the Northern Territory requires registration for enduring powers of attorney (financial) with the Registrar-General to take effect,⁸⁴ Tasmania currently has the most intensive regulation of enduring powers.

With regard to financial matters, both general and enduring powers of attorney must be registered to have effect in Tasmania. The fee for lodging a power of attorney is \$132.13 at the time of writing.⁸⁵ Any person may apply for registration of a power of attorney online through the Tasmanian On-Line Land Dealings system via Land Information System Tasmania, a government portal site for property and title information.⁸⁶ The Recorder (the Register of Titles,⁸⁷ which is responsible for administering land titles) may only register powers that comply with the *Powers of Attorney Act 2000* (Tas), but this does not entail screening beyond formal requirements for validity.⁸⁸ The Tasmanian Guardianship and Administration Board does, however, play a role in reviewing the suitability of enduring power of attorney where this is requested by a

⁸³ *Powers of Attorney Act 2003* (NSW) ss 51–52; *Land Title Act 1994* (Qld) s 132; *Land Titles Act 1925* (ACT) s 130(2); *Real Property Act 1886* (SA) ss 155–156.

⁸⁴ *Powers of Attorney Act 1980* (NT) ss 7, 8, 13.

⁸⁵ Tasmania, *Tasmanian Government Gazette*, No 21 320, 27 March 2013, 563; under s 11(5) of the *Powers of Attorney Act 2000* (Tas) where the recorder refuses an application, he or she may refund 50 per cent of the application fee.

⁸⁶ Tasmanian Government, *Land Information System Tasmania* (12 September 2012) <<http://www.thelist.tas.gov.au/told/faces/jsp/contents.jsp>>. The law states that the Recorder may agree to an applicant lodging a power of attorney online ‘providing the procedures are to be comparable with the normal procedures adopted by the Recorder and will not adversely affect the register [and] will ensure the accurate transmission of the power of attorney or other instrument’: *Powers of Attorney Act 2000* (Tas) ss 13(2)(a)–(b). The Recorder may also require documentation for authority to lodge online: s 13(3). The legislation confers discretion on the Recorder regarding the manner of recording entries and related documents: s 4(3).

⁸⁷ This Register of Titles falls within the Department of Primary Industries, Parks, Water and Environment.

⁸⁸ *Powers of Attorney Act 2000* (Tas) s 11. An applicant may lodge either the original powers of attorney document or a copy.

concerned party.⁸⁹ The Recorder gives the document a registration number and returns the hard copy of the endorsed power of attorney document to the applicant. Registration gives effect to transactions entered into by the representative on the principal's behalf during 'a period of mental incapacity', in practice determined by the representative.⁹⁰ A third party without notice (of a matter that invalidates the power of attorney) will be protected unless 'notice of the revocation, death, mental incapacity, bankruptcy or insolvency has been given to the Recorder.'⁹¹ Information on the Powers of Attorney Register (including documents lodged for registration) is publicly available.⁹² However, it is not a database that can be easily trawled. For a fee of \$28,⁹³ the Recorder provides certified copies of information on the register in a format that is left to the Recorder's discretion, including potentially in electronic form.⁹⁴

With regard to personal matters, the Tasmanian Guardianship and Administration Board administers a system of mandatory registration for enduring guardianship. At the time of writing, there is a \$65 fee for registration (which may be waived)⁹⁵ and the register is publicly accessible during business hours⁹⁶ for \$28.⁹⁷ Since its inception in 1997, over 13,500 appointments have been registered.⁹⁸

⁸⁹ *Guardianship and Administration Act 1995* (Tas) s 33.

⁹⁰ *Ibid* s 30(4).

⁹¹ *Ibid* s 28. The Powers of Attorney Amendment Bill 2013 (Tas) proposes to indemnify the Recorder for loss incurred through registration of a power of attorney in certain cases. This results from concerns expressed by the Recorder of Titles about possible liability on its own part for endorsing 'false declarations': Tasmania, *Parliamentary Debates*, Legislative Council, 24 September 2013, 12–69 (Craig Farrell, Deputy Leader of Government Business in the Legislative Council). The proposed amendment to s 11 is: 'The Recorder is not personally liable for any damage or loss caused to a person by, or as a consequence of, the registration under this Act of – (a) a purported enduring power of attorney signed by a witness who is a party to, or a close relative to a party to, the enduring power of attorney; or (b) an annexure to an enduring power of attorney, or purported enduring power of attorney, which annexure is signed by a witness who is a party to, or a close relative to a party to, the enduring power of attorney; or (c) an alteration or correction made to [an enduring power of attorney]'; the Bill also introduces stronger witnessing requirements for the execution of powers of attorney.

⁹² Powers of Attorney Amendment Bill 2013 (Tas) s 5(1), although the legislation grants discretion to the Recorder over fees for access and (apparently) the terms of access: s 5(2).

⁹³ Tasmanian Government, *Guardianship and Administration Board* (14 July 2015) <http://www.guardianship.tas.gov.au/new_fee_structure>.

⁹⁴ *Guardianship and Administration Act 1995* (Tas) s 6(2).

⁹⁵ Tasmanian Government, *Guardianship and Administration Board* (14 July 2015) <http://www.guardianship.tas.gov.au/new_fee_structure>.

⁹⁶ *Guardianship and Administration Act 1995* (Tas) s 89(2).

⁹⁷ Tasmanian Government, *Guardianship and Administration Board* (14 July 2015) <http://www.guardianship.tas.gov.au/new_fee_structure>.

⁹⁸ Victorian Law Reform Commission, above n 15, 352.

In summary, while the Tasmanian regime has moved toward greater regulation than that of ‘first generation’ enduring powers, the focus is on preserving the certainty of transactions, as indicated by the formalistic and passive role of government agencies overseeing the regime and the relative ease of access to information on the registers.

B *United Kingdom*

In England and Wales, court appointments and private enduring appointments for both personal and financial matters must be registered with the Public Guardian to have effect.⁹⁹ A ‘lasting power of attorney (personal)’ may only be activated when the represented person is unable to make his or her decisions,¹⁰⁰ but activation itself need not be registered or notified separately. At the time of writing, the fee for registration is £110 (A\$190),¹⁰¹ which may be reduced or exempted in cases of hardship.¹⁰² Even where there are no errors in the application, registration will not take effect for at least four weeks (and may take longer) to enable concerns to be raised about possible fraud.¹⁰³ Third parties without notice are protected if an instrument is registered even if the lasting power of attorney is invalid.¹⁰⁴ Delays and costs have been criticised by some commentators who believe the new lasting powers regime has imposed inconvenient layers of regulation upon the popular and effective original enduring powers scheme.¹⁰⁵ To help address this problem, applications can now be made partially online, though hardcopy documents must still be provided.¹⁰⁶

⁹⁹ *Mental Capacity Act 2005* (UK) c 9, s 9(2)(b).

¹⁰⁰ *Ibid* s 11(7)(a).

¹⁰¹ Reduced from £130 (A\$224) in October 2013.

¹⁰² Office of the Public Guardian (United Kingdom), *Make, register or end a lasting power of attorney* (10 August 2015) <<https://www.gov.uk/power-of-attorney/register-a-lasting-power-of-attorney>>.

¹⁰³ *Ibid*.

¹⁰⁴ *Mental Capacity Act 2005* (UK) c 9, s 14. The presumption in favour of a purchaser is conclusive within 12 months of registration or if the purchaser has signed a statutory declaration within three months of a transaction to the effect that the purchaser had ‘no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.’: s 14 (4).

¹⁰⁵ See, eg, Jo Samanta, ‘Lasting Powers Of Attorney For Healthcare Under The Mental Capacity Act 2005: Enhanced Prospective Self-Determination For Future Incapacity Or A Simulacrum?’ (2009) 17(1) *Medical Law Review* 377; Denzil Lush, *Lasting Powers of Attorney: The First Twelve Months* (13 February 2009) UK Ministry of Justice <<http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/lpas-12-months-senior-judge-lush.pdf>>; William Edwards, *Delivering a Verdict on Lasting Powers of Attorney* (6 January 2009) Mondaq <<http://www.mondaq.com/x/72276/Family+Law/Delivering+A+Verdict+On+Lasting+Powers+Of+-Attorney>>.

¹⁰⁶ Office of the Public Guardian (United Kingdom), *Make, register or end a lasting power of attorney* (10 August 2015) <<https://www.lastingpowerofattorney.service.gov.uk>>.

With regard to monitoring capacity and the validity of the lasting powers generally, the Office of the Public Guardian must notify the person who is named principal and any representatives upon receiving an application for registration.¹⁰⁷ The applicant (whether the principal or representative) is obliged to notify any other 'named person' who has been nominated in the instrument conferring authority such as a family member or third party.¹⁰⁸ A person notified may then object to the registration on factual grounds such as events that revoke the authority, including the principal or representative's bankruptcy or death.¹⁰⁹ A person notified may also request the Court of Protection, a specialist court with jurisdiction over persons who have diminished decision-making ability, to direct that the application be rejected on grounds that otherwise invalidate a lasting power of attorney, including revocation, duress, fraud, or demonstrated unsuitability of the representative.¹¹⁰

With regard to access, the register has different tiers. Any member of the public may search the register at no cost (reduced from £25 (A\$43) in 2012)¹¹¹ using a form that may be posted, faxed, or emailed.¹¹² The Office of the Public Guardian will check for a match between an entry on the register and details provided in the application. The form includes space to specify the full name, address and date of birth of the person concerned and any additional information.¹¹³ If there is a match, the applicant will receive information including the case number, personal information about the donor, the name of the representative, the date of creation and registration (or revocation) and the nature of the appointment, including whether multiple representatives have been appointed jointly or severally and whether there are restrictions on the power.¹¹⁴ An applicant may then make a 'second-tier application' (also free) to access additional information, such as the nature of such restrictions and the contact details of a representative.¹¹⁵ In considering whether to release information, the Office of the Public Guardian will consider the applicant's relationship to the case, the information requested and the reason for the request.¹¹⁶

¹⁰⁷ *Mental Capacity Act 2005* (UK) c 9, sch 1, s 7. Other than a representative making the application: sch 1, s 8(2).

¹⁰⁸ *Ibid* sch 1, s 6.

¹⁰⁹ *Ibid* s13(6)(a)–(d), sch 1 s13(1)(b); for enduring powers of attorney created before the enactment of the *Mental Capacity Act 2005* (UK), this screening role is done administratively by the Office of the Public Guardian: *ibid* s 22; sch 1, ss 17, 18.

¹¹⁰ *Ibid* sch 4 s 13.

¹¹¹ Ministry of Justice (United Kingdom), *Office of the Public Guardian: Fees 2011/2012* (2011) 43 <http://www.legislation.gov.uk/ukia/2011/209/pdfs/ukia_20110209_en.pdf>.

¹¹² Office of the Public Guardian (United Kingdom), *Find out if someone has an attorney or deputy acting for them* (10 August 2015) <<https://www.gov.uk/find-someones-attorney-or-deputy>>.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397043/LPA109_Office_of_the_Public_Guardian_Registers_guidance.pdf> 7.

¹¹⁵ *Ibid* 9.

¹¹⁶ *Ibid*.

Scotland also has a mandatory registration scheme for enduring powers.¹¹⁷ The scheme is administered by the Office of the Public Guardian (Scotland), which charges £70 (AU\$121) for registration.¹¹⁸ If the application is successful, the Public Guardian issues copies of an enduring powers instrument to the representative and any other named parties.¹¹⁹ These copies are ‘sufficient evidence of the contents of the original’ and general law on the protection of innocent third parties applies.¹²⁰ The principal may customise the screening role of the Public Guardian by specifying a conditional event for registration.¹²¹ This might be a factual matter such as the principal moving out of his or her home.¹²² Or it could be a legal matter such as a decline in requisite capacity for decision-making, as assessed by the Public Guardian.¹²³ Upon registration, the Public Guardian notifies local authorities.¹²⁴ The information on the register is publicly available at no cost (reduced from £15 (A\$26) in 2013), but through written application rather than an open search.¹²⁵

In summary, the regimes in England, Wales and Scotland represent a further step in the direction of intensive regulation of enduring powers, especially at the stage of initial registration using innovations in notification, appeals and customisable safeguards. Furthermore, the England and Wales system in particular contains significant hurdles to illegitimate trawling of personal information. While there is a cost to efficiency and functionality, the principle of certainty of transactions does not seem to have been compromised.

C Germany

Germany has a voluntary registration system for enduring powers. A representative must be in possession of the document establishing power of attorney to exercise the powers.¹²⁶ The document may be created privately and deposited with the repre-

¹¹⁷ Office of the Public Guardian (Scotland), *What is a power of attorney?* <<http://www.publicguardian-scotland.gov.uk/power-of-attorney>>.

¹¹⁸ Office of the Public Guardian (Scotland), *Fees* <<http://www.publicguardian-scotland.gov.uk/power-of-attorney/fees>>.

¹¹⁹ Office of the Public Guardian (Scotland), *After registration* <<http://www.publicguardian-scotland.gov.uk/power-of-attorney/registration/after-registration>>.

¹²⁰ *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, s 19(4).

¹²¹ *Ibid* s 19(3).

¹²² *Ibid*, Explanatory Notes [79].

¹²³ *Ibid*. Section 19(6) states: ‘A decision of the Public Guardian under subsection (2) as to whether or not a person is prepared to act or under subsection (3) as to whether or not the specified event has occurred may be appealed to the sheriff, whose decision shall be final.’

¹²⁴ *Ibid*. Local authorities are not permitted to request further routine searches (apparently for cost concerns rather than privacy reasons).

¹²⁵ Office of the Public Guardian (Scotland), *FAQs* <<http://www.publicguardian-scotland.gov.uk/general/faq>>.

¹²⁶ Reisei Jinno, ‘The Operation of the Enduring Power of Attorney System in Germany (doitsu ni okeru nin’i kouken seido no unyou)’ (2011) 41 *Koushou Hougaku* 1, 7.

sentative or a third party.¹²⁷ Alternatively, it may be drafted by a notary public and released to the representative conditional on an event, for example upon submission of medical evidence of incapacity.¹²⁸ In either case, the existence of the power may be registered with a central enduring powers register administered by the quasi-public National Notary Public Association.¹²⁹ The entry includes the personal information of the represented person and the representative, information about the drafting of the document and where it is stored and the scope of the authority.¹³⁰ Registration does not involve screening of the contents of the enduring power or its validity.¹³¹ To some extent, assistance with applications can offset this. In particular, lawyers and notaries public who draft (and register) the enduring powers may play a gatekeeper role.¹³² Similarly, associations of professionals and laypersons known as ‘guardianship associations’ may play an assistive role.¹³³ Accordingly, there are discounts for registrations made by a public notary, lawyer, or guardianship association.¹³⁴ It is also cheaper to apply for registration online.¹³⁵

Because registration is largely for the benefit of the principal and the court, there are no provisions on protection for third parties afforded by registration. For the same reason, only Germany’s Protective Court (dedicated to guardianship matters) may access the register.¹³⁶ This will occur in the case that an application for guardianship (technically, ‘custodianship’) has been made for a person and the court needs to make a decision about whether the individual’s needs are already catered for by existing enduring powers.¹³⁷

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Bundesnotarkammer [National Notary Public Association], *Datensicherheit* <<http://www.vorsorgeregister.de/ZVR-Zentrales-Vorsorgeregister/Datensicherheit/index.php>>. In Germany and many other civil law countries, notaries are appointed by the state to attest to private law arrangements.

¹³⁰ This 2003 initiative was codified in legislation in 2005. It is also possible to register advance directives and directives to guardians: Jinno, above n 126, 8.

¹³¹ Ibid 10.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ As of 2013, a €3 discount at €13 (A\$19): Bundesnotarkammer [National Notary Public Association], *Eintragungsgebühren* <<http://www.vorsorgeregister.de/ZVR-Zentrales-Vorsorgeregister/Kosten/index.php>>. Fees also depend on payment method and number of representatives. It is reported that online applications lead to fewer errors due to the input method, in addition to speed and cost benefits: Jinno, above n 126, 10.

¹³⁶ Jinno, above n 126, 9.

¹³⁷ The data, which is kept indefinitely, are maintained and transmitted to the court via a secure Internet connection in encrypted form: Bundesnotarkammer [National Notary Public Association], *Datensicherheit* <<http://www.vorsorgeregister.de/ZVR-Zentrales-Vorsorgeregister/Datensicherheit/index.php>>.

In summary, Germany provides a model where functionality, efficiency and certainty of transactions are secondary concerns to the primary issue of ensuring that the needs of persons with dementia are met. For those principals who wish to opt into a higher degree of regulation through registration, the option is available and customisable.

D Japan

Japan has long had a system of registration for adult guardianship. Under Japan's pre-1999 system of adult guardianship, when a family court declared that a person lacked capacity the appointed guardian would have a duty to notify local authorities, who would register this on the (local) family register (*koseki*). Registration records and gives effect to matters of legal status such as births, deaths, adoption, paternity and marriage within a family unit.¹³⁸

Registration of guardianship in Japan has had consequences that vindicate concerns in other jurisdictions that it may create a chilling effect. The family register has had a controversial history in Japan because of its abuse as an instrument of identification of and discrimination against illegitimate children, foreign nationals and Japan's untouchable caste (*burakumin*).¹³⁹ For these reasons, from the 1970s access to the family register has been wound back. Yet because of the emphasis on certainty and security of transactions concerning family property in the former guardianship regime, it was thought necessary for registration of guardianship orders on the family register to be accessible to 'interested parties' (defined broadly).¹⁴⁰ Given the stigma attached to dementia and mental illness, there was strong resistance both on the part of individuals and families to apply for guardianship and have this listed on the semi-public family register.¹⁴¹ Believing that registration in itself was not the cause of this chilling effect, reformers designed a new UK-influenced registration

¹³⁸ Akihiko Kobayashi and Ichiro Otaka, *Understanding the New Adult Guardianship System (wakariyasui shin seinen kouken seido)* (Yuhikaku, 2000) 77. Unlike its common law equivalents, it is a family-based register. Thus, when two people marry, a new family register is created and their children remain on the register until married. Before reforms in 1947 to bring family law into line with the new Constitution, the register was based on a patrilineal extended family (*ie*) centred on the head of the family: Hiroshi Oda, *Japanese Law* (Oxford University Press, 2nd ed, 1999) 380.

¹³⁹ Taimie Bryant, 'For the Sake of the Country, for the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan' (1991) 39 *University of California Los Angeles Law Review* 109, 110. The status of untouchables could be inferred by the location of birth. Because foreign nationals do not have their own family registry, it also proved inconvenient for minorities, including second and third generation Koreans and Chinese, given the importance of the family registry in relations with government, schools, and potential employers.

¹⁴⁰ *Ibid.*

¹⁴¹ Guardianship was registered using stigmatising terminology, such as 'of unsound mind' (*shinshinsoushitsu*) and 'mentally retarded' (*shinshinmoujaku*).

scheme. The scheme is administered centrally by the Ministry of Justice¹⁴² without the baggage of the family register and is capable of reflecting the new diverse range of protective arrangements of the post-1999 guardianship regime, including enduring powers (directly translated as ‘voluntary guardianship’).¹⁴³

Registration and activation proceeds as follows. Enduring powers (over both financial and personal matters) are first created through a contract between the represented person and the representative. The contract must be drafted by a notary public, a state-appointed official who is typically a retired judge, prosecutor, or public servant.¹⁴⁴ Officially, the role played by the notary public in assessing capacity at the time of creation is minimal, but the practice discussed below indicates more than screening for formal validity. The notary public who drafted the contract will arrange (for a fee)¹⁴⁵ for the agreement to be registered (which also attracts a fee).¹⁴⁶ This is a prerequisite for the second stage of registration (that is, activation), undertaken by a family court registrar when the principal, or the representative or a family member with the consent of the principal, applies to a family court for the appointment of

¹⁴² Which has for the time being designated its Tokyo Legal Affairs Bureau as the sole registration authority. Okamura notes that when the Bill was debated it was suggested that there would be a wider network of registration offices: Mihoko Okamura, ‘The Adult Guardianship System (*seinen kouken seido*)’ in National Diet Library (ed), *Declining Fertility, Ageing and Countermeasures (shoushi koureika to sono taisaku)* (2005) 198, 208. This is perhaps now unlikely with the advent of online services described below. The two main statutes were *minpou no ichibu o kaisei suru houritsu* [Act to Partially Revise the Civil Code] (Japan) Act No 149 of 1999 and *nini kouken keiyaku ni kansuru houritsu* [Act on Voluntary Guardianship Contracts] (Japan) Act No 150 of 1999.

¹⁴³ Kobayashi and Otaka, above n 138, 78. In 2005 (after the new guardianship system was introduced in 2000), the family register became much less open. Incidentally, South Korea (which has many legal similarities to Japan) has abolished its family register in favour of an individual-based system for registering family relationships. It also set up a new guardianship registration system, after rejecting proposals to integrate this into the new relationships register: 2010 World Congress on Adult Guardianship Committee, ‘Proceedings of the First World Congress on Adult Guardianship Law 2010 (2010 nen seinen kouken hou sekai hokokushoshuu)’ (Yokohama, 2011) 207.

¹⁴⁴ Kobayashi and Otaka, above n 138, 57. Notaries public can be found at approximately 300 locations throughout Japan and, if circumstances require, will make home visits for an extra fee. The fee for having the document drafted is ¥11,000 (A\$120): Japan National Notaries Association <<http://www.koshonin.gr.jp/nin.html>>.

¹⁴⁵ At the time of writing, ¥1400 (A\$15): Japan National Notaries Association, <<http://www.koshonin.gr.jp/nin.html>>; more on costs here: <http://www.seinen-kouken.cc/pages/step_n.htm#H3_STEP_N6>. The Act states ‘by entrustment or application’ so, technically, the parties can also apply for registration at this initial phase.

¹⁴⁶ Presumably to stimulate uptake of enduring powers and guardianship, registration fees were reduced in 2011. The fee for registering the initial contract has been reduced from ¥4000 (A\$44) to ¥2600 (A\$28): Ministry of Justice, <<http://houmukyoku.moj.go.jp/tokyo/content/000128548.pdf>>.

a third-party ‘monitor’.¹⁴⁷ This application requires submission of a range of documentation including evidence of capacity (typically from a physician) and payment of court fees (¥3780 (A\$41)).¹⁴⁸ Unless any change (such as the termination of the authority) is reflected on the register, an innocent third-party will be protected in any transaction.¹⁴⁹

Japan’s regime has adopted technological innovations in registering and proving authority under an enduring powers agreement. The Ministry of Justice¹⁵⁰ now provides an online certification and (limited) registration service (amendments to

¹⁴⁷ Kobayashi and Otaka, above n 138, 52.

¹⁴⁸ Tokyo Family Court, (2005) <http://www.courts.go.jp/tokyo-f/saiban/koken/ninigoken_mousitake>. Fees can be claimed from the principal’s assets: *Civil Code (minpou)* (Japan) Act No 9 of 1898 s 862.

¹⁴⁹ *nini kouken keiyaku ni kansuru houritsu* [Act on Voluntary Guardianship Contracts] (Japan) Act No 150 of 1999 s 11. All parties listed on the file have a duty to register changes such as termination of the agreement, death of the represented person, invalidation of the agreement through bankruptcy of the representative. This may be done either directly or through a court registrar. Other interested parties such as family members may also apply for necessary amendments to the file: *kouken touroku tou ni kansuru houritsu* [Act on Registration of Guardianship] (Japan) Act No 152 of 1999 s 7. This approach is also reflected in statutory guardianship: if an adult ward creates the impression to an innocent third-party that he or she does not have a guardian, the transaction may not be voided: *minpou* [Civil Code] (Japan) Act No 89 of 1896 s 20. Also, to enhance security of transactions, once a guardianship or enduring powers arrangement comes to an end, a closed file is maintained recording the existence and extent of a representative’s authority at a given time. In addition to the above parties, successors to the represented person’s estate may access this information. Delegated legislation regulates other aspects of the registration system, including strict notification requirements where data is lost or damaged, in light of scandals relating to negligent, fraudulent and abusive data management in government agencies, particularly the Ministry of Health and Welfare: ‘SIA to improve, resend notices on missing pension records’, *The Japan Times* (Tokyo), 24 January 2008; ‘Alteration of pension records said rampant’, *The Japan Times* (Tokyo), 30 November 2008; ‘SIA officer uses woman who applied for pension for promoting adult website (shakaichou shokuin ga nenkin shinsei josei riyou shi adaruto saito kanyuu)’, *TV Asahi News* (Tokyo), 31 October 2007. Other provisions regulate data storage and security such as prohibitions on removing the data from the premises and timeframes for data retention; discretionary access to application-related material on the basis of need; and exemption of application documents from Japanese freedom of information law: *koukentakoukitounikansurushorei* [Registration of Adult Guardianship Ordinance] (Japan) Ord 1, 3, 5; *Registration of Adult Guardianship Cabinet Order (koukentakoukitounikanseirei)* (Japan) Ord 3, 12, 13, 14. Also, while a party may apply to the chief of the Legal Affairs Bureau for a review of a registrar’s decisions generally, decisions under the Act are generally exempt from merits review: *Act on Registration of Guardianship (kouken touroku tou ni kansuru houritsu)* (Japan), Act No 152 of 1999 s 16.

¹⁵⁰ Specifically, the Guardianship Registration Division of the Tokyo Civil Affairs Administration Bureau.

or closure of the file).¹⁵¹ Applicants use software downloaded from the Ministry's website, which requires a password (and other user information) and a digital signature or digital certificate to use.¹⁵² An applicant may request a traditional paper certificate by mail or a certificate in electronic form.¹⁵³ Its authenticity is supported by the official title of the Registrar and an attached (electronic) certificate stating that it has been issued by the Ministry of Justice Certification Authority.¹⁵⁴ In an attempt to balance privacy against certainty of transactions, the Registrar may only issue a 'certificate of registered matters' of the contents of the guardianship order or enduring power to persons stipulated in legislation.¹⁵⁵ Other parties, for example banks, only have access to certification indirectly through a stipulated person.¹⁵⁶

In summary, Japan's regime has distinct historical factors that explain the variables adopted, including a strong concern to balance certainty of transactions against

¹⁵¹ Ministry of Justice, <http://www.moj.go.jp/MINJI/minji04_00020.html>. Oddly, it is only active from 8:30am until 9:00pm on non-public holiday weekdays. In contrast, the Australian eTax service is active 24 hours a day. See also *Registration of Adult Guardianship Ordinance (koukentakitounikansurushorei)* (Japan).

¹⁵² Ministry of Justice, <http://www.moj.go.jp/MINJI/minji04_00020.html>. The website lists five acceptable digital signatures, including government and private providers (Nippon Denshi Ninsho, NTT, Secom), some provided through a card with an IC chip. It must contain information about the name and address of the applicant.

¹⁵³ Ibid. This reflects costs, but is presumably also an incentive to promote the efficiencies of eGovernment. Payment of the fee may be made by funds transfer through internet banking or at an ATM. The certificate is provided through the software. The online certificate is slightly cheaper (¥320 (A\$3.50), compared to ¥380 (A\$4.20)). The certificate evidences the extent of the representative's authority, but the contents of the certificate differ according to who is applying. For example, the certificate issued to a manager of property in question would merely state the manager's status in relation to that property.

¹⁵⁴ Ibid. The Ministry of Justice website notes that some institutions may not accept a certificate in electronic form as evidence of an agent's authority.

¹⁵⁵ These include the principal, a guardian/representative, a monitor, public officials where necessary to perform their duties, and other persons including a spouse or family member within four degrees: *kouken touroku tou ni kansuru houritsu* [Act on Registration of Guardianship] (Japan) Act No 152 of 1999 s 10. For illustration, this includes a cousin, a great aunt or uncle, and a spouse's aunt or uncle. An administrator of the represented person's property who has been appointed as an interlocutory measure in guardianship proceedings may also apply. At present, no local governments issue electronic copies of the family register, which means family members cannot apply online for a guardianship certificate because they need this documentation to prove their relationship. However, any person may use the service with the principal's digital signature. As with the fee for registration, the fee for a certificate has been reduced from ¥800 (A\$9) to ¥550 (A\$6): Ministry of Justice, <<http://houmukyoku.moj.go.jp/tokyo/content/000128548.pdf>>. Any person may also apply for a certificate that states that one does not have a guardian/representative, which costs ¥300 (A\$3).

¹⁵⁶ *kouken touroku tou ni kansuru houritsu* [Act on Registration of Guardianship] (Japan), Act No 152 of 1999.

privacy values. The concern to protect the reputation of this new import appears to have influenced the decision to adopt intensive regulation of enduring powers, especially at the activation stage. Of all the jurisdictions considered, it fits most closely with the ‘third generation’ model of enduring powers. Regulation of registration could have been more intensive as some key elements of the UK system were omitted — neither registration nor activation involves notification, for example to family members, which detracts from the monitoring function of registration.¹⁵⁷ Yet, as discussed below, it appears that the degree of regulation adopted has posed a significant obstacle to the uptake of enduring powers.

E Summary

Each jurisdiction has a unique arrangement of variables that constitute its enduring powers registration regime. The picture that emerges from the comparison above is that jurisdictions sit along a continuum ranging from minimal to extensive regulation of registration, activation and access stages of enduring powers. As a rule, the degree of regulation correlates to an emphasis on protection of the welfare and privacy interests of the person with dementia. Other factors are also relevant, including unique historical and institutional factors. As suggested in the next part, any attempt to fit the jurisdictions into simplistic models is complicated by specific design factors, the differing intensities of regulation over different stages and the fact that regulation may be just as easily correlated to a concern to ensure the certainty of transactions, as is arguably the case in Japan. Nevertheless, there are certain clues in the design of each regime that reveal the prioritisation of values. It is evident, for example, that in Germany a concern to meet the needs of persons with dementia overrides the concern to ensure the certainty of transactions. In the UK, protection values arguably override efficiency concerns. In contrast, even the most intensively regulated regime in Australia, Tasmania, reveal a prioritisation of functionality over protection. This is arguably also the case with the Victorian proposals, though in some important respects, they adopt some of the protective elements of the UK system. The following part builds on this comparative survey to explain in more detail how aspects of a registration system reveal such assumptions and priorities.

V REGISTRATION AND VALUES

A Regulation: Screening vs Monitoring?

This section analyses further the significance of the different variables adopted in the above jurisdictions and the assumptions they reflect regarding how competing values such as efficiency, functionality, certainty of transactions, autonomy, protection and privacy should be prioritised within any system of enduring powers registration.

¹⁵⁷ Fukiko Nakayama, ‘The Current Situation and Issues of the Voluntary Guardianship System (nin’i kouken seido no genjo to kadai)’ (2011) 22(4) *Rounen Seishin Igaku Zasshi* 400, 404. In contrast, an order for statutory guardianship must be notified by the Registrar to local authorities: *koukentanikounikansurushorei* [Registration of Adult Guardianship Ordinance] (Japan) Ord 13.

There are two main points at which registration may play a regulatory role over the conduct of representatives and thereby protect the interests of those with dementia: initial registration and activation. While at initial registration all jurisdictions require capacity and voluntariness of the principal, there is great disparity in how these are ascertained. 'First generation' jurisdictions do not involve any screening, unless the document is drafted by a lawyer. Other jurisdictions, such as Tasmania, screen for the formal validity of the arrangement only, to ensure that documents are correctly filled in and executed. Still other jurisdictions engage in optional or mandatory screening for capacity, consent, coercion or fraud. In the case of Japan, described more fully below, screening may play a hybrid function, combining screening of capacity with conciliatory and educative roles. Some jurisdictions, such as the UK, send a notification upon initial registration to interested parties (in addition to the principal), which enables objections to be made.

A number of factors seem to determine the degree of screening upon registration. First, governments are cautious about establishing procedural burdens because of cost and the effect they may have on the uptake of enduring powers. Second, legal tradition is influential. Each of the common law jurisdictions surveyed features minimal screening on the part of the registering authority. This is consistent with the history of power of attorney as a creature of private law. In contrast, in Japan, despite a pre-existing functional civil law equivalent (mandate), the common law creation of enduring powers was imported as part of comprehensive reform to guardianship laws. Thus, it features a rigorous screening regime at both registration and activation stages. The difference could also be expressed as one of institutional context. For example, in the common law jurisdictions and Germany, a legal professional is typically involved in drafting the document, which attracts professional obligations to assess capacity. In Japan, this step is more closely integrated into the process of registration itself because a state-appointed official is responsible for drafting and organising registration.

A third factor is that real or perceived differences among jurisdictions regarding problem areas may influence the degree of screening exercised at the point of registration. Minimal screening may reflect the perception, for example in Australia, that financial abuse typically occurs using validly created powers of attorney.¹⁵⁸ Pressure to enhance the screening role may occur, as in Japan, where the perception is rather that vulnerable persons with dementia are coerced into granting enduring powers by organised criminals, professionals, or family members with the purpose of abusing the powers.¹⁵⁹

¹⁵⁸ Law Reform Committee, Parliament of Victoria, above n 13, 27.

¹⁵⁹ For example, 'Fraudulent misuse of guardian system, former administrative scrivener etc. plead guilty at first hearing (kouken seido akuyou sagi hatsukouhan de moto gyousei shoshira kiso jijitsu mitomeru)', *Asahi Shimbun* (Tokyo), 26 July 2007; 'Guardian fraud, Committal hearing succeeds, First instance Tokyou District Court (tokyou chisai hatsu kouhankoukennin sagi, kiso jijitsu mitomeru)', *Mainichi Shimbun* (Tokyo), 26 July 2007; 'Adult guardianship: judicial scrivener makes remuneration claim beyond the law, disciplinary measures (seinen kouken: shihoushoshi ga hougai houshuu, 1 nenhan de 5 hyakuman en, shobun e)', *Mainichi Shimbun* (Tokyo), 14 September 2006; 'Property of the Elderly Targetted (rougo no zaisan ga nerawareru)', *NHK Close-up Gendai*, 22 May 2008.

Registration at the point of activation may play an equally important regulatory role. In most jurisdictions, activation is unmonitored and relies entirely on the representative's discretion. Some jurisdictions, such as Japan, require evidence of incapacity before activation, which then triggers the appointment of an additional 'monitor'. Other jurisdictions, such as the UK, impose notification obligations either directly upon representatives when they choose to activate the powers or that arise automatically upon registration or activation, which allows interested parties to object. There may also be alternative avenues for activation within one jurisdiction. For example, in Germany or the UK specific events can be linked to activation, including a medical assessment that the principal lacks decision-making capacity over financial matters. In Germany and Japan, activation may also be a point at which judicial intervention occurs to ensure that enduring powers (as evidenced on a register) are sufficient to protect the principal's interests.

B *Autonomy vs Paternalism?*

The regulatory role of registration is not determined solely by system design. An understanding of its regulatory role requires an appraisal of additional unintended effects that arise in implementation. These may run counter to the intentions of reformers, for example where additional procedural burdens aimed at strengthening regulation provide a disincentive for registration thereby preventing the regulatory net from being cast widely. In Japan, reformers have been disappointed by the uptake of enduring powers, which may be explained in part by structural issues such as the procedural and cost burdens of registration and activation.¹⁶⁰ Even where reformers have a clear vision, this may be compromised in practice by values that run counter to this on the part of gatekeepers or members of the wider community.

Japan provides an example of the influence of gatekeeper values on implementation of registration. The legislation merely specifies that an enduring powers agreement must be made through a notarised document.¹⁶¹ Public notaries in Japan are appointed by the state and have as one of their functions drafting documents to ensure that the rights of the parties are protected and to prevent future disputes from arising.¹⁶² While their authority to reject applications is unclear, a range of screening behaviour is compatible with this statutory mandate. Some notaries screen for capacity in borderline cases on the basis of interviews with the parties and medical documentation.¹⁶³ Some notaries reportedly divert applicants away from enduring powers toward low-level statutory guardianship. This is solely because statutory guardianship offers stronger protections (such as the power of the representative to void transactions), even though a person with sufficient capacity to enter into an enduring powers arrangement would (for this very reason) not technically qualify for statutory

¹⁶⁰ Kazuo Taniguchi, 'Why is the Adult Guardianship System Not Taking Root? (seinen kouken seido wa naze fukyuu shinai no ka)' (2013) 3 *Yutaka na Kurashi* 24, 24–25.

¹⁶¹ *nini kouken keiyaku ni kansuru houritsu* [Act on Voluntary Guardianship Contracts] (Japan), Act No 150 of 1999s 3.

¹⁶² Kobayashi and Otaka, above n 138, 57.

¹⁶³ Japan National Notaries Association, <<http://www.koshonin.gr.jp/nin.html#05>>.

guardianship.¹⁶⁴ Some notaries also reportedly discourage registration of enduring powers where there is no family consensus.¹⁶⁵ This is due to a well-founded prediction that where there are competing applications for activation of enduring powers and appointment of a statutory guardian, a family court may well opt for the latter.¹⁶⁶ Although the legislation clearly prioritises enduring powers, family courts in Japan have adopted a contextual, balancing approach, which takes into account matters that go beyond formal requirements and capacity, including the suitability of the representative, the content of the enduring powers agreement and the principal's needs in light of their family and community environment.¹⁶⁷ Finally, the majority of representatives fail to apply for formal activation and continue to operate on the basis of a standard, unregulated power of attorney contrary to the pre-expressed views of the principal.¹⁶⁸ It is apparent that the values of principals, notaries, and judges influence the screening role of registration in ways that may depart from the government and academic reformers who sponsored the importation of enduring powers.

According to some critics, the values reflected by these gatekeepers in the registration and activation process are inconsistent with the fundamental premise of enduring powers, namely that they are a principal's autonomous choice of substitute decision-maker for a future time when capacity for exercising that autonomy is diminished through dementia.¹⁶⁹ However, the question arises whether this is a convincing premise either theoretically or in practice. A competing view might be that registration facilitates a conciliatory, contextual approach consistent with social norms surrounding the resolution of conflict and the legitimate interest of family members in the well-being of other family members. These social norms are dynamic, contested and variable according to locality.¹⁷⁰ They are also under significant pressure from a larger process in recent decades whereby the state has attempted to impose formal, legal structures upon new social frontiers.¹⁷¹ This is in turn driven by a renewed commitment to the liberal values of autonomy and individualism and a preference for market forces evident in other reforms such as deregulation of welfare providers.¹⁷² Yet the apparent

¹⁶⁴ The creation of enduring powers is premised on sufficient capacity. In contrast, 'assistance' which is the lowest level of statutory guardianship requires 'insufficient capacity to understand the reason of things': *Civil Code of Japan* Act No 89 of 1896 s 15.

¹⁶⁵ Arai, above n 24, 9.

¹⁶⁶ Ibid.

¹⁶⁷ Nakayama, above n 157, 404; Yasuhiro Akanuma, 'Issues regarding the Adult Guardianship System and the Role of Lawyers (seinen kouken seido no kadai to bengoshi no yakuwari)' (2005) 58(6) *Houritsu no hiroba* 16, 20.

¹⁶⁸ Nakayama, above n 157, 403.

¹⁶⁹ Arai, above n 24, 10.

¹⁷⁰ Takao Tanase, 'Global Markets and the Evolution of Law in China and Japan' (2006) 27 *Michigan Journal of International Law* 895, 898.

¹⁷¹ Takashi Uchida and Veronica L Taylor, 'Japan's "Era of Contract"' in Daniel H Foote (ed), *Japanese Law: a Turning Point* (University of Washington Press, 2007) 467.

¹⁷² Toshikazu Yokoyama, *Marketisation and Commercialisation of Social Security (shakai hoshou no shijouka-eirika)* (Shin Nihon Shuppansha, 2003) 31.

failure of this process to entirely displace pre-existing social norms suggests that it is necessary to re-evaluate the premise that enduring powers are and should always be a pure autonomous choice of the individual. As explained below, this has ramifications for the regulatory role that registration of enduring powers is capable of playing.

Views on autonomy and protection are often polarised into two camps. One camp, of which Ronald Dworkin has been a representative thinker, argues that pre-expressed autonomy should be respected over the ‘experiential interests’ (perceived in the moment) of a person who has experienced a significant decline in capacity through dementia. Dworkin employs the concepts of integrity and ‘authorship’ of one’s overall life to justify this view.¹⁷³ The other camp is sceptical of what it regards as an absolutist approach to autonomy. Perhaps dominant within the institutions such as hospitals and courts that grapple with the everyday reality of dementia sufferers, this camp tends to emphasise the unknowability of the future and the need to balance autonomy with the realities of protection and care.¹⁷⁴

These two approaches have different ramifications for the screening role that registration may play. Screening for capacity and consent at the time of creating and activating enduring powers is consistent with Dworkin’s precedent autonomy model. When screening goes beyond these matters and facilitates interventions (including transition to statutory guardianship) in the best interests of the principal within that person’s wider family and social context, this is compatible with the second view. Arguably, this second approach is more able to combat financial abuse, precisely because it is more paternalistic. Indeed, if one were to take the pure autonomy model to its extreme, financial abuse could ultimately be regarded as a result of the autonomous (albeit poor) choice of representative on the principal’s part.

Some of the registration regimes considered above seek to steer a course between these poles. For example, in Germany and Scotland, the principal may opt in to registration as a more intensive avenue of regulation over the representative, which may include requirements to provide documentation for an alleged decline in capacity on the part of the principal. Other systems contain additional customisable safeguards such as notification requirements. One way of regarding these innovations is that they cater for different types of principal: those who fit the precedent autonomy model and those who prefer to submit their agreement by default to higher degrees of regulation, in effect conceding that their initial decision about who their representative should be (and how they should exercise their powers) needs to be evaluated continuously in light of their evolving social context.

¹⁷³ Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (Alfred A. Knopf, 1993) 221–229.

¹⁷⁴ See, eg, Susan Adler Channick, ‘The Myth of Autonomy at The End-Of-Life: Questioning The Paradigm of Rights’ (1999) 44 *Villanova Law Review* 577; Sarah Walker, ‘Autonomy or Preservation of Life? Advance Directives and Patients with Dementia’ (2011) 17 *University College London Jurisprudence Review* 100; Rebecca Dresser, ‘Dworkin on Dementia: Elegant Theory; Questionable Practice’ (1995) 25 *Hastings Centre Report* 32; Mary Donnelly, ‘Best Interests, Patient Participation and the *Mental Capacity Act 2005*’ (2009) 17 *Medical Law Review* 25.

One concrete issue for reformers that emerges from this discussion on autonomy is how to set the default rules for registration in a way that promotes the perceived benefits without creating disincentives to uptake. Many principals may be hesitant to opt in to regulation in a way that imposes additional burdens on representatives and may be corrosive to the relationship of trust essential to granting enduring powers. Therefore, it would be prudent to set default rules that allow principals to opt out of more intensive regulatory avenues if this is their preference.

C Open vs Closed Register?

As is evident from the survey above, there are diverse arrangements for accessing information on any register for enduring powers. The Tasmanian policy is one of relatively open access. Japan seeks to balance information security with convenience through innovations in online registration and certification. The UK has a layered approach to accessing the register based on need. Germany has a closed register that is only accessible to the courts. Application fees also have an impact on the accessibility of registers — fees provide a disincentive to data trawling by third parties, but may also detract from the convenience of a register if not determined responsively to purpose and ability to pay. A high degree of accessibility to the register has the appeal of convenience and may contribute to the security of transactions. However, this must be weighed against any possible chilling effect of public exposure on the creation of enduring powers. Furthermore, like the use of assistive technologies such as GPS tagging of dementia patients, there is a risk that pressure to find convenient solutions may preclude rigorous consideration of rights and ethical issues.¹⁷⁵

The term ‘privacy’ is often used loosely, reflecting the contested nature of the concept and inescapable tensions regarding private and social goods that reflect differing perceptions of dignity and risk. On the one hand, privacy can be regarded as oppositional to the welfarist value of protection whereby social workers can be seen as intrusive and paternalistic.¹⁷⁶ Aware of this perception, Australian reformers were concerned early in the shift to adult guardianship tribunals to ensure that privacy obligations were imposed on parties and tribunals.¹⁷⁷ As a result, privacy also came to be positioned as a value that competes with other traditional liberal values such as transparency and procedural fairness in proceedings.¹⁷⁸ Alternatively, in what some regard as an era of managerialism — in which state agencies outsource the labour of guardianship to private parties and focus instead on monitoring

¹⁷⁵ Karen Eltis, ‘Predicating Dignity on Autonomy? The Need for Further Inquiry into the Ethics of Tagging and Tracking Dementia Patients with GPS Technology’ (2005) 13 *Elder Law Journal* 387, 414.

¹⁷⁶ William H Simon, ‘Legality, Bureaucracy, and Class in the Welfare System’ (1983) 92 *Yale Law Journal* 1198, 1215.

¹⁷⁷ Robert D Nicholson, ‘Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability’ (1995) 2 *Journal of Law and Medicine* 270, 285.

¹⁷⁸ Robert D Nicholson, ‘Balancing Privacy and Natural Justice in Informal Tribunals: The Case of the Guardianship Boards’ (1995) 6 *Public Law Review* 307, 307.

processes¹⁷⁹ — privacy as interpreted and enforced by banks and other institutions is often seen as an impediment to the functionality of enduring powers.¹⁸⁰ Though this problem might be addressed by a reliable register, privacy as an impediment to the flow of information could then be seen to threaten a register's functionality.

When privacy is criticised as an impediment, what is often meant is 'information privacy'.¹⁸¹ This is a concept that focuses on control of information about oneself in an era in which a range of personal data is collected for various purposes, processed and stored on large databases and accessed without the individual's knowledge via the internet (potentially accessed and reprocessed by entities in another jurisdiction).¹⁸²

¹⁷⁹ Terry Carney, 'Re-Mixing "Access", "Advocacy", "Empowerment" and "Protection": A Case for a Specialised Division of Labour in Guardianship, Mental Health and Disability Services Adjudication?' (2003) 5(2) *Newcastle Law Review* 43, 54.

¹⁸⁰ Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) 102, noting that in part this may be due to difficulty understanding the complex legislation that has developed in the area.

¹⁸¹ Some commentators believe that privacy is increasingly anachronistic in this new environment: Polly Sprenger 'Sun on Privacy: "Get Over It"' (2009) 7(1) *Wired* 34. Others argue that it is a fallacy to regard it as a strong right: Mirko Bagaric, 'Rights Must Yield To Community Prosperity: The Fallacy That Is A Strong Right To Privacy' in Brett Mason and Daniel Wood (eds), *Future Proofing Australia: The Right Answers For Our Future* (Melbourne University Press, 2013) 65. See also James Whitman, 'The Two Western Cultures of Privacy: Dignity v Liberty' (2004) 113(6) *Yale Law Journal* 1151. Some counter that it is a fundamental value of the liberal democratic state in which there is a demarcation between the public and private sphere and in which people legitimately expect to enjoy the interrelated freedoms of thought, communication and association: Wolfgang Sofsky, *Privacy: A Manifesto* (Princeton University Press, 2009); and Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 7. Still, others argue that privacy continues to be relevant as a key facet of dignity and inextricably entwined with the agency that is a basis of legal personhood: See Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66(3) *Modern Law Review* 346; Franz Schoeman, *Privacy and Social Freedom* (Cambridge University Press, 2012); Julie Cohen, 'What Privacy is For' (2013) 126 *Harvard Law Review* 1904; and Thomas Hill Jr, 'Autonomy and Agency' (1999) 40(3) *William and Mary Law Review* 847. See also John Rawls, *Political Liberalism* (Columbia University Press, revised ed, 2005) 33; Thomas Nagel, 'Comments: Individual Versus Collective Responsibility' (2004) 72(5) *Fordham Law Review* 2015; and Barbara Carter, 'Adult Guardianship: Human Rights or Social Justice?' (2010) 18 *Journal of Law and Medicine* 143, 153.

¹⁸² Gehan Gunasekara, 'Paddling in Unison or Just Paddling? International Trends in Reforming Information Privacy Law' (2014) 22(1) *International Journal of Law & Information Technology* 141, 143–4. This has been a focus of recent law reform action at provincial, national and international levels, for example statutory change in Australian jurisdictions such as Victoria and the ACT and development by the OECD of global guidelines regarding health data, for example the *Privacy Act 1988* (Cth), *Health Records & Information Privacy Act 2002* (NSW), *Health Insurance Portability & Accountability Act of 1996*, 42 USC §201, *Children's Online Privacy Protection Act of 1998*, 15 USC 6501; and *Data Protection Act 1998* (UK).

It could be argued that a necessary aspect of autonomy — the right to self-determination and expression — entails the right to restrict what sensitive information pertaining to an individual appears in the public domain, an underpinning of the demarcation between the public and private spheres evident in all liberal democratic states. The onus is therefore on the designers of personal information databases to guarantee the security of information and live up to these guarantees, which has not always occurred in the past.¹⁸³ Yet some argue that privacy is inefficient as a consequence of the increased resource costs associated with compliance with protection regimes and opportunity costs associated with less direct access to information.¹⁸⁴

Whether one regards privacy as a strong right or not, as the Japanese experience shows, the failure to protect privacy is potentially fatal to the uptake of enduring powers. Nevertheless, the spectrum of protection afforded to privacy in enduring powers regimes across jurisdictions reveals differing assumptions and prioritisation of values. Jurisdictions in the United States and New Zealand reject any form of registration on privacy grounds,¹⁸⁵ perhaps due in part to ideological resistance to state interventions. Tasmania has embraced open access to promote security of transactions and efficiency. Other jurisdictions, such as the UK, have more tightly controlled access, which indicates a willingness to sacrifice the functionality and efficiency of the regime to some extent. With its legacy of discrimination and stigma, Japan takes privacy about dementia very seriously and has thus adopted a register that is relatively closed to the public. At the same time, it is open to other stakeholders, such as extended family members, which may reflect communitarian notions of privacy that situate the individual within a larger family context.¹⁸⁶ In this comparative light, the Victorian proposals indicate an attempt to protect privacy as far as this is consistent with a broadly accessible mandatory register. That is, one allowing routine online access to a large amount of data along with the associated risks of data breaches.

D Summary

Ultimately, registration may, in addition to protection values, reflect equally a concern to ensure certainty of transactions. However, assumptions about which of these values is prioritised can be revealed in design features. These include the manner

¹⁸³ For example, major data breaches involving Sony, Telstra, the US Veterans Administration, health service providers and retailers such as Target. Points of entry to the literature are provided by Daniel Solove and Chris Jay Hoofnagle, 'A Model Regime of Privacy Protection' [2006] *University of Illinois Law Review* 357; and Sasha Romanosky, Rahul Telang and Alessandro Acquisti, 'Do Data Breach Disclosure Laws Reduce Identity Theft?' (2011) 30(2) *Journal of Policy Analysis and Management* 256.

¹⁸⁴ Richard Posner, 'The Economics of Privacy' (1981) 71(2) *American Economic Review* 405, 407. See also Amitai Etzioni, *The Limits of Privacy* (Basic Books, 1999).

¹⁸⁵ Law Commission of New Zealand, *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) 18.

¹⁸⁶ Samanta, above n 105. This tradition is a contested one, however, with some commentators within Japan emphasising the potential conflict of interest that family members may have: Makoto Arai, 'Present Situation and Issues Regarding the Adult Guardianship System (seinen kouken seido no genjou to kadai)' (2005) 58(6) *Houritsu no hiroba* 4, 4.

and intensity of initial screening and whether initial screening is part of a longer term process whereby representatives are regularly monitored, whether by courts or their delegates, public officials, family members, or professional or civil society organisations. Where such gatekeepers are introduced, there is a risk that their values may depart from and undermine those that purportedly underpin the system. Yet customisation may be a way of reconciling these theoretical, cultural and ideological tensions within the wider field of substitute decision-making. Conversely, assumptions can be revealed by the form and degree to which principals can customise the degree of regulation, even where this may detract from the convenience of a uniform, mandatory regime. Proposed Victorian reforms allow for some customisation (the option of appointing a personal monitor), but the default rules of minimal active monitoring reveal a preoccupation with efficiency, functionality and certainty of transactions over protection values. This is also the case in the accommodation of privacy to these values in a proposed system where broad access and mandatory registration are non-negotiable necessities.

VI CONCLUSION

There are alternative means to achieving some of the perceived benefits of registration, such as promoting awareness of enduring powers in the community and financial institutions and enhanced prosecution of fraud and financial abuse by monitoring through official, institutional and community channels. Nevertheless, Victorian reformers have established that there are compelling arguments and apparently community support for establishing a registration system for enduring powers in Victoria and, by logical extension, in all Australian jurisdictions. Existing proposals demonstrate a willingness to consult with stakeholders on the design of the system and a view that privacy and cost issues are manageable.

Yet viewed comparatively, the Victorian recommendations (albeit differing on some points) reveal a prioritisation of efficiency, convenience and security of transactions. This is evident in each of the design variables considered above: the repository of the register, the screening role of this body, the identity of applicants, access to the register and protection afforded to third parties. Many opportunities for greater oversight of representatives have been dismissed or ignored. The proposals envisage that activating enduring powers will continue to be a matter solely for the discretion of representatives despite the regulatory opportunities offered by registration. Other than the proposed modest strengthening of witnessing requirements at the time of execution, the minimalist monitoring of capacity at the stages of execution and activation would remain unchanged under the default rules. Locating the register with the Registry of Births, Deaths and Marriages and 'layering' access would go only partially toward addressing concerns about data security where this data is routinely accessed by a large number of individuals and institutions. As the German example demonstrates, both protection and autonomy values associated with registration can be achieved without allowing broad access to information about existing enduring powers. The design of the system should attempt a better balance of competing values, lest reformers lose sight of the vulnerable individuals with dementia that enduring powers are ultimately supposed to serve.

LEGISLATIVE OVERSIGHT OF A BILL OF RIGHTS: THE AMERICAN PERSPECTIVE

ABSTRACT

In recent years, whenever a federal bill of rights is proposed for Australia, the example of the United States and particularly the ‘judicial activism’ of the US Supreme Court are usually cited as reasons to shoot down the proposal. However early US history, prior to American adoption of a federal bill of rights actually supports legislative rather than judicial oversight of rights issues. This little known history would seem to be in keeping with modern proposals for a federal bill of rights in Australia today, which usually emphasise parliamentary rather than High Court oversight of rights issues. However, the early American experience also provides a caution against the ‘dialogue model’ which is the most popular proposal for an Australian bill of rights in recent times. This is due to structural and federalism difficulties the dialogue model would likely create.

I INTRODUCTION

Every few years, in the course of the debate on whether or not Australia should adopt a Commonwealth bill of rights, other countries are frequently referred to as examples of what has worked and what has not. The most vilified example tends to be the United States. Indeed, while the debating parties disagree on many things, even some of the most ardent proponents of a bill for rights for Australia acknowledge that the entrenched US Bill of Rights — however popular it may be in America — is not a good example to emulate in Australia.¹ One of the most

* Duane L Ostler is a Post-doctoral Research Fellow at the University of Queensland. Prior to obtaining his PhD in law from Macquarie University he obtained a JD in the United States and practiced law in the State of Utah, USA, for 11 years.

¹ For example, George Williams, one of the strongest proponents of a bill of rights for Australia, has argued that ‘[w]e should jettison the US model and any idea of a constitutional bill of rights.’ George Williams, *A Charter of Rights for Australia* (University of New South Wales Press, 2007) 87–8. In their recent book, *Bills of Rights in Australia*, Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon acknowledge that ‘[t]he recent history of human rights in national legal systems reveals a movement away from the US-style bill of rights, which gives significant power to the judiciary’. Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon (eds), *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 51.

frequently repeated reasons against adopting an entrenched bill of rights is that such a bill gives the judiciary far too much power to make policy decisions that are more properly left in the realm of the legislature. In 1985, the Queensland government expressed the concept quite well:

The vast majority of the issues dealt with by a Bill of Rights reflect particular views of political, economic and social questions and are not, as such, matters requiring legal interpretation. The Judiciary is thus placed, in interpreting the provisions of a Bill of Rights, in the position to make determinations upon questions which should more properly be left to Parliament and the political process to determine. This results in the entire Judiciary becoming subject to political partisanship with a consequent decline in its effectiveness and standing in the general community. Respect for the general legal system thus declines once a Bill of Rights is enacted.²

It is therefore usually assumed that the US experience offers little positive support for the adoption of a bill of rights in Australia, particularly one which focuses on parliamentary rather than judicial oversight of rights. However, this article asserts one important way in which the US experience is, in fact, one of the best supports for parliamentary rather than judicial oversight of a bill of rights in Australia. In order to see this, it is necessary to go back in US history to a time when the US was in roughly the same position that Australia is in today — that of having a national constitution, but no national bill of rights. It was James Madison who initially drafted the federal bill of rights in the US, and pushed it through a reluctant Congress. Madison's views regarding the best way to protect rights were surprisingly more in line with the Australian preference for parliamentary rather than judicial protection of rights — even though he drafted the judicially enforced entrenched bill of rights himself. However, it was only political expediency and the disagreement of his peers that led Madison to act as he did.

Part II of this article will explain why and how the US Bill of Rights came into existence when it did and the negative views James Madison held toward a bill of rights. This is significant because historians have noted that if it were not for Madison, the US Bill of Rights may not have come into existence, or at least would certainly not have come about as soon as it did.³ Part III will explain Madison's unique and oft-forgotten solution to the question of how a national government can best protect rights through the legislative veto and Council of Revision. Part IV will discuss the relevance to Australia of these American perspectives.

² Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *A Bill of Rights for Australia?* (1985) 6.

³ See, eg, Kenneth R Bowling, 'A Tub to the Whale: The Founding Father and Adoption of the Federal Bill of Rights' (1988) 8 *Journal of the Early Republic* 223, 223–4. Robert Rutland asserts the Bill of Rights would still have been passed, but a little later in time. Robert A Rutland, 'The Bill of Rights at 200 Years: Bicentennial Perspective: The Trivialization of the Bill of Rights: One Historian's View of how the Purposes of the First Ten Amendments have been Defiled' (1990) 31 *William and Mary Law Review* 287, 287.

II JAMES MADISON'S VIEWS OF A BILL OF RIGHTS

At the very first session of the new US Congress in 1789, Madison proposed a bill of rights. His proposal was met with opposition from many of his contemporaries. They felt that diving immediately into constitutional amendments of this sort was inappropriate at such an early stage of the government when more pressing matters needed to be dealt with.⁴ They considered Madison's strange fixation with a bill of rights as an unusual obsession.

However, Madison's motive for submitting the proposed amendments was extremely pragmatic. During the state ratification debates of the previous year regarding the new constitution, it had been necessary to promise that a bill of rights would be added to the document if ratification were achieved. Without this promise, the Constitution would not have been ratified.⁵ But this is not all. Regardless of this promise, many opponents of the Constitution were calling for a new constitutional convention. Their intent went beyond adding language to protect rights; rather, they had structural changes in mind as well.⁶

Hence, Madison saw the adoption of a bill of rights not only as fulfilment of a ratification promise, but most importantly as being essential to guarantee the ongoing existence of the new federal government. He and other 'federalists' or 'constitutionalists' knew that the new government was still in its infancy and still had many enemies. If a second constitutional convention were held, those enemies may succeed at inserting the structural amendments and corrections they thought were necessary.⁷ Madison believed that a second convention of this type would be a disaster, since opponents of the Constitution would make significant structural changes, altering the whole form of government. As he stated in his speech proposing the Bill of Rights:

I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given; because I doubt, if such a door were opened, we should be very likely to stop at that point which would be safe to the Government itself.⁸

⁴ 1 *Annals of Congress* 446 (Joseph Gales) (1789, House of Representatives).

⁵ Drew R McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge Press, 1989) 89.

⁶ Carl T Bogus, 'The Hidden History of the Second Amendment' (1998) 31 *University of California at Davis Law Review* 309, 362–3; Leonard Levy, *Origins of the Bill of Rights* (Yale University Press, 1999) 39.

⁷ Bogus, above n 6, 262–3; Levy, above n 6, 39.

⁸ 1 *Annals of Congress* 450 (Joseph Gales) (1789, House of Representatives) Madison's speech presenting the proposed Bill of Rights was given in the House of Representatives on June 8, 1789. See also 1 *Annals of Congress* 448–59. (Joseph Gales) (1789, House of Representatives).

Hence, Madison's 'obsession' with a bill of rights was motivated by a desire to protect the structure he and others had worked so hard to obtain at the Constitutional Convention in 1787. It was a very pragmatic course of action by an astute politician. It is interesting to note that Canada's motivation for its 1982 *Canadian Charter of Rights and Freedoms* was quite similar.⁹ Faced in the early 1980s with possible withdrawal of Quebec from the Canadian union, the Trudeau government pursued the bill of rights charter revision as a way to demonstrate 'unity building' across Canada.¹⁰ Hence, the entrenched bills of rights in these two countries primarily came about for reasons that had little to do with rights.

Of course, this is *not* a situation that Australia faces today. It is beyond any question that the American and Canadian motives for adopting their entrenched bills of rights are simply not the same as the motives which exist in Australia today. However, recognising Madison's true motive in submitting the US Bill of Rights helps explain one of the most unusual anomalies in the history of government. This is the fact that Madison personally disliked and distrusted bills of rights and thought they were largely ineffective and pointless.

In light of this, it is no surprise that in drafting his proposed amendments, Madison carefully chose only those generalised statements that would not cause contention in the short run, and which would almost certainly be adopted.¹¹ His goal was to avoid rehashing the fundamental principles on which the new government was based while it was in its infancy. However, Madison's true dislike of a bill of rights frequently came out. He referred to the very Bill of Rights that he had prepared as a mere 'declaration of certain fundamental principles,'¹² and as a rather pathetic 'parchment barrier' that would not necessarily protect rights at all. Indeed, Madison was not the only one who thought that a bill of rights was more illusory than real. Samuel Livermore, a representative from New Hampshire, stated that his constituents would see the Bill of Rights as no 'more than a pinch of snuff; they went to secure rights never in danger.'¹³ Congressman Fisher Ames carried the point further. He stated that the Bill of Rights was 'a prodigious great dose for a medicine. But it will stimulate the stomach as little as hasty-pudding. It is rather

⁹ *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*').

¹⁰ For a detailed discussion of this process, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing, first published 1989, 1994 ed).

¹¹ See Letter from James Madison to Samuel Johnston, June 21, 1789, in Gaillard Hunt (ed), *The Writings of James Madison* (Putnam's Sons, 1787–1790) vol 5, 409–10. Madison stated that 'nothing of a controvertible nature ought to be hazarded' in the amendments so as to increase the chances of passing a Bill of Rights. See Letter from James Madison to Edmund Pendleton, June 21, 1789, in Gaillard Hunt (ed), *The Writing of James Madison* (Putnam's Sons, 1787–1790) vol 5, 406.

¹² Letter from James Madison to Ambrose Madison, June 24, 1788, cited in Hunt, above n 11, 226–7.

¹³ 1 *Annals of Congress* 805 (Joseph Gales) (1789, House of Representatives).

food than physic. An immense mass of sweet and other herbs and roots for a diet drink.’¹⁴

Some scholars have asserted that Madison initially disliked bills of rights, but later came to be in favour of them.¹⁵ However, this is simply not consistent with Madison’s own statements. As late as 1821, more than 30 years after he wrote the Bill of Rights and four years after he had departed from the political stage, he referred to the Bill of Rights as ‘those safe, if not necessary, and those politic if not obligatory, amendments introduced in conformity to the known desires of the Body of the people.’¹⁶

For Madison, a bill of rights was of little importance. However, because the bill of rights was so strongly favoured by many, he frequently made statements that showed marginal support (or at least tolerance) of a bill of rights. Simply put, Madison did not think a bill of rights was necessary, but he was willing to put up with one if he had to. He stated:

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment... I have favored it because I supposed that it might be of use, and if properly executed could not be of disservice.¹⁷

Having placated by this statement those who staunchly favoured a bill for rights, Madison went on to explain why he did not think a bill of rights to be worth the trouble and indeed why it might be dangerous. One of the most significant reasons for him was that

experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.¹⁸

¹⁴ William B Allen, *The Works of Fisher Ames* (Liberty Fund Inc, 1983) vol 1, 643.

¹⁵ See, eg, Robert L Jones, ‘Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance’ (2012) 27 *Journal of Law and Politics* 459; Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (Oxford University Press, 1993) 61; Leonard Levy, *Seasoned Judgments: The American Constitution, Rights and History* (Transaction Publishers, 1995) 9.

¹⁶ Letter from James Madison to John G Jackson, December 27, 1821, in Hunt, above n 1, vol 9, 75.

¹⁷ Letter from James Madison to Thomas Jefferson, October 17, 1788, in Hunt, above n 11, vol 5, 271.

¹⁸ *Ibid* 271–2.

In other words, Madison viewed a bill of rights as a mere ‘parchment barrier’ that was easily circumvented by the legislature. It created a dangerous illusion that rights were now protected, even though the legislature often felt free to ignore these guarantees. The reason legislatures would do this was simple and obvious to Madison, although not as apparent to others. It had to do with factions, a subject he eloquently addressed in *The Federalist* Number 10.¹⁹ A faction was a group of citizens with a common interest, but with little regard for the rights of those who opposed them.²⁰ When the faction consisted only of a minority of a community, the majority held it in check. However, when the faction was in the majority, then it would often abuse the rights of the minority.

Hence, Madison stated that ‘[w]hen a majority is included in a faction, the form of popular government ... enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.’²¹ On another occasion, he said that

wherever the real power in a government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.²²

In sum, Madison did not view a bill of rights as being a very effective way of guaranteeing rights when the majority trampled on them. Most of the new American states had a state bill or declaration of rights.²³ But state bills of rights were sometimes ignored due to factions in the legislature. Madison had personally seen this happen in Virginia. In 1785, after the Virginia Bill of Rights had been adopted and was supposedly serving to protect the rights of the people, a majority in the legislature tried to pass a bill that would use tax money to pay the clergy. This was a clear violation of the new Bill of Rights, which the majority of Virginia legislators were only too happy to ignore. Madison strongly opposed this new bill.²⁴

Federalism was a new concept at this point. The structure of concurrent state and federal jurisdiction over the populace was a new experiment. Based on what he had

¹⁹ Benjamin Fletcher Wright (ed), *The Federalist: The Famous Papers of the American Government* (Barnes & Nobles Books, 1961) 129–36.

²⁰ Ibid 130.

²¹ Ibid 132.

²² Letter from James Madison to Thomas Jefferson, October 17, 1788, in Hunt, above n 11, vol 5, 272 (emphasis altered).

²³ Bills of Rights for most of the states in this era can be found in: Francis Thorpe (ed), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, Colonies Now or Heretofore Forming the United States* (Washington Government Printer, 1909), and William F Swindler, *Sources and Documents of United States Constitutions* (Oceana Publications, 1973).

²⁴ Madison’s ‘Memorial and Remonstrance’ against this bill is found at: Hunt, above n 11, vol 2, 183–91.

seen, Madison believed that most abuses of rights would be by the states. He had less concern for abuses of rights by the federal government, due to the severe limitations on its power in the Constitution. Hence, Madison viewed a bill of rights at the federal level as being of little value because it would apply only to what was at that time a small federal government, and would not protect individual citizens from abuses of power by states.²⁵ In Madison's view, what was chiefly needed was a way for the federal government to protect citizens from abuse of rights by the states. As historian and scholar William L Miller stated, Madison 'believed that the states were more likely to violate civil liberties than was the new federal union — a prediction that history has surely proved to be correct.'²⁶

Madison also expressed another concern about bills of rights. This was that listing certain rights as protected could create the illusion that rights not on the list could be controlled and violated at will by the government. When Madison presented his proposed bill of rights to Congress in 1789, in his discussion of the pros and cons of having a bill of rights, this was the strongest argument against having one that he cited:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. *This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.*²⁷

Madison was not the only founder with this concern. Alexander Hamilton in the Federalist No 84 stated that a bill of rights could be dangerous because it would 'contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.'²⁸ Representative James Jackson of Georgia also noted that

[t]here is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.²⁹

²⁵ Since passage of the 14th Amendment, most of the federal bill of rights has been 'incorporated' to apply directly to the states. A description of this process can be found in: Joseph A Melusky and Whitman H Ridgway, *The Bill of Rights: Our Written Legacy* (Krieger Publishing Company, 1993), 29–31.

²⁶ William L Miller, *The Business of May Next: James Madison and the Founding* (University of Virginia Press, 1994) 254.

²⁷ 1 *Annals of Congress* 456 (Joseph Gales) (1789, House of Representatives) (emphasis added).

²⁸ Wright, above n 19, 535.

²⁹ 1 *Annals of Congress* 460 (Joseph Gales) (1789, House of Representatives).

Madison proposed what ultimately became the 9th Amendment to deal with this problem. This amendment states that ‘the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.’³⁰ Accordingly, unenumerated rights would still be protected, and any implication that unlisted rights could be controlled by government was assumed to be overcome. Unfortunately, however, this amendment has been little used. In modern US history, rights have usually been implied by way of the due process clause of the 14th Amendment rather than by using the 9th Amendment as originally intended.³¹

III MADISON’S VIEWS ON THE BEST WAY TO PROTECT RIGHTS

Whatever his misgivings about the Bill of Rights, Madison firmly believed there *was* a direct and effective way to protect individual rights from state abuses. This method was so vital to his thinking that he proposed it at the commencement of the Constitutional Convention in 1787. This was no afterthought, or language written merely to satisfy the whims of those clamouring for a bill of rights or threatening a second constitutional convention. Rather, it was fundamental to Madison’s whole plan of government. It consisted simply of this: that the federal legislature would retain an absolute power to veto all acts by the state legislatures violative of rights.³² Hence, rights protection would primarily be structurally provided by the federal legislature, or Congress.

This concept was proposed by Madison at the very start of the Constitutional Convention in 1787, years before the Bill of Rights was adopted. The sixth resolution of his Virginia Plan stated that the National Legislature should have the power ‘to negative all laws passed by the several States contravening, in the opinion of the National Legislature the articles of Union’.³³ Obviously, such a power could be very broad, since almost anything could come within the National Legislature’s opinion. Later, during the debates, Madison confirmed this broad view when he stated that

an indefinite power to negative legislative acts of the states [was] absolutely necessary to a perfect system. Experience had evinced a constant tendency in the states to ... [among other things] oppress the weaker party within their jurisdictions.³⁴

³⁰ *United States Constitution* amend IX.

³¹ See Melusky and Ridgeway, above n 25, 29–31.

³² For an informative discussion of Madison’s thoughts regarding the legislative veto, and why a bill of rights was not an effective instrument, see Robert A Goldwin, *From Parchment to Power: How James Madison used the Bill of Rights to save the Constitution*, (American Enterprise Institute, 1997) 59, 65; see also Jack N Rakove, ‘James Madison and the Bill of Rights’, *This Constitution: A Bicentennial Chronicle* (Washington DC) (1988) 4.

³³ Hunt, above n 11, vol 3, 19. The Virginia Resolutions, although originating from the mind of Madison, were proposed to the Convention by Virginia Governor Edmund Randolph on May 29, 1787.

³⁴ Hunt, above n 11, vol 3, 121.

This statement demonstrates clearly that for Madison a legislative veto was the chief instrument to protect individual rights and would be far more effective than a written bill of rights.³⁵

One may wonder why Madison had such a distrust of state legislatures, yet was willing to put so much trust in the federal Congress. The reason was once more in relation to federalism and the check it provided to factions, which he considered to be the greatest source of threats to individual rights. Simply put, it was not at all strange for factions to take control of smaller state governments, but it was far less likely that they would assume control of the legislature of a large government, drawing its membership from a diverse group of states. Madison stated that '[t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States'.³⁶ This is because of the greater diversity to be found where there is a 'greater number of citizens and extent of territory'.³⁷ Hence, the very size of a large republic would be the most effective tool for controlling the factions that arose within it.

But Madison was also a pragmatist and knew that even with the severe limitations on its power described in the Constitution, that federal Congress might still abuse the rights of the people. That is why the eighth resolution of his 'Virginia Plan' proposed the formation of a 'council of revision', which would be composed of the chief executive — the President of the United States — and 'a convenient number of the National Judiciary' who would have 'authority to examine every act of the National Legislature before it should operate,' with the power to veto any congressional act.³⁸ The veto could be overcome by Congress re-passing the law. This was the predecessor of the veto power, which was changed by the constitutional convention to rest solely with the President.³⁹

What Madison wanted was a mechanism whereby violations of rights could be stopped before they took effect. Again, for Madison, the only way the legislative veto power by the federal Congress over state acts could be effective was for it to be unlimited. He said:

in order to give the negative this efficacy, it must extend to all cases. A discrimination [ie partial or limited legislative veto power] would only be a fresh source of contention between the two authorities [the federal and state governments] ... This prerogative of the General Government is the great pervading principal that must controul the centrifugal tendency of the States; which, without it, will

³⁵ Alexander Hamilton also favoured a federal veto power over questionable state acts. However, he felt that federally appointed state governors would be the best ones to exercise this power, rather than the federal Congress. Hunt, above n 11, vol 3, 196, 207.

³⁶ Jacob E Cooke (ed), *The Federalist* (Wesleyan University Press, 1961) 64.

³⁷ Ibid 63.

³⁸ Hunt, above n 11, vol 3, 19.

³⁹ *United States Constitution*, Art 1, § 7, para 2.

continually fly out of their proper orbits and destroy the order and harmony of the political system.⁴⁰

It must be remembered that this was 1787, long before the incorporation doctrine of the 14th Amendment allowed the federal Bill of Rights to be enforced in all the states, and long before the ‘commerce power’ was interpreted so expansively that the federal Congress could impose legislation on all the states. When the federal Bill of Rights was first enacted, it was understood that it would only apply to the federal government and would not reach state abuses.⁴¹ For Madison, the best way to deal with such state abuses was through the national legislature. It was Madison’s colleagues in the constitutional convention that switched his legislative veto to judicial oversight by the Supreme Court, rather than Congress and changed his council of revision to a veto power in the executive only. These changes occurred over Madison’s objections.

Many members of the constitutional convention did not agree with Madison’s proposed legislative veto. The small states objected that the larger number of representatives from the larger states might use the federal veto power as a tool to bully the small states.⁴² Many also wondered how the national legislature could review all state laws. As James Mason said, ‘[a]re all laws whatever to be brought up? Is no road nor bridge to be established without the Sanction of the General Legislature?’⁴³

Ultimately the convention changed the negative proposal significantly, but did not utterly abolish it. Instead, the delegates specified certain limits to state power within the body of the Constitution, in art 1, s 10. If the states defied these limits, the federal judiciary could then declare their acts unconstitutional, or, failing that, the Congress would take action by passing a federal law. As stated by Governor Morris, ‘a law that ought to be negatived will be set aside in the Judiciary department and if that security should fail; may be repealed by a National law.’⁴⁴ In essence, Madison’s legislative veto was replaced with a judicial veto. An entrenched system of rights protection was born, to be enforced by the judiciary. This was directly contrary to Madison’s thinking that the legislature was the best body to protect individual rights — which mirrors the thinking of many who favour a bill of rights in Australia today.

After the convention, Madison revealed to Thomas Jefferson his thoughts regarding the failure of the delegates to agree to his legislative veto, and their replacement of it with a judicial veto, which he considered to be inferior. Madison stated:

⁴⁰ Hunt, above n 11, vol 3, 122.

⁴¹ The Supreme Court so ruled in *Barron v Baltimore*, 32 US 243 (1833).

⁴² Hunt, above n 11, vol 3, 125–6. This point was raised by Gunning Bedford of Delaware.

⁴³ Hunt, above n 11, vol 4, 287. It is significant that Mason’s example had to do with a rights issue—a ‘taking,’ or exercise of the power of eminent domain, to take private property to build a public road or bridge.

⁴⁴ Hunt, above n 11, vol 3, 449.

a constitutional negative on the laws of the States seems equally necessary to secure individuals against encroachments on their rights ... A reform therefore which does not make provision for private rights, must be materially defective. The restraints against paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark.⁴⁵

In sum, Madison believed the convention had missed the best way to protect rights. This was the legislative veto which would have given the national legislature power to take swift action against any state attempting to defy rights and a council of revision which would provide a watchdog over possible rights violations by Congress. While these proposals by Madison are almost forgotten today, for him they were essential parts of the plan for a new federal government.

Of course, the judicial and presidential vetoes were still in place and the federal legislature as a rights safeguard was as well. Publicly, Madison noted these and cited them as safeguards, since he knew the system that had been created was still better than the alternative. Hence in the *Federalist* No 51, Madison stated that because of the division of government between states and the federal power, and the further divisions of power within each government, society was 'broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.'⁴⁶

But privately, Madison was still not satisfied. In the convention debates after the legislative veto was rejected, Madison said of the judicial veto:

The jurisdiction of the supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was, that this was sufficient. *A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.*⁴⁷

Hence, Madison acknowledged to his contemporaries in the convention that the judicial veto had to be 'sufficient,' even though the legislative veto (which he thought would be much better) had been overruled. However, he continued to lament the loss of a legislative veto in his private correspondence with Jefferson. A judicial veto power, although better than nothing, was problematic. He stated:

It may be said that the Judicial authority, under our new system will keep the States within their proper limits, and supply the place of a negative on their laws.

⁴⁵ Letter from James Madison to Thomas Jefferson, October 24, 1787, in Hunt, above n 11, vol 5, 27 (emphasis added).

⁴⁶ Wright, above n 19, 358.

⁴⁷ Hunt, above n 11, vol 4, 443–4 (emphasis added).

The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed.⁴⁸

In so saying, Madison raised the very policy-making issue that opponents of entrenched bills of rights raise today. Judicial intervention in questions of rights can only come *after* a violation has occurred. We must wait for someone to be hurt, then ask the courts to remedy the matter. In so doing, courts are aware that their decisions are not limited to the case at hand, but will be considered binding law on all similarly situated persons in the future. They are also aware that their decision has the potential to override legislation, since the bill of rights is considered superior to legislation. In short, under such a system, the risk was ever present that courts might depart from the law to make policy decisions better left to the legislature. Madison disliked such a structure. For him it was abundantly obvious that the best branch of government to protect rights was the federal legislature.

Indeed, on another occasion, Madison commented pointedly about the dangers of judicial activism in respect to threatened rights. This comment was made in 1799, as part of his response to the *Alien and Sedition Acts of 1789* ('*Alien and Sedition Acts*') which were enacted during the presidential administration of John Adams. These Acts allowed the president to deport 'dangerous' aliens, and criminalised certain criticisms of the government.⁴⁹ This naturally implicated the 1st Amendment right of free speech. Because the authority to enact such Acts was hard to find in the written Constitution, some justified them on the basis that the Constitution impliedly incorporated the British common law, and that the Acts were made under the authority of the common law. While many states had adopted the common law in their jurisdictions, it had never been adopted as binding on the federal government. Accordingly, Madison strongly disagreed with the assertion that the *Alien and Sedition Acts* could be supported by the common law, and concluded that 'the common law never was, nor by any fair construction ever can be, deemed a law for the American people.'⁵⁰ Madison was particularly firm that the Supreme Court should not interpret the common law as support for a constitutional right. He stated:

whether the common law be admitted as of legal or of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power ... [they would] decide what parts of the common law would, and what would not, be properly applicable to the circumstances of the United States. A discretion of this sort has always been lamented as incongruous and dangerous

⁴⁸ Letter from James Madison to Thomas Jefferson, October 24, 1787, in Hunt, above n 11, vol 5, 26–7. James Wilson from Pennsylvania expressed a similar sentiment during the 1787 Convention, stating that '[t]he firmness of judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law, than to declare it void when passed.' Hunt, above n 11, vol 4, 287.

⁴⁹ For a detailed description of the *Alien and Sedition Acts* see John Chester Miller, *Crisis in Freedom: The Alien and Sedition Acts* (New York, 1951).

⁵⁰ Hunt, above n 11, vol 6, 380–1.

... the power of the judges over the law would, in fact, erect them into legislators, and ... it would be impossible for the citizens to conjecture, either what was or would be law.⁵¹

Jefferson also was greatly concerned with judicial activism of this sort. In 1819 he expressed concern regarding the decisions of 'unelected' judges who would view the Constitution as 'a mere thing of wax ... which they may twist and shape into any form they please.'⁵²

IV THE RELEVANCE TO AUSTRALIA

From the above, it can be seen that Madison's ideas support the belief held by many Australians that the legislature, rather than the judiciary, is the entity best equipped to deal with rights questions. As such, the American experience may be cited as support for the legislative oversight of rights issues that is espoused by many in Australia today.

However, the relevance of the American example does not end there. The American experience also suggests that problems may arise from a *statutory* bill of rights such as has frequently been proposed for Australia. Difficulties may result due to structural and federalism issues that are unique to Australia. Each of these issues are discussed in turn.

A The Structural Problem

As can be seen from Madison's proposal for a parliamentary rather than a judicial veto of rights violations, parliamentary oversight of rights questions appears at heart to be an entrenched constitutional-structural issue. This is so because any change regarding which governmental body has oversight of rights issues may alter the constitutionally entrenched relationship between Parliament and the judiciary. However, most proposals for a national bill of rights in Australia today call for a statutory bill of rights, rather than formal amendment of the *Australian Constitution*. The model that has probably been the most discussed in Australia today is the 'dialogue' form of bill of rights, which many feel is the most likely to be adopted. This method originated in the United Kingdom with the *Human Rights Act 1998* (UK), and variation of it has been adopted in Victoria and the Australian Capital Territory.⁵³ However, as Madison's views and the American example illustrate, a statutory attempt to alter the constitutional relationship between the legislature and the judiciary is problematic.

⁵¹ Ibid 378, 380–1.

⁵² Paul Leicester Ford, *The Writings of Thomas Jefferson* (Putnam's Sons 1803–1807) vol 12, 137.

⁵³ *Human Rights Act 1998* (UK). See also *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

In the recent discussion about whether to pursue adoption of a bill of rights by the Labour government in 2009–2010, the Human Rights Consultation Committee concluded that the statutory dialogue model was the best alternative for Australia.⁵⁴ Under this ‘dialogue’ form of bill of rights, which has been adopted in the ACT and Victoria, the bill of rights is a statutory enactment rather than a constitutional amendment. The statute contains the further restriction that the judiciary may not invalidate statutes which violate rights. Rather, courts are to interpret all statutes compatibly with rights. If the courts feel they cannot provide such an interpretation because the legislation is contrary to the statutory bill of rights, they may then issue a ‘Certificate of Incompatibility’, which is only an opinion for the legislature to consider. This is said to open a ‘dialogue’ on the matter between the branches of government. However, it is left solely to Parliament to change laws that could violate rights.⁵⁵

While such a proposal may be appealing, it is nonetheless difficult for a mere statute to alter the constitutionally entrenched structure of judicial review that is followed in Australia today. Accordingly, it would appear that a statutory bill of rights provides only a non-structural solution to a structural problem, and is based on the assumption that mere legislation can somehow bypass judicial review provided for in the Constitution. Because of this, judicial behaviour may continue as it has, regardless of any statutory attempt to change things. While Australia has a rich tradition of holding the judiciary to well defined paths,⁵⁶ tradition alone may not be enough to preserve the separation between the branches of government if a statutory bill of rights is enacted.

Indeed, the recent case of *Momcilovic v The Queen*⁵⁷ highlights this structural problem by demonstrating that a statutory bill of rights may not fully be respected by the courts, regardless of the intent of the drafters of such an act. Three out of seven justices on the High Court stated that the ‘Declaration of Inconsistent Interpretation’ provided for in Victoria’s statutory bill of rights was invalid in their view because it impairs the institutional integrity of the courts.⁵⁸ However, if one more justice had joined this group, the very purpose of the Victorian Act would have been threatened. Furthermore, two other

⁵⁴ Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation Report* (2009) 15. The Committee’s Findings: <<https://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>>. However, in April 2010, the Labor government indicated that it would not be pursuing a bill of rights for Australia at the present time.

⁵⁵ The ‘dialogue’ method is discussed in greater detail in Byrnes, Charlesworth and McKinnon, above n 1, 51–4.

⁵⁶ See *Singh v Commonwealth* (2002) 222 CLR 322 for a discussion of this tradition.

⁵⁷ (2011) 245 CLR 1 (*Momcilovic*).

⁵⁸ The justices so holding were Gummow, Hayne and Heydon JJ. The justices noted that it was not the High Court but the Victorian Supreme Court which had its ‘institutional integrity’ impaired pursuant to the Kable principle. However, a similar impairment could be found in respect to a statutory bill of rights for all of Australia if one were enacted. See *Momcilovic* (2011) 245 CLR 1, 97 [188], 123 [280], 184 [456].

justices felt that issuance of such a statement by a court could be valid, but that the Court of Appeal's issuance of such a statement in that specific case was erroneous.⁵⁹ Hence, a majority of the court indicated that a 'Declaration of Inconsistent Interpretation' was inappropriate in the case.

Closely related to the structural problem faced by a statutory bill of rights in Australia today is a potential federalism and constitutional problem under s 109.

B Federalism and the Constitutional Problem under s 109

Federal oversight of state rights issues was a major concern for James Madison, as we have seen above. The relationship between the federal government and the states in a federal government such as the United States and Australia is always a delicate matter, and is in a constant state of flux. Proposals for an Australian bill of rights today have the potential of altering the relationship between the states and the federal government. Section 109 of the *Australian Constitution* says that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' Some feel that this clause will be invoked no matter how carefully a Commonwealth statutory bill of rights is crafted to avoid it. Hence, they feel it will be impossible to keep the federal government from interfering with the states, which clearly impacts federalism in Australia. While the Senate in Australia was created and designed to protect the states within the federal system, the structure of the dialogue method and s 109 may still allow the federal Parliament far greater power to override state decisions, thereby injuring the independence of the states.

Mere verbiage in a bill of rights act intended to deal with this federalism problem may simply not be enough. For example, the 2009 proposal by the National Human Rights Consultation Committee asserted that a statutory bill of rights should apply only to federal acts. However, scholar Anne Twomey pointed out that even with such language, the High Court could still decide that s 109 is implicated if it so wanted. This is because there would be an obvious inconsistency any time a state law violated rights protected under the federal statutory bill of rights.⁶⁰ Indeed, as Hayne J observed in *Momcilovic*, it would be wrong

to conclude that it is for the federal legislature to determine for itself whether or to what extent s 109 is engaged with respect to any particular law of the Commonwealth. Resolution of the question must rest with the judicial branch by its application of accepted principles.⁶¹

Hence, notwithstanding any language in a bill of rights to the contrary, a bill of rights may be interpreted by the High Court as being applicable to the states through s 109.

⁵⁹ The justices so holding were Crennan and Kiefel JJ. See *Momcilovic* (2011) 245 CLR 1, 240 [658].

⁶⁰ National Human Rights Consultation Report, above n 54, 305.

⁶¹ *Momcilovic* (2011) 245 CLR 1, 133 [313].

Examples of seemingly successful statutory bills of rights in other countries do not prevent this conclusion, since in most cases they do not have the same federal structure as Australia. As Gummow J said in *Momcilovic*:

the human rights systems established in the United Kingdom, Canada, South Africa, New Zealand and Hong Kong ... present imperfect analogues. None of them involves legislation of a state or provincial legislature in a federal structure with a rigid constitution.⁶²

Indeed, the possibility of judicial enforcement of a Commonwealth bill of rights to the states under s 109 is bolstered by Australia's obligation due to its ratification of the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').⁶³ Australia has a duty under its treaty ratification to implement these treaties across Australia, including in all the states, not just the federal government.⁶⁴ An example illustrates this concern. In 1992, Nicholas Toonen submitted a 'communication' to the Human Rights Committee in Europe, under the ICCPR that Australia had acceded to in the prior year. Toonen complained that Tasmania's criminal code outlawing homosexual behaviour violated his right of privacy. The Committee agreed, but of course it had no jurisdiction to enforce its decision.⁶⁵ However, the Keating government in Canberra then enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth). This federal law said that any law in Australia which created an 'arbitrary interference with privacy' was void, regardless of whether the law was enacted by 'the Commonwealth, a state or a territory.'⁶⁶ The unquestioned intent was to override Tasmania's law by using s 109 of the Commonwealth Constitution.⁶⁷ Of course, in this example it was the Commonwealth Parliament, not the High Court that took this point of view regarding s 109. However, as noted above

⁶² (2011) 245 CLR 1, 83 [146]. Canada is the only country named by Gummow J with a federal structure similar to Australia. Canada had a statutory bill of rights for a short period of time, but subsequently enacted an entrenched bill of rights which remains in force to this day. See Mandel, above n 10.

⁶³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1967) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993, UNTS 3 (entered into force 3 November 1976) ('ICESCR').

⁶⁴ Article 50 of the ICCPR states that '[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.' ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1967). An identical provision is found in Article 28 of the International Covenant on Economic, Social and Cultural Rights ICESCR, opened for signature 16 December 1966, 993, UNTS 3 (entered into force 3 November 1976). These provisions are binding on all ratifying states, such as Australia.

⁶⁵ Williams, above n 1, 49.

⁶⁶ *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4.

⁶⁷ Williams, above n 1, 49.

by Hayne J's comment on s 109 in *Momcilovic*, the High Court may also interpret s 109 broadly in like fashion.⁶⁸

Protecting the system of federalism in Australia is a real concern for many today. A recent Senate Committee report on federalism reported that

In the 110 years since its inception, federalism in Australia has come under growing pressure ... Perhaps not surprisingly, this has created tensions in federal state relations and been a factor in undermining the power and authority of the states and territories to be true partners in the federation.⁶⁹

The Committee noted that the single factor which has most significantly undermined federalism in Australia has been pro-Commonwealth decisions of the High Court.⁷⁰ The Committee observed that if such 'expansive interpretations' of the High Court continue, the resulting growth in federal power 'would further undermine the Constitutional balance struck at the time of federation between the states and the federal government.'⁷¹ For this reason the Law Council of Australia recently stated that 'there is growing consensus across politics, business and the community that there needs to be a reallocation of powers in the Australian Federation.'⁷² The Senate Committee then urged that issues relating to federalism 'should be widely debated among Australians,'⁷³ and that it 'encourages more extensive academic research to be undertaken on the subject with a view to formulating policy proposals that might be referred to a constitutional convention for possible constitutional change.'⁷⁴ This statement indicates that, once again, structural change may be needed to safeguard the states. However, a statutory bill of rights does not provide such a structural change.

V CONCLUSION

The American experience — at a time when it had no bill of rights — is in keeping with the desire of many in Australia for legislative, rather than judicial, oversight of rights issues. However, the American experience also highlights some potential problems that may arise under a purely statutory bill of rights. Careful thought will need to be given to ways in which these problems may be overcome in Australia. Some method of constitutional entrenching of parliamentary oversight of rights may be needed. If this can be achieved, Australia will show the world a better way to deal with rights.

⁶⁸ See above n 58.

⁶⁹ Senate Select Committee on Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: an agenda for reform* (2011) 18 [1.63].

⁷⁰ *Ibid* 28 [2.25].

⁷¹ *Ibid*.

⁷² *Ibid* 26 [2.19].

⁷³ *Ibid* 28 [2.28].

⁷⁴ *Ibid* 29 [2.29].

TO LEASH OR NOT TO LEASH THE DOGS OF WAR? THE POLITICS OF LAW AND AUSTRALIA'S RESPONSE TO MERCENARISM AND PRIVATE MILITARY AND SECURITY COMPANIES

ABSTRACT

The growth in the number of private military and security companies ('PMSCs') in the post-Cold War era has been exponential. An oft-raised concern regarding this growth is how to deal with PMSCs in relation to international anti-mercenary norms. Some would say that PMSCs are little more than corporatised mercenaries and deserve moral and legal opprobrium as mercenaries. Others maintain that PMSCs are legitimate military and security service providers, capable of self-regulation under industry codes and international regulatory initiatives on PMSCs. Others argue that even if PMSCs do not fit the mercenary tag, they pose problems for stability in weak or failing states, which often lack the means to make PMSCs accountable for their actions. This article focuses on evaluating Australian responses to international concerns about the modalities of mercenarism both past and present. The critical core of the article is the argument that achieving progress on building legal frameworks to regulate the privatisation of war is inextricably linked with the politics of law.

I INTRODUCTION

It seems paradoxical that Australia declined to support the *International Convention Against Recruitment, Use, Financing and Training of Mercenaries*¹ in 1989 and yet in 1991 ratified the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International*

* BA Hons, PhD, Grad Dip Ed, LLB Hons (Adelaide); Tutor, Department of Politics and International Studies, University of Adelaide; Lecturer and Tutor, University Preparatory Program, University of Adelaide.

¹ *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) ('*Mercenaries Convention*'). The *Mercenaries Convention* entered into force when it attained the required number of 22 ratifications under art 19(1).

Armed Conflicts (Protocol I),² both of which defined ‘mercenary’ in substantially similar terms.³ Australia still had not become a party to the *Mercenaries Convention* in 2008 when it supported *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*,⁴ and is unlikely to sign the *Mercenaries Convention* as it is ill-suited to dealing with the privatisation of war in the post-Cold War era.⁵ This article will explicate the above paradox and problematise what various United Nations (‘UN’) fora have called the ‘new modalities of mercenarism’.⁶

The ‘new modalities of mercenarism’ refers to the activities of private military and security companies (‘PMSCs’) in conflict and post-conflict settings. Mistreatment and torture of prisoners throughout 2003–04 in Abu Ghraib prison, near Baghdad, is a frequently cited example of how the excesses of PMSCs are said to infringe human rights; in this example, CACI International provided interrogators, while Titan

² *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) (‘*Additional Protocol I of the Geneva Conventions*’).

³ See below Part II(A).

⁴ *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (17 September 2008) <<http://www.icrc.org/eng/resources/documents/publication/p0996.htm>> (‘*Montreux Document*’). See also *Letter Dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to the Secretary-General*, UN GAOR, 63rd sess, Agenda Item 76; UN SCOR, 63rd sess, UN Docs A/63/467 and S/2008/636 (6 October 2008) annex (‘*Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*’).

⁵ See below nn 95–107 and accompanying text.

⁶ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN GAOR, 3rd Comm, 62nd sess, Agenda Item 69, UN Doc A/C.3/62/L.62 (8 November 2007) Preamble para 10; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 62/145, UN GAOR, 62nd sess, 76th plen mtg, Agenda Item 69, Supp No 49, UN Doc A/RES/62/145 (4 March 2008) Preamble para 9; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 63/164, UN GAOR, 63rd sess, 70th plen mtg, Agenda Item 63, Supp No 49, UN Doc A/RES/63/164 (13 February 2009) Preamble para 9. See also Commission on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, UN ESCOR, 61st sess, 3rd mtg, Agenda Item 5, UN Doc E/CN.4/2005/23 (18 January 2005) 6–7 [6]–[7], 9 [15]–[16], 18 [59]; UN Working Group on the use of Mercenaries, *Use of Mercenaries as a Means of Violating Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN GAOR, 62nd sess, Agenda Item 71, UN Doc A/62/301 (24 August 2007) 20 [68].

Corporation provided translators.⁷ Another frequently cited example is the Nisour Square massacre. On 16 September 2007, Blackwater personnel, escorting a convoy of United States ('US') diplomats, fired into commuter traffic at Nisour Square, Baghdad, killing 17 people and injuring scores more. Blackwater claimed that their personnel had fired in self-defence after having come under fire from insurgents, but this claim has been widely discredited.⁸ In response to its notoriety, Blackwater, founded in 1997, rebranded itself as Xe Services in 2009 and then as Academi in 2011; it now goes by the name Constellis Holdings, which was formed in June 2014 when Academi merged with a rival company, Triple Canopy.⁹ On 22 October 2014, a US Federal District Court jury convicted four Blackwater personnel of, variously, murder, manslaughter and weapons charges for their involvement in the massacre.¹⁰

⁷ Mark W Bina, 'Private Military Contractor Liability and Accountability After Abu Ghraib' (2005) 38 *John Marshall Law Review* 1237, 1244–5; Seymour M Hersh, 'Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?', *The New Yorker* (online), 10 May 2004 <http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=all>; Human Rights Watch, *The Road to Abu Ghraib* (June 2004) 1–4, 24–34 <<http://www.hrw.org/sites/default/files/reports/usa0604.pdf>>; David Isenberg, 'The Government Made Me Do It?', *The Huffington Post* (online), 29 April 2010 <http://www.huffingtonpost.com/david-isenberg/the-government-made-me-do_b_557054.html?ir=Australia>. In 2004, General John Abizaid, commander of US Central Command, acting at the request of Lieutenant General Ricardo Sanchez, the then senior US military official in Iraq, assigned Major General Antonio Taguba to investigate allegations of mistreatment and torture of prisoners. For Major General Taguba's report as it relates to private contractors, see Department of Army, United States of America, *AR 15-16 Investigation of the 800th Military Police Brigade (Taguba Report)* (May 2004) annex 90 (Contract Interrogator, 205th MI) <<https://www.aclu.org/sites/default/files/torturefoia/released/a90.pdf>>; Department of Army, United States of America, *AR 15-16 Investigation of the 800th Military Police Brigade* (May 2004) annex 91 (Civilian Interview, 205th MI) <<https://www.aclu.org/sites/default/files/torturefoia/released/a91.pdf>>.

⁸ See, eg, David Johnston and John M Broder, 'FBI Says Guards Killed 14 Iraqis Without Cause', *The New York Times* (online), 14 November 2007 <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?_r=1&pagewanted=all>; Sudarsan Raghavan and Josh White, 'Blackwater Guards Fired at Fleeing Cars, Soldiers Say', *The Washington Post* (online), 12 October 2007 <<http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR200710110101030.html>>; Jeremy Scahill, 'Making a Killing', *The Nation* (New York), 15 October 2007, 21–4.

⁹ James Risen, 'Before Shooting in Iraq, a Warning on Blackwater', *The New York Times* (online), 29 June 2014 <http://www.nytimes.com/2014/06/30/us/before-shooting-in-iraq-warning-on-blackwater.html?smid=pl-share&_r=1>.

¹⁰ Matt Apuzzo, 'Blackwater Guards Found Guilty in 2007 Iraq Killings', *The New York Times* (online), 22 October 2014 <http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html?_r=1>; Andrew Grossman, 'Jury Finds Blackwater Guards Guilty of Iraq Shootings', *Wall Street Journal* (online), 22 October 2014 <<http://online.wsj.com/articles/jury-finds-blackwater-guards-guilty-of-iraq-shootings-1413994609>>; Spencer Hsu, 'Blackwater Guards Convicted of Killing 14 Unarmed Innocent Iraqis in 2007', *The Sydney Morning Herald* (online), 23 October

According to Faiza Patel, a member of the UN Working Group on the Use of Mercenaries, episodes such as the Nisour Square massacre and the use of contractors in Abu Ghraib show that ‘new forces need new rules’.¹¹ This comment was made in a press release in September 2012, where the author discussed the ‘critical lesson’ to be drawn from the US military presence in Iraq and Afghanistan — the lesson being that

[e]xperience with security contractors in Iraq and Afghanistan has shown that their personnel often lack discipline and can commit violent crimes. But the international community lacks the tools and political will to control them or bring them to book when they abuse human rights.¹²

For Patel and others, the ‘new rules’ ought to take shape not simply in self-regulation under industry codes but instead in a legally binding convention on the use and regulation of PMSCs.¹³

The myriad responses to the old and new modalities of mercenarism evince the politics of law; that is, law, as this article argues, is not neutral but is inherently political in its origin, development and application.¹⁴ This article begins by outlining the state of affairs with regard to mercenarism and PMSCs. Rather than survey the long history of mercenarism or examine the neoliberal underpinnings of the privatisation of war, the article will evaluate how the increasing reliance on PMSCs in the ‘market for force’ challenges the anti-mercenary norm in international law.¹⁵ International initiatives to create ‘new rules’ to clarify the legal status of PMSCs are themselves challenged by, and the product of, the flux of interactions between actors (state and non-state) and institutions in the post-Cold War world.¹⁶ UN efforts, regarding fact-finding on mercenarism and PMSCs, are likewise the product of, or at the very least are inextricably linked with, pressures arising from and relating to the flux of interactions between actors and institutions. Importantly, fact-finding parties serve as ‘norm entrepreneurs’ by shaping norms on the role of human rights law

2014 <<http://www.smh.com.au/world/blackwater-guards-convicted-of-killing-14-unarmed-innocent-iraqis-in-2007-20141022-11a7mu.html>>; Dan Roberts, ‘US Jury Convicts Blackwater Guards in 2007 Killing of Iraqi Civilians’, *The Guardian* (online), 23 October 2014 <<http://www.theguardian.com/us-news/2014/oct/22/us-jury-convicts-blackwater-security-guards-iraq>>. For the jury’s decision, see *US v Slough* (DC, 1:14-cr-107-RCL, 1:08-cr-360-RCL, 22 October 2014).

¹¹ Faiza Patel, ‘New Forces Need New Rules’ (Press Release, Office of the High Commissioner for Human Rights, 25 September 2012) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12579&LangID=E>>.

¹² Ibid.

¹³ See below Part II(C)–(D).

¹⁴ This article is not a theory-based analysis of the roots of the ‘politics of law’ thesis in legal realism and critical legal studies; such an analysis is beyond the scope of this article. For the ‘politics of law’ thesis as it relates to international law, see, eg, Martti Koskeniemi, *The Politics of International Law* (Hart Publishing, 2011).

¹⁵ See below Part II(A)–(C).

¹⁶ See below Part II(D).

and international humanitarian law in the marketplace for force.¹⁷ The article then evaluates the politics of law in Australian parliamentary responses to mercenarism and PMSCs.¹⁸ This article contends that Australian laws on the old modalities of mercenarism are interwoven with certain intractable political issues — such as how to give voice to moral disquiet about mercenary activities and yet respond in a timely manner to exigencies of politics — and that these issues resonate in the inchoate Australian legislative response to PMSCs and the ‘new modalities of mercenarism’.¹⁹

II MERCENARIES AND PRIVATE MILITARY AND SECURITY COMPANIES

A What is a Mercenary?

The mercenary enterprise pre-dates the emergence of the national armies that arose with the creation of the modern Westphalian state system by several thousand years. From early in human history, it was clear that organised violence offered ‘great advantages of scale’ in protecting society.²⁰ Early urban civilisations, Greek city-states, the Carthaginian Empire and Rome all relied upon hired soldiers and built up their native forces with trained foreign specialists.²¹ Historically, mercenaries have been defined by reference to the desire for private gain and by factors such as country of origin and ideology. Where individual mercenaries in Medieval and Renaissance Italy banded together under the leadership of military captains to fight for city-states, footloose bands of mercenaries in later times came to be seen as potentially threatening to the emerging European nation-states and their creation of professional armies.²² Nonetheless, mercenary activity was not eliminated and did not otherwise cease; instead, mercenaries were a resource to be harnessed. In the face of manpower shortages and to maintain the imperial project, the European imperial powers supplemented their national armies with foreign soldiers and indigenous recruits. Additionally, mercantile companies, such as the Dutch East India Company and the English East India Company, employed their own military forces to protect their trading interests.²³ As the nation-state system moved towards the end of the 19th century, and colonial land grabs in Asia and Africa continued unabated, mercenaries remained a resource to be harnessed. Associated risks (for example, nationals of a country being recruited to enlist in the armed forces of another country without

¹⁷ See below Part III(A)–(D).

¹⁸ Discourse analysis of the politicisation of the very term ‘mercenary’, which parliamentarians often use to impugn the ethics of their opponents, is, however, beyond the scope of this article.

¹⁹ See below Part IV(A)–(C).

²⁰ P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, 2003) 20.

²¹ *Ibid* 20–1.

²² *Ibid* 22–6, 30–1.

²³ *Ibid* 34–7.

the permission of authorities in their own country) were technical problems to be either managed or ameliorated through legislation.²⁴

In common parlance, a mercenary is a volunteer who fights for a foreign armed force for monetary gain or other personal gains.²⁵ The legal definition is more technical. For instance, satisfying the subjective ‘motivation’ element is notoriously difficult.²⁶ As the 1976 *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries* noted,

any definition of mercenaries which required positive proof of motivation would, in our view, either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.²⁷

Article 47(2) of *Additional Protocol I of the Geneva Conventions* stipulates six criteria that must be cumulatively fulfilled for a person to be classified as a mercenary:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and

²⁴ An early example of a legislative restriction on ‘the non-commercial liberties of intercourse and recruitment’ (David Riesman, ‘Legislative Restrictions on Foreign Enlistment and Travel’ (1940) 40 *Columbia Law Review* 793, 793) is the British *Foreign Enlistment Act 1819*, 59 Geo III, c 69, later amended by *Foreign Enlistment Act 1870*, 33 & 34 Vict, c 90.

²⁵ See, eg, H C Burmester, ‘The Recruitment and Use of Mercenaries in Armed Conflict’ (1978) 72 *American Journal of International Law* 37, 37; Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, House of Commons Paper No 577, Session 2001–02 (2002) 6 [3]–[4].

²⁶ See, eg, Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (Cambridge University Press, 2011) 29–30.

²⁷ Lord Diplock, Sir Derek Walker-Smith and Sir Geoffrey De Freitas, *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries*, Cmnd 6569 (1976) 2 [7] (‘*Diplock Report*’). The *Diplock Report* is an inquiry by a committee of Privy Counsellors into the recruitment of 160 men in the UK to ‘serve with or in support’ of the National Front for the Liberation of Angola against the People’s Movement for the Liberation of Angola.

- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Similarly, art 1(1) of the *Mercenaries Convention* repeats all but criteria (b), though as art 3(1) of the *Mercenaries Convention* stipulates:

A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.

The *Mercenaries Convention* specifies that mercenaries are people who undermine legitimate governments,²⁸ and regards mercenary activities as criminal offences.²⁹ Likewise, the *Rome Statute of the International Criminal Court*³⁰ outlines '[t]he crime of aggression',³¹ which includes '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or *mercenaries*, which carry out acts of armed force against another State' in violation of the *Charter of the United Nations*.³²

Legal definitions of 'mercenary' stem from critiques of mercenaries, popularly known as 'whores' and 'dogs' of war,³³ plying their trade in Cold War proxy wars in decolonisation conflicts in Africa and Asia. During the Cold War, 'wild geese' mercenaries plagued the African continent, suppressing movements of national liberation at the behest of former colonial powers.³⁴ Condemnation of mercenarism underpins UN General Assembly Resolution 1514, adopted in December 1960.³⁵ Resolution 1514 and General Assembly Resolutions adopted throughout the 1960s on the progress of Resolution 1514 did not mention the very terms 'mercenaries' or 'mercenarism' as such, but the critical thrust of the Resolutions was clear: the resort to violence to delay progress on achieving independence is inimical to international peace and stability.³⁶ The absence of explicit references either to 'mercenaries' or

²⁸ *Mercenaries Convention* arts 1(2)(a)(i)–(ii).

²⁹ *Ibid* arts 2, 3(1), 4(a)–(b).

³⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

³¹ *Ibid* art 5(d).

³² *Ibid* art 8 *bis* (2)(g) (emphasis added). See also *Charter of the United Nations* art 1(1).

³³ Wilfred Burchett and Derek Roebuck, *The Whores of War: Mercenaries Today* (Penguin Books, 1977); Frederick Forsyth, *The Dogs of War* (Viking Press, 1974).

³⁴ Jackson Nyamuya Maogoto and Benedict Sheehy, 'Private Military Companies and International Law: Building New Ladders of Legal Accountability and Responsibility' (2009) 11 *Cardozo Journal of Conflict Resolution* 99, 103.

³⁵ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, Agenda Item 87, UN Doc A/RES/1514(XV) (14 December 1960).

³⁶ *Ibid* Preamble paras 4, 7, 9; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2105 (XX), UN GAOR, 20th sess, 1405th plen mtg, Agenda Item 23, UN Doc A/RES/2105(XX) (20 December 1965) Preamble para 9; *Implementation of the Declaration on the Granting of*

to ‘mercenarism’ may have been a reflection of the reluctance of former colonial powers to forswear the use of force to secure natural resources as well as a reflection of the then embryonic status of international efforts to rally against the use of mercenaries to stymie anti-colonial struggles.³⁷ In 1968, General Assembly Resolution 2465 explicitly referred to mercenaries as ‘outlaws’, and called for all States ‘to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries’.³⁸ General Assembly Resolution 3103 also referred to the criminal nature of the use of mercenaries to stymie anti-colonial struggles,³⁹ but, as Todd Milliard notes, did not say that ‘mercenaries themselves are outlaws’.⁴⁰ Instead, it

Independence to Colonial Countries and Peoples, GA Res 2189 (XXI), UN GAOR, 21st sess, 1492nd plen mtg, Agenda Item 23, UN Doc A/RES/2189(XXI) (13 December 1966) para 10; *The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654 (XVI), UN GAOR, 16th sess, 1066th plen mtg, Agenda Item 88, UN Doc A/RES/1654(XVI) (27 November 1961) Preamble paras 6–7; *The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1810 (XVII), UN GAOR, 17th sess, 1195th plen mtg, Agenda Item 25, UN Doc A/RES/1810(XVII) (17 December 1962) Preamble para 6. See also *Activities of Foreign Economic and Other Interests Which Are Impeding the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia, South West Africa and Territories Under Portuguese Domination and in Other Territories Under Colonial Domination and Efforts to Eliminate Colonialism, Apartheid and Racial Discrimination in Southern Africa*, GA Res 2288 (XXII), UN GAOR, 22nd sess, 1622nd plen mtg, Agenda Item 24, UN Doc A/RES/2288(XXII) (7 December 1967) paras 3–4, 7, 11; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131 (XX), UN GAOR, 20th sess, 1408th plen mtg, Agenda Item 107, UN Doc A/RES/2131(XX) (21 December 1965) paras 1–2.

³⁷ With regard to early debates on drafting an international convention against mercenarism, see UN GAOR, 34th sess, 104th plen mtg, UN Doc A/34/PV.104 (14 December 1979) 1945–9 [405]–[447].

³⁸ *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2465 (XXIII), UN GAOR, 23rd sess, 1751st plen mtg, Agenda Item 23, UN Doc A/RES/2465 (XXII) (20 December 1968) para 8, quoted in Jackson Nyamuya Maogoto and Benedict Sheehy, ‘Contemporary Private Military Firms Under International Law: An Unregulated “Gold Rush”’ (2005) 26 *Adelaide Law Review* 245, 256. Milliard points out that ‘Resolution 2465 received slightly more than half of the General Assembly members’ votes, which suggests an international principle far short of widespread acceptance.’ Todd S Milliard, ‘Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies’ (2004) 176 *Military Law Review* 1, 26.

³⁹ *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes*, GA Res 3103 (XXVIII), UN GAOR, 28th sess, 2197th plen mtg, Agenda Item 96, UN Doc A/RES/3103(XXVIII) (12 December 1973) Preamble paras 5–6 (‘Resolution 3103 (XXVIII)’).

⁴⁰ Milliard, above n 38, 29.

said that the use of mercenaries against national liberation movements ‘is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.’⁴¹

In 1977, the Organization of African Unity (‘OAU’), established in 1963 as an expression of regional ‘unity and solidarity’ against ‘all forms of colonialism’ in Africa,⁴² adopted the *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*.⁴³ The OAU proscribed the use of mercenaries by any ‘individual, group or association’ to suppress movements of national liberation.⁴⁴ Yet, while an OAU Member State cannot use mercenaries to interfere with the territorial integrity of another Member State or with its efforts to achieve self-determination, a Member State is not prevented from using mercenaries to crush an insurrection within its own borders.⁴⁵ Therefore, as Jackson Maogoto and Benedict Sheehy note, the regional focus of the *OAU Mercenaries Convention* has limited its ‘role in creating added impetus in international circles towards criminalising and punishing mercenarism.’⁴⁶ (Evidently, though, sufficient impetus existed for the *Rome Statute* to be amended in 2010 to categorise mercenarism as a ‘crime of aggression’.⁴⁷) Notably, concerns about mercenarism in Africa persist in the new millennium. In 2002, the UN General Assembly declared in Resolution 56/232 that it was ‘*Alarmed and concerned* at the danger that the activities of mercenaries constitute to peace and security in developing countries, in particular in Africa and in small States’.⁴⁸ The General Assembly has reiterated that alarm and concern on numerous occasions, when, amongst other matters, drawing attention to the

⁴¹ *Resolution 3103 (XXVIII)*, UN Doc A/RES/3103(XXVIII), para 5.

⁴² *Charter of the Organization of African Unity*, opened for signature 25 May 1963, 479 UNTS 39 (entered into force 19 September 1963) arts II(1)(a), (b).

⁴³ *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*, opened for signature 3 July 1977, 1490 UNTS 95 (entered into force 22 April 1985) (‘*OAU Mercenaries Convention*’).

⁴⁴ *Ibid* art 1(2). The African Union replaced the OAU in 2001.

⁴⁵ Kofi Oteng Kufuor, ‘The OAU Convention for the Elimination of Mercenarism and Civil Conflicts’ in Abdel-Fatau Musah and J ‘Kayode Fayemi (eds), *Mercenaries: An African Security Dilemma* (Pluto Press, 2000) 198, 200–4; Montgomery Sapone, ‘Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence’ (1999) 30 *California Western International Law Journal* 1, 36–7.

⁴⁶ Maogoto and Sheehy, ‘Contemporary Private Military Firms Under International Law’, above n 38, 260. See also Commission on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, UN ESCOR, 61st sess, 3rd mtg, Agenda Item 5, UN Doc E/CN.4/2005/23 (18 January 2005) 11 [29].

⁴⁷ *Rome Statute* art 8 bis (2)(g).

⁴⁸ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 56/232, UN GAOR, 56th sess, 92nd plen mtg, Agenda Item 118, Supp No 49, UN Doc A/RES/56/232 (26 February 2002) Preamble para 6 (emphasis in original).

persistence of mercenarism as a threat to peace, stability and self-determination in postcolonial states.⁴⁹

B *Security and Conflict*

To contextualise the precise problem posed by PMSCs in relation to the legal definition of mercenary, it is instructive to consider how post-Cold War era concerns about mercenarism have morphed into discourses about security and globalisation and, as the following section explains, have been paralleled by debates about the accountability of corporate military and security entities.⁵⁰ The post-Cold War era has witnessed not Francis Fukuyama's prophesied 'end of history' and triumph of liberal democracy,⁵¹ but instead conflict and disorder in relation to the global–local

⁴⁹ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 57/196, UN GAOR, 57th sess, 77th plen mtg, Agenda Item 108, Supp No 49, UN Doc A/RES/57/196 (25 February 2003) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 58/162, UN GAOR, 58th sess, 77th plen mtg, Agenda Item 116, Supp No 49, UN Doc A/RES/58/162 (2 March 2004) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 62/145, UN GAOR, 62nd sess, 76th plen mtg, Agenda Item 69, Supp No 49, UN Doc A/RES/62/145 (4 March 2008) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 63/164, UN GAOR, 63rd sess, 70th plen mtg, Agenda Item 63, Supp No 49, UN Doc A/RES/63/164 (13 February 2009) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 64/151, UN GAOR, 64th sess, 65th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/64/151 (26 March 2010) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 65/203, UN GAOR, 65th sess, 71st plen mtg, Agenda Item 67, Supp No 49, UN Doc A/RES/65/203 (16 March 2011) Preamble para 7; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 66/147, UN GAOR, 66th sess, 89th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/66/147 (29 March 2012) Preamble para 7; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 67/159, UN GAOR, 67th sess, 60th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/67/159 (26 February 2013) Preamble para 8.

⁵⁰ See generally Deborah D Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2005) 30–1, 35–8, 67, 115, 146; Caroline Holmqvist, 'Private Security Companies: The Case for Regulation' (SIPRI Policy Paper No 9, Stockholm International Peace Research Institute, January 2005) 1–7, 42–50 <<http://books.sipri.org/files/PP/SIPRI09.pdf>>; Anna Leander, 'The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies' (2005) 42 *Journal of Peace Research* 605, 605–6, 611–13, 616; Clive Walker and Dave Whyte, 'Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom' (2005) 54 *International and Comparative Law Quarterly* 651, 651–2, 661–2, 688–9.

⁵¹ Francis Fukuyama, *The End of History and the Last Man* (Penguin, 1992).

nexus. Samuel Huntington contended in his 1993 article, ‘The Clash of Civilizations?’, that accounts such as Fukuyama’s failed to give due consideration to the role of civilisational dynamics in shaping the post-Cold War world. Huntington warned that patterns of conflict in the post-Cold War world were highly likely to be shaped by the clash between Western and non-Western civilisations.⁵² Even if civilisational differences, for example, regarding religious values and control of territory, have re-emerged in the wake of the fall of the Iron Curtain, patterns of conflict cannot be ascribed solely to inter-civilisational differences; instead, intra-civilisational differences, coupled with the emergence of non-state actors, have become particularly salient aspects of contemporary global politics.⁵³

Symptoms of problems with the global–local nexus include the ‘global war on terror’⁵⁴ (or, put differently, ‘a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America’)⁵⁵ and the turmoil of tensions giving rise to outbreaks of ethno-nationalist conflict.⁵⁶ Although the ‘kill-capture’ strategy of the global war on terror has shifted to counterinsurgency efforts, namely, to ‘a win-the-population strategy that is directed at building a stable and legitimate political order’,⁵⁷ it is clear that ‘[w]arfare remains a violent clash of interests between organized groups characterized by the use of force’,⁵⁸ and asymmetries of

⁵² Samuel P Huntington, ‘The Clash of Civilizations?’ (1993) 72 *Foreign Affairs* 22, 22–5. The phrase ‘clash of civilizations’ was coined in Bernard Lewis, ‘The Roots of Muslim Rage’, *The Atlantic Monthly*, 1 September 1990.

⁵³ See, eg, Mary Kaldor, *New and Old Wars* (Policy, 2nd ed, 2006) 182–5; Singer, *Corporate Warriors*, above n 20, 50–2.

⁵⁴ George W Bush, ‘President Discusses War on War’ (Speech delivered at the FBI Academy, Quantico, Virginia, 11 July 2005) <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/07/20050711-1.html>>. See also George W Bush, ‘Address to a Joint Session of Congress and the American People’ (Speech delivered at the United States Capitol, Washington, DC, 20 September 2001) <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>>; George W Bush, ‘President Bush Discusses Progress in the Global War on Terror’ (Speech delivered at the Cobb Galleria Centre, Atlanta, Georgia, 7 September 2006) <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060907-2.html>>.

⁵⁵ Barack Obama, ‘Remarks by the President at the National Defense University’ (Speech delivered at the National Defense University, Fort McNair, Washington, DC, 23 May 2013) <<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>.

⁵⁶ See generally *Implementing the Responsibility to Protect — Report of the Secretary-General*, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Docs A/63/677 (12 January 2009) 4–8 [1]–[10]; *Responsibility to Protect: Timely and Decisive Response — Report of the Secretary-General*, UN GAOR, 66th sess, Agenda Items 14 and 117; UN SCOR, 66th sess, UN Docs A/66/874 and S/2012/578 (25 July 2012) 1–3 [1]–[6].

⁵⁷ Ganesh Sitaraman, ‘Counterinsurgency, the War on Terror, and the Laws of War’ (2009) 95 *Virginia Law Review* 1745, 1747.

⁵⁸ Department of Army, United States of America, *Counterinsurgency* (Field Manual No 3–24, Headquarters, Department of the Army, Washington, DC; Marine Corps Warfighting Publication No 3–33.5, Headquarters, Marine Corps Combat

power and problems with security persist. Counterterrorism policies such as targeted killings and extraordinary rendition are issues of concern in international law, and reflect asymmetries of power between actors, both state and non-state, in a putative liberal democratic world order.⁵⁹

It is useful to turn briefly here to philosophical dimensions of discourses about security and globalisation. The compression of time and space due to the sheer speed of communication linkages and cross-border flows of goods, services and ideas in the globalising world has produced what may variously be described as a ‘crisis of modernity’ and the ‘postmodern condition’. In the ‘postmodern condition’, says Jean-François Lyotard, the truths or ‘grand narratives’ of modernity, including the faith in the capacity of scientific knowledge to provide for material and social progress, that once served to undergird society, have given way to a crisis of ‘legitimation’.⁶⁰ The crisis is about ‘the status of knowledge’,⁶¹ and was foreshadowed in Karl Marx and Friedrich Engel’s claim in *The Communist Manifesto* that ‘[a]ll that is solid melts into air’ under capitalism, due to the ceaseless movement of capital across the globe.⁶² Similarly, Herbert Marcuse warned in his 1964 work, *One-Dimensional*

Development Command, Department of the Navy, Headquarters, United States Marine Corps, Washington, DC, 15 December 2006) 1 <http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_24.pdf>.

⁵⁹ On terrorism and the post-Cold War liberal democratic world order, see Philip G Cerny, ‘Terrorism and the New Security Dilemma’ (2004) 58 *Naval War College Review* 11, 11–14, 22, 23, 25; Georg Sørensen, *A Liberal World Order in Crisis: Choosing Between Imposition and Restraint* (Cornell University Press, 2011) 18–20, 23, 26, 78. On targeted killings, see, eg, Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Philip Alston — Addendum — Study on Targeted Killings*, UN Doc A/HRC/14/24/Add.6 (28 May 2010) 3 [1]–[6], 9–27 [28]–[93]; International Human Rights and Conflict Resolution Clinic, Stanford Law School, and Global Justice Clinic, NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (September 2012) v–x, 1–5, 103–24 <<http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>>. On extraordinary rendition, see, eg, Committee Against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, UN Doc CAT/C/USA/CO/3-5 (19 December 2014) 4 [11]; Leïla Zerrougui, Chairperson-Rapporteur, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2006/7 (12 December 2005) 18–19 [53]–[59], 20–2 [68]–[75], 23 [80]–[81].

⁶⁰ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, Manchester University Press, 1984) 3–9, 12, 27–41, 64–5 [trans of: *La Condition Postmoderne: Rapport sur le Savor* (first published 1979)]. For an alternative diagnosis of the ‘crisis of modernity’, see Leo Strauss, ‘The Three Waves of Modernity’ in Hilail Gildin (ed), *An Introduction to Political Philosophy: Ten Essays by Leo Strauss* (Wayne State University Press, 1989) 81, 81–98.

⁶¹ Lyotard, above n 60, 6.

⁶² Marshall Berman, *All That Is Solid Melts Into Air: The Experience of Modernity* (Verso, revised ed, 2010) 15–16, 28–9, 87–105; Karl Marx and Friedrich Engels, *The Communist Manifesto* (Samuel Moore trans, Penguin Books, 1967) 83 [trans of: *Das Kommunistische Manifest* (first published 1848)].

Man, that relentless mass consumption inexorably produces conformist, ‘one-dimensional’ individuals, who are not so much individuals (if at all) as they are ‘cogs in a culture-machine which remakes their content’ into a homogenised whole.⁶³ The postmodern condition is, in short, both a crisis about knowledge qua knowledge and a crisis about the legitimacy of the power wielded by legal and political institutions to decide what knowledge ought to be.⁶⁴

Further discussion of postmodern ruminations on power, knowledge and alternatives to ‘scientific knowledge’⁶⁵ is beyond the scope of this article, but it is instructive to note here the issue of the dissonance between certainty and uncertainty. In the globalising world, satisfying the need for ontological security, namely, ‘security of the self’,⁶⁶ pervades inter-state and intra-state relations.⁶⁷ Identity dissonance, which can be defined as the ‘clash between an identity and the practices that are expected to result from it’,⁶⁸ has the potential to lead to ontological dissonance when threats to identity cannot be resolved or ameliorated and actors are unable ‘to assure *themselves* of who they are.’⁶⁹ Just as individuals, through forming relationships with others, seek not only personal or physical security but also ontological security, so, too, do collective actors such as states.⁷⁰ States seek to resolve their ontological insecurities through routines of ‘competitive’ interactions with other states and actors.⁷¹ However, the risk of such routines is that states ‘become attached to conflict’ and prefer conflict to resolving their uncertainties of identity.⁷² Attachment to conflict, amongst other matters, underpins what some call the ‘military Keynesian zeitgeist’⁷³ of the Great Depression era and

⁶³ Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Routledge Classics, 2nd ed, 2002) 68. For the phrase ‘one dimensional’, see Marcuse at 3–21, 79–80, 251–61.

⁶⁴ Lyotard, above n 60, 7–9.

⁶⁵ Ibid 3, 7–8, 18, 23–8, 30–1, 39, 43–4, 47, 53–4.

⁶⁶ Jennifer Mitzen, ‘Ontological Security in World Politics: State Identity and the Security Dilemma’ (2006) 12 *European Journal of International Relations* 341, 341.

⁶⁷ Catarina Kinnvall, ‘Globalization and Religious Nationalism: Self, Identity, and the Search for Ontological Security’ (2004) 25 *Political Psychology* 741, 746–9, 752–3; Mitzen, above n 66, 341–4, 351–3; Mikkel Vedby Rasmussen, ‘“A Parallel Globalization of Terror”: 9-11, Security and Globalization’ (2002) 37 *Cooperation and Conflict* 323, 323–4, 327, 331–5.

⁶⁸ Amir Lupovici, ‘Ontological Dissonance, Clashing Identities, and Israel’s Unilateral Steps Towards the Palestinians’ (2012) 38 *Review of International Studies* 809, 814.

⁶⁹ Ibid 812 (emphasis in original). See also Mitzen, above n 66, 342–6.

⁷⁰ Jef Huysmans, ‘Security! What Do You Mean? From Concept to Thick Signifier’ (1998) 4 *European Journal of International Relations* 226, 242–4; Mitzen, above n 66, 342–3, 351–2, 360.

⁷¹ Mitzen, above n 66, 348, 359–60.

⁷² Ibid 342. See also Huysmans, above n 70, 238–40; Lupovici, above n 68, 811.

⁷³ Thomas K Duncan and Christopher J Coyne, ‘The Origins of the Permanent War Economy’ (2013) 18 *Independent Review* 219, 220–2. See also Casey Borch and Michael Wallace, ‘Military Spending and Economic Well-Being in the American States: The Post-Vietnam War Era’ (2010) 88 *Social Forces* 1727, 1729–31.

the solidification of the ‘permanent war economy’ in the Cold War era.⁷⁴ Pragmatic yet principled concern with the dangers of institutionalising attachment to conflict can be seen in President Eisenhower’s prescient warning about the ‘military industrial complex’ in his 1961 *Farewell Address*.⁷⁵ Then as now, a pragmatic concern about the war economy is its economic sustainability; a principled concern is about the influence of industrial interests on electoral politics and the quality of democratic governance.⁷⁶

C How to Conceptualise PMSCs

PMSCs have flourished in the post-Cold War era as standing armies have been reduced in size and former soldiers have sought alternative employment. It is in this context that PMSCs have taken on a greater role in providing security in conflict and post-conflict zones.⁷⁷ Illustrating the growth in the use of PMSCs are changes in the ratio of soldiers to PMSC personnel: the ratio was 50 to 1 in the first Gulf War; 10 to 1 in the 2003 Iraq War; and by 2008, the ratio was almost 1 to 1 in Iraq.⁷⁸ PMSCs provide an ‘enormously diverse’ array of services, which can be

⁷⁴ Seymour Melman, *The Permanent War Economy: American Capitalism in Decline* (Simon and Schuster, 1974). See also Duncan and Coyne, above n 73, 219–40.

⁷⁵ Dwight D Eisenhower, *Farewell Address* (17 January 1961), 15 <http://www.eisenhower.archives.gov/research/online_documents/farewell_address/Reading_Copy.pdf>.

⁷⁶ See generally Deborah Avant and Lee Sigelman, ‘Private Security and Democracy: Lessons From the US and Iraq’ (2010) 19 *Security Studies* 230, 235–65; Susan Eisenhower, ‘50 Years Later, We’re Still Ignoring Ike’s Warning’, *The Washington Post* (online), 16 January 2011 <<http://www.washingtonpost.com/wp-dyn/content/article/2011/01/14/AR2011011404915.html>>; Charles J G Griffin, ‘New Light on Eisenhower’s Farewell Address’ (1992) 22 *Presidential Studies Quarterly* 469, 469–79; Kaldor, above n 53, 95–118; Alexander Volokh, ‘Privatization and the Law and Economics of Political Advocacy’ (2008) 60 *Stanford Law Review* 1197, 1198–1206, 1240–53.

⁷⁷ See, eg, James Cockayne, ‘Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study’ (Research Paper, International Peace Academy, March 2006) 1–2, 5–6 <http://psm.du.edu/media/documents/reports_and_stats/think_tanks/international_peace_academy_cockayne_commercial_security_in_humanitarian_settings.pdf>; José Luis Gómez del Prado, Chairperson-Rapporteur, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, UN Doc A/HRC/7/7 (9 January 2008) 8–11 [23]–[28], 24 [57]; Kathleen M Jennings, ‘Armed Services: Regulating the Private Military Industry’ (Fafo Report 532, New Security Programme, Fafo Institute for Applied International Studies, Norway, 2006) 19–20 <<http://www.fafo.no/pub/rapp/532/532.pdf>>; Oliver R Jones, ‘Implausible Deniability: State Responsibility for the Actions of Private Military Firms’ (2009) 24 *Connecticut Journal of International Law* 239, 246–8; Singer, *Corporate Warriors*, above n 20, 49–50.

⁷⁸ Laura A Dickinson, ‘Military Lawyers, Private Contractors, and the Problem of International Law Compliance’ (2010) 42 *International Law and Politics* 355, 356; Kateryna L Rakowsky, ‘Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan’ (2006) 2 *Stanford Journal of Civil Rights and Civil Liberties* 365, 370.

classified into three broad categories, providing: combat-capable forces; military consultancy services (including training and bodyguard services); and non-lethal support (including ‘intelligence collection and analysis’).⁷⁹ How sharply defined the categories are in practice can be questioned, because PMSCs ‘can do more than one task and offer more than one capability at any given time.’⁸⁰

Military focused PMSCs as well as ostensibly security focused PMSCs that offer military capabilities perform functions formerly thought to be within the state’s exclusive domain.⁸¹ As Laura Dickinson explains, ‘[p]erhaps no function of government is deemed more quintessentially a “state” function than the military protection of the state itself.’⁸² The corollary here is that privatisation in the international or global sphere has the further potential to ‘hollow out’ state actors.⁸³ Those inclined to reject privatisation of core government functions underscore what they see as the pernicious impact of neoliberal economic ideology and contend that the privatisation of military and security services emasculates the state’s monopoly on legitimate violence.⁸⁴

⁷⁹ David Isenberg, ‘Private Military Contractors and US Grand Strategy’ (Report, International Peace Research Institute, Oslo, 2009) 10, 11 <http://file.prio.no/Publication_files/Prio/Isenberg%20Private%20Military%20Contractors%20PRIO%20Report%201-2009.pdf>. See also David Isenberg, ‘A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq’ (Research Report 2004.4, British-American Security Information Council, September 2004) 11 <http://www.wikileaks.org/gifiles/attach/23/23108_Fistfull%20of%20contractors.pdf>; Sarah Percy, ‘Regulating the Private Security Industry’ (Adelphi Paper No 384, International Institute for Strategic Studies, London, December 2006) 13–14; Peter W Singer, ‘The Private Military Industry and Iraq: What Have We Learned and Where to Next?’ (Policy Paper, Geneva Center for the Democratic Control of Armed Forces, November 2004) 2–3 <mercury.ethz.ch/serviceengine/Files/ISN/14132/ipublicationdocument_singledocument/6c72ca8b-2711-4b18-8103-55305e8136e3/en/PP4_Singer.pdf>.

⁸⁰ Isenberg, ‘Private Military Contractors’, above n 79, 12.

⁸¹ Laura A Dickinson, ‘Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law’ (2005) 47 *William and Mary Law Review* 135, 147–52; Jones, above n 77, 240–1, 245–6; Dino Kritsiotis, ‘Mercenaries and the Privatization of Warfare’ (1998) 22 *Fletcher Forum of World Affairs* 11, 11–14; Martha Minow, ‘Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy’ (2005) 46 *Boston College Law Review* 989, 1014–16; Singer, *Corporate Warriors*, above n 20, 6–8.

⁸² Dickinson, ‘Government for Hire’, above n 81, 147.

⁸³ Ibid 146–7. See also Jon D Michaels, ‘Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War’ (2004) 82 *Washington University Law Quarterly* 1001, 1040–42. See generally Jody Freeman, ‘Extending Public Law Norms Through Privatization’ (2003) 116 *Harvard Law Review* 1285, 1294–5, 1300 (but see Freeman at 1314–52).

⁸⁴ Bernedette Muthien and Ian Taylor, ‘The Return of the Dogs of War? The Privatization of Security in Africa’ in Rodney Bruce Hall and Thomas J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002) 183, 183–5. See also Jennings, above n 77, 34–5, 42–5; Virginia Newell and Benedict Sheehy, ‘Corporate Militaries and States: Actors, Interactions, and Reactions’

A related critique is that PMSCs are corporatised mercenaries and deserve moral and legal opprobrium as mercenaries.⁸⁵ Others take a more sanguine view of the precise challenge posed by PMSCs, particularly in light of their divergence from the traditional and legal conceptualisations of mercenaries, and maintain that PMSCs are legitimate military and security service providers, capable of self-regulation under PMSC industry codes and international regulatory initiatives on PMSCs.⁸⁶ One such initiative is the Swiss Government organised *International Code of Conduct for Private Security*

(2006) 41 *Texas International Law Journal* 67, 68–70, 74, 77–8. Cf James Cockayne, ‘Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies’ in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford Scholarship Online, 2009) 196, 199–200, 202–5, 207–8; Chia Lehnardt, ‘Private Military Companies and State Responsibility’ in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford Scholarship Online, 2009) 139, 139–42, 146–7, 150.

⁸⁵ Kritsiotis, above n 81, 11, 11–14, 21–2; Sapone, above n 45, 1–5, 7–8, 41–3; Christopher Wrigley, ‘The Privatisation of Violence: New Mercenaries and the State’, *CAAT (Campaign Against Arms Trade)*, March 1999 <<http://www.caat.org.uk/resources/publications/government/mercenaries-1999.php>>. See also Muthien and Taylor, above n 84, 188; Ken Silverstein, ‘Privatizing War: How Affairs of State are Outsourced to Corporations Beyond Public Control’, *The Nation* (New York), 28 July 1997, 12, 17. Cf Percy, ‘Regulating the Private Security Industry’, above n 79, 14; Sarah Percy, ‘Morality and Regulation’ in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford Scholarship Online, 2009) 11, 14–19, 23–4, 28. *Contra* David Shearer, ‘Private Military Force and Challenges for the Future’ (1999) 13 *Cambridge Review of International Affairs* 80, 80–1, 85–6, 88–90.

⁸⁶ For examples of industry codes see, eg, British Association of Private Security Companies, *Charter* <<http://www.bapsc.org.uk/?keydocuments=charter>>; International Stability Operation Association, *ISOA Code of Conduct* (20 October 2011) <<http://www.stability-operations.org/?page=Code>>. For relatively sanguine views on self-regulation, see Andy Bearpark and Sabrina Schulz, ‘The Private Security Challenge in Africa: Problems and Options for Regulation’ in Sabelo Gumedze (ed), *Private Security in Africa: Manifestation, Challenges and Regulation* (ISS Monograph Number 139, Institute for Security Studies, Pretoria, South Africa, 1 November 2007) 73, 82–5 <mercury.ethz.ch/serviceengine/Files/ISN/104907/ichaptersection_singledocument/8b2519e3-9816-496b-a5c4-9a29c91a64cc/en/5.pdf>; Doug Brooks, ‘Messiah or Mercenaries? The Future of International Private Military Services’ (2000) 7 *International Peacekeeping* 129, 130–1, 136–7, 141. Cf Foreign Affairs Committee, *Private Military Companies*, House of Commons Paper No 922, Session 2001–02 (2002) 35 [136]–[137]; Holmqvist, above n 50, 46–50; Nicola Jägers, ‘Will Transnational Private Regulation Close the Governance Gap?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 295, 307–14; Jennings, above n 77, 58–61; Singer, ‘The Private Military Industry and Iraq’, above n 79, 21–2; UN Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 16–18

Service Providers.⁸⁷ Others argue that even if PMSCs do not fit the mercenary tag, they pose problems for stability in weak or failing states, which often lack the means to make PMSCs accountable for their actions.⁸⁸

Contestation aside, the precise challenge posed by PMSCs stems from how PMSCs challenge the traditional conception and legal definition of ‘mercenary’ as outlined in the *Mercenaries Convention*, *Additional Protocol I of the Geneva Conventions* and the *OAU Mercenaries Convention*. Satisfying the subjective ‘motivation’ criteria of the definition is notoriously difficult, as PMSC employees can be motivated by a range of interests and not just material gain.⁸⁹ To circumvent the nationality criteria, contracting states can simply deputise the employees of PMSCs to make them nationals of a party to the conflict.⁹⁰ The corporate form of PMSCs is a further reason why the definition of mercenary is limited in its application to PMSCs; as Singer puts it, ‘it is the *corporatization* of military service provision’ that distinguishes PMSCs from

[66]–[74]. Note: Andrew Bearpark is the Honorary Director General of the British Association of Private Security Companies; Doug Brooks founded the International Peace Operations Association (now ISOA) in 2001.

⁸⁷ *International Code of Conduct for Private Security Service Providers* (9 November 2010) <http://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf> (‘ICoC’). See also *Draft Charter of the Oversight Mechanism for the International Code of Conduct (ICoC) for Private Security Service Providers* (16 January 2012) <http://psm.du.edu/media/documents/regulations/global_instruments/multi_stakeholder/icoc/icoc_draft_charter.pdf> (‘Draft ICoC Charter’); *Second Draft of the Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Service Providers (ICoC)* (30 January 2013) <http://psm.du.edu/media/documents/regulations/global_instruments/multi_stakeholder/icoc/icoc_second_draft_charter.pdf> (‘Second Draft ICoC Charter’). At the time of original submission of this article, the *Second Draft ICoC Charter* was still in draft form. The ICoC Association’s (‘ICoCA’) General Assembly finalised its vote on the Charter in late June 2015; in turn, news of its unanimous approval of the draft was announced by the ICoCA Secretariat on 3 July 2015. See Human Analytics, ‘Update: Further Progress Made in Finalizing Certification to ICoCA Using PSC.1’ (Press Release, 18 August 2015) <<http://human-analytics.net/update-progress-made-finalizing-certification-icoca-using-psc-1/>>.

⁸⁸ Ellen L Frye, ‘Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War”’ (2005) 73 *Fordham Law Review* 2607, 2637–8, 2646–7; P W Singer, ‘War, Profits, and Vacuum of Law: Privatized Military Firms and International Law’ (2004) 42 *Columbia Journal of Transnational Law* 521, 535–6; Singer, ‘The Private Military Industry and Iraq’, above n 79, 12–13, 21. See also Holmqvist, above n 50, 11–12, 14–15, 21; Leander, above n 50, 605–6, 609–10, 615, 617–19; Angela McIntyre, ‘Weak Governments in Search of Strength: Africa’s Experience of Mercenaries and Private Military Companies’ in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford Scholarship Online, 2009) 68, 68–9, 78–81. Cf Malcolm Patterson, ‘A Corporate Alternative to United Nations ad hoc Military Deployments’ (2008) 13 *Journal of Conflict and Security Law* 215, 215–19.

⁸⁹ See, eg, Singer, *Corporate Warriors*, above n 20, 41.

⁹⁰ This occurred in the Sandline Affair. See below n 219 and accompanying text.

mercenaries.⁹¹ Where individual mercenaries adopt an ad hoc structure, PMSCs ‘are ordered along pre-existing corporate lines’.⁹² If a PMSC is incorporated in a country with a regulatory regime to monitor PMSC activities that proves to be less than welcoming to their activities, then the PMSC can reincorporate in a more hospitable country⁹³ or otherwise ‘transform’ to a more respectable corporate mien.⁹⁴

Notwithstanding the contested views about how to conceptualise PMSCs, this much is clear: the strictness of the definition of ‘mercenary’ limits its use for regulating PMSCs in a full range of conflict and post-conflict settings.⁹⁵ In December 2003, Enrique Bernales Ballesteros, in his final report as the UN Special Rapporteur on the Question of the Use of Mercenaries, pointed out:

International legislation [regarding the legal definition of mercenary] contains a number of loopholes regarding the requirements relating to nationality, residence, changes in nationality to conceal identity as a mercenary, the participation of mercenaries in illicit trafficking or in organized crime, and, lastly their participation in terrorist acts.⁹⁶

To close the loopholes, Ballesteros proposed a redefinition of mercenary. One aspect of the proposal was that mercenary activity be regarded as ‘a crime in and of itself and be internationally prosecutable, both because it violates human rights and because it affects the self-determination of peoples.’⁹⁷ Another core aspect of the proposal was that

⁹¹ Singer, *Corporate Warriors*, above n 20, 45 (emphasis in original).

⁹² Ibid. See also Deborah Avant, ‘The Implications of Marketized Security for IR Theory: The Democratic Peace, Late State Building, and the Nature and Frequency of Conflict’ (2006) 4 *Perspectives on Politics* 507, 510.

⁹³ Frye, above n 88, 2645; Jones, above n 77, 255.

⁹⁴ Singer, ‘War, Profits, and Vacuum of Law’, above n 88, 535.

⁹⁵ See, eg, Enrique Bernales Ballesteros, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur, Pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113, UN Doc E/CN.4/1997/24 (20 February 1997) 26–7 [85]–[87]; Enrique Bernales Ballesteros, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination; Report Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur*, UN Doc E/CN.4/2004/15 (24 December 2003) 12–15 [37]–[46], 17–18 [52]; Commission on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, UN ESCOR, 61st sess, 3rd mtg, Agenda Item 5, UN Doc E/CN.4/2005/23 (18 January 2005) 7 [7]; Holmqvist, above n 50, 3–5; Leander, above n 50, 610–11.

⁹⁶ Enrique Bernales Ballesteros, Special Rapporteur, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination; Report Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur*, UN Doc E/CN.4/2004/15 (24 December 2003) 13 [40].

⁹⁷ Ibid 13 [43(c)].

the redefinition avoids the cumulative criteria of existing definitions.⁹⁸ (The individual mandate of the Special Rapporteur on the Question of the Use of Mercenaries, established in 1987,⁹⁹ was replaced by the UN Working Group on the Use of Mercenaries ('UN Working Group') in July 2005; the UN Working Group was established to investigate, inter alia, how PMSCs impact 'on the enjoyment of human rights, particularly the right of peoples to self-determination'.¹⁰⁰) In a draft resolution in November 2012, the Third Committee of the General Assembly recommended, inter alia, that the definition be changed in line with Ballesteros' proposal.¹⁰¹ The resolution, sponsored by Cuba, was adopted with widespread support from Member States from the African Group, Asia-Pacific Group and Latin American and Caribbean Group in the General Assembly; however, many Western States voted against it, including European Union ('EU') Member States.¹⁰² EU Member States explained their vote by arguing, amongst other matters, that 'the Third Committee and the Human Rights Council were not the proper forums for addressing mercenary activity'.¹⁰³ A year later, the Third Committee again recommended in a draft resolution that, inter alia, Ballesteros' proposal be implemented.¹⁰⁴ The resolution was adopted, but again many Western states voted against it. EU Member States explained their voting decision by arguing that the UN Working

⁹⁸ Ibid 15 [45]. See also Commission on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, UN ESCOR, 61st sess, 3rd mtg, Agenda Item 5, UN Doc E/CN.4/2005/23 (18 January 2005) 23 [81].

⁹⁹ *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, ESC Res 1987/61, UN ESCOR, 18th plen mtg, Agenda Item 17, Supp No 1, UN Doc E/RES/1987/61 (29 May 1987) para 5; *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, GA Res 42/96, UN GAOR, 42nd sess, 93rd plen mtg, Agenda Item 91, Supp No 49, UN Doc A/RES/42/96 (7 December 1987) para 8.

¹⁰⁰ *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/RES/2005/2 (7 April 2005) para 12(e). On self-determination as a human right, see especially *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex ('*United Nations Declaration on the Rights of Indigenous Peoples*') arts 3–4. I discuss the UN Working Group on the Use of Mercenaries in further detail in Part III.

¹⁰¹ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 15.

¹⁰² *Summary Record of the 47th Meeting*, UN GAOR, 3rd Comm, 67th sess, 47th mtg, Agenda Items 27, 28, 62, 65 and 68, UN Doc A/C.3/67/SR.47 (29 January 2013) 5–6 [47].

¹⁰³ Ibid 5 [46].

¹⁰⁴ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 68th sess, Agenda Item 68, UN Doc A/C.3/68/L.66 (5 November 2013) para 15.

Group, with its mandate to investigate both mercenary and PMSC activities, was not drawing a sufficiently ‘clear distinction between the use of mercenaries and the lawful activities of private military and security companies’.¹⁰⁵ EU Member States further argued that the UN Working Group ought to be more ‘open-minded’ about forms of regulating PMSCs other than by way of a convention.¹⁰⁶ Despite Third Committee resolutions and calls from the UN Working Group for all UN Member States to support Ballesteros’ proposal, the *Mercenaries Convention* retains the cumulative definition of mercenary.

D International Initiatives to Regulate PMSCs

Not surprisingly, the UN Working Group has noted that PMSCs largely elude the legal definition of mercenary, which ‘does not generally apply to the personnel of PMSCs legally operating in foreign countries’.¹⁰⁷ The *Montreux Document* and the *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*¹⁰⁸ both seek to address shortcomings with the efficacy of the strict legal definition of mercenary as it relates to the regulation of PMSCs. The *Montreux Document*, initiated by the Swiss Government and the International Committee of the Red Cross, outlines ‘Pertinent International Legal Obligations Relating to Private Military and Security Companies’ and ‘Good Practices Relating to Private Military and Security Companies’. A good practice for Home States is, for instance, to ‘evaluate whether their domestic legal framework ... is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel’.¹⁰⁹ The *Montreux Document* itself is non-binding, but it encapsulates principles of international humanitarian law and human rights law, pertinent to the use of PMSCs by states, that are binding. For instance, Common Article 1 of the *Geneva Conventions* stipulates, ‘[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’. In light of Common Article 1, standards

¹⁰⁵ *Summary Record of the 47th Meeting*, UN GAOR, 3rd Comm, 68th sess, 51st mtg, Agenda Items 27, 28, 65 and 68, UN Doc A/C.3/68/SR.51 (16 January 2014) 8 [58].

¹⁰⁶ *Ibid.*

¹⁰⁷ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 10 [38]. See also Percy, ‘Regulating the Private Security Industry’, above n 79, 44–5; Juan Carlos Zarate, ‘The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder’ (1998) 34 *Stanford Journal of International Law* 75, 80.

¹⁰⁸ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) annex (‘*Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*’) (‘*Draft PMSC Convention*’).

¹⁰⁹ *Montreux Document* pt 2 div C, introduction.

of conduct vis-à-vis respect for international humanitarian law that are obligatory for all Parties apply also, it could be argued, to contractual relationships between state actors and non-state actors such as PMSCs — with a contracting state bearing the ‘obligation ... to exercise due diligence and take reasonable measures within its power to prevent and repress violations of IHL by PMSCs.’¹¹⁰

The *Montreux Document* provides a timely summation of principles for regulating PMSCs, but questions may be asked about the extent of how international it is in terms of its support from a wide range of state actors. The *Montreux Document* has been presented in the UN General Assembly and the Security Council,¹¹¹ but it was not formulated under UN frameworks such as the Sixth (Legal) Committee of the General Assembly, and was mostly the creation of Western States, due to their ‘heavy involvement’ in the privatisation of war.¹¹² Only ‘three African States were involved (Angola, Sierra Leone and South Africa)’ in its creation, and no Latin American or Caribbean States were involved.¹¹³ Given the overrepresentation of Western States in the Montreux consultation process, the *Montreux Document*, as the UN Working Group notes, ‘has ... failed to address the regulatory gap in the responsibility of States with respect to the conduct of PMSCs and their employees.’¹¹⁴ A related aspect of the said ‘gap’ pertains to contract law and marketplace dynamics. Contract law and market mechanisms seem to have the potential to improve the accountability of PMSCs in the market for force, but the *Montreux Document*, as José Luis Gómez del Prado, a member of the UN Working Group from 2005–10, argues, ‘fails to require a centralised office responsible

¹¹⁰ Hannah Tonkin, ‘Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies’ (2009) 22 *Leiden Journal of International Law* 779, 793. See generally Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble’ (2010) 21 *European Journal of International Law* 125, 125–71; ‘Report of the International Law Commissions on the Work of Fifty-Third Session (23 April – 1 June and 2 July – 10 August 2001)’ [2001] II(2) *Yearbook of the International Law Commission* 1, 26, 31–67.

¹¹¹ *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, UN Docs A/63/467 and S/2008/636, annex.

¹¹² José L Gómez del Prado, ‘Private Military and Security Companies and the UN Working Group on the Use of Mercenaries’ (2009) 13 *Journal of Conflict and Security Law* 429, 443. The *Montreux Document*, as its Preface states at 9:

was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America.

¹¹³ Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 443.

¹¹⁴ Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/10/14 (21 January 2009) 11 [44]. See also Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 443. Cf James Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’ (2009) 13 *Journal of Conflict and Security Law* 402, 425–8.

to register all contracts, apply common standards and monitor the contracts'.¹¹⁵ For other commentators and scholars, the *Montreux Document* is a 'yardstick' by which states can measure their practices on the use and regulation of PMSCs, and is a 'significant step' towards ensuring that PMSCs respect human rights.¹¹⁶

In July 2010, the UN Working Group submitted the *Draft PMSC Convention* to the Human Rights Council, with a view to banning PMSCs from providing 'inherently State functions,' especially core military activities.¹¹⁷ These functions, as the Working Group noted, 'are consistent with the principle of the State monopoly on the legitimate use of force and that a State *cannot* outsource or delegate to PMSCs *under any circumstances*.'¹¹⁸ Whereas art 47 of *Additional Protocol I of the Geneva Conventions* only applies to international armed conflict,¹¹⁹ the *Draft PMSC*

¹¹⁵ Gómez del Prado, 'Private Military and Security Companies', above n 112, 442. On improving the accountability of PMSCs in the market for force, see Michael Cottier, 'Elements for Contracting and Regulating Private Security and Military Companies' (2006) 88 *International Review of the Red Cross* 637, 637, 638–40, 642–3; Dickinson, 'Government for Hire', above n 81, 171–2, 199–207. Cf Valentina Calderai, 'The Privatization of Military and Security Services and the Limits of Contract Law' (Working Paper, Max Weber Programme, European University Institute, Florence, 2010) 2–4, 9–11 <http://cadmus.eui.eu/bitstream/handle/1814/14558/MWP_2010_31.pdf?sequence=1>; Rakowsky, above n 78, 375–7, 397.

¹¹⁶ Human Rights First, 'Oversight Mechanism Will Promote and Advance Private Security Contractors' Respect for Human Rights' (Press Release, Human Rights First, 25 February 2013) <<http://www.humanrightsfirst.org/2013/02/25/oversight-mechanism-will-promote-and-advance-private-security-contractors%E2%80%99-respect-for-human-rights/>>. See also Cockayne, 'Regulating Private Military and Security Companies', above n 114, 427; James Cockayne and Emily Speers Mears, 'Private Military and Security Companies: A Framework for Regulation' (Policy Report, International Peace Institute, New York, March 2009) 1, 6, 13 <http://www.ipinst.org/media/pdf/publications/pmsc_epub.pdf>. But see Rebecca DeWinter-Schmitt (ed), *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practice* (November 2013) Center for Human Rights and Humanitarian Law, American University, Washington College of Law, 157–8 <<http://ihrib.org/wp-content/uploads/2013/12/MontreuxFv31.pdf>>; Kristine A Huskey, 'Accountability for Private Military and Security Contractors in the International Legal Regime' (2012) 31 *Criminal Justice Ethics* 193, 204–5.

¹¹⁷ *Draft PMSC Convention*, UN Doc A/HRC/15/25, annex arts 1(b), 2(i), 4(3), 6(2), 9, 19(1).

¹¹⁸ Ibid art 2(i) (definition of 'Inherently State functions') (emphasis added). Regarding the principles that underpin the *Draft PMSC Convention*, see Huskey, above n 116, 205–7; Nigel D White, 'The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention' (2011) 11 *Human Rights Law Review* 133, 137–41.

¹¹⁹ Emanuela-Chiara Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 525, 564. Cf *Report of the ad hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, UN GAOR, 42nd sess, Supp No 43, UN Doc A/42/43 (24 March 1987) 3 [17].

Convention 'would apply to all situations whether or not the situation is defined as an armed conflict.'¹²⁰ Progress on garnering international support for the *Draft PMSC Convention* seems, however, to consist mainly of General Assembly Resolutions calling for all states to support the regulatory initiative and, for states that have not already done so, to become parties to the *Mercenaries Convention*.¹²¹

Clearly, then, building a regulatory regime on PMSCs requires coordinating inputs from states, civil society, industry stakeholders and other interested individuals and organisations.¹²² In October 2010, the Human Rights Council established 'an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework' on PMSCs.¹²³ In a parallel initiative to the *Draft PMSC Convention*, the UN Working Group has recognised the *ICoC* and *Draft ICoC Charter*, both of which were developed through consultations between a range of state and non-state actors (including industry stakeholders), 'as a means of improving the adherence of private military and security companies to international humanitarian and human rights standards.'¹²⁴ The Working Group

¹²⁰ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 11 [46].

¹²¹ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 65/203, UN GAOR, 65th sess, 71st plen mtg, Agenda Item 67, Supp No 49, UN Doc A/RES/65/203 (16 March 2011) paras 4–8, 11, 18–19; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 66/147, UN GAOR, 66th sess, 89th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/66/147 (29 March 2012) paras 4–8, 11, 18–19; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 67/159, UN GAOR, 67th sess, 60th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/67/159 (26 February 2013) paras 4–8, 11, 17–18. See also *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 21/8, UN GAOR, 21st sess, 36th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/RES/21/8 (10 October 2012) paras 3–7, 15, 20.

¹²² Cockayne and Mears, above n 116, 3–5.

¹²³ *Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*, HRC Res 15/16, UN GAOR, 15th sess, 34th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/Res/15/26 (7 October 2010) para 4. Originally the mandate was to last for two years but it has been extended for a further two years: *Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*, HRC Res 22/33, UN GAOR, 22nd sess, 50th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/Res/22/33 (22 March 2013) para 1.

¹²⁴ Faiza Patel, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/21/43 (2 July 2012) 6 [19]. See also José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the*

recommends, though, that the *ICoC* and *Draft ICoC Charter* be ‘strengthened’ by externally administered mechanisms such as ‘field audits’, because ‘self-regulatory mechanism[s] ... can never replace accountability through the law.’¹²⁵

The above regulatory initiatives ‘provide important guidance’ for how to deal with PMSCs; however, in the case of the *Montreux Document*, *ICoC* and *Draft ICoC Charter*, they do not ‘stipulate meaningful consequences in cases of non-compliance.’¹²⁶ Proponents of a legally binding instrument for regulating PMSCs argue that the *Montreux Document*, *ICoC* and *Draft ICoC Charter* are ‘only some of the elements required for an international system to regulate the activities of private military and security companies’.¹²⁷ The fundamental elements relate to the obligations imposed on States: a legally binding instrument, as the UN Working Group contends, would be ‘the most efficient way to regulate’ PMSCs, for instance, by creating ‘general due diligence-related obligations’ for PMSCs and contracting states.¹²⁸ If a PMSC carried out its due diligence obligations but human rights violations nonetheless occurred in the course of its activities does not mean, however, that that PMSC or the contracting State could automatically avoid liability for complicity for violations committed by PMSC personnel or related parties.¹²⁹

Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN Doc A/HRC/18/32 (4 July 2011) 16 [70]–[72].

¹²⁵ Faiza Patel, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/21/43 (2 July 2012) 7 [22]. See also Gabor Rona, ‘A Tour de Horizon of Issues on the Agenda of the Mercenaries Working Group’ (2013) 22 *Minnesota Journal of International Law* 324, 338–9; UN Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN GAOR, 67th sess, Agenda Item 69, UN Doc A/67/340 (30 August 2012) 19 [67].

¹²⁶ Abdul S Minty, Chair-Rapporteur, *Report of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies on its Second Session*, UN Doc A/HRC/22/41 (24 December 2012) 10 [41], [42]. See also UN Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 15–16 [63]–[65].

¹²⁷ UN Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 17 [69].

¹²⁸ *Ibid* 16 [66], [68].

¹²⁹ Tonkin, *State Control*, above n 26, 132–7; UN Working Group on the Use of Mercenaries, *Submissions by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 6–10 [13]–[25]; UN Working Group

Given that the above three initiatives are recent, it would be premature to evaluate their efficacy in a definitive manner. Nonetheless, it is apparent that tensions between *realpolitik* and moral disquiet about mercenarism pervade the milieu of the initiatives, if not the initiatives themselves.¹³⁰ The persistence of tensions between *realpolitik* and moral disquiet about mercenarism underscores the difficulty of transforming emerging norms into law, in this case, transforming the normative significance of UN and civil society appeals to regulate PMSCs into a convention with widespread international support.

III FACT-FINDING ON MERCENARIES AND PMSCs

A Why Conduct Fact-Finding on PMSCs?

Fact-finding regarding the activities of PMSCs and their impact on human rights is itself a case study of the politics of law. Fact-finding on PMSCs, as this section argues, cannot be understood in isolation to its institutional milieu and broader political environment. The search for probative facts on human rights violations has taken on increasing prominence in recent years. Humanitarian crises and occurrences of ethnic cleansing, mass killings and genocide illustrate the need for fact-finding missions in addressing human rights violations.¹³¹ Yet, the politicised nature of the UN system

on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 18–19 [70]–[73]. See generally *Identical Letters Dated 25 February 2013 from the Secretary-General Addressed to the President of the General Assembly and to the President of the Security Council*, UN GAOR, 67th sess, Agenda Item 69; UN SCOR, 67th sess, UN Docs A/67/775 and S/2013/110 (5 March 2013) annex (*Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*); Sabine Michalowski, ‘Due Diligence and Complicity: A Relationship in Need of Clarification’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 218, 236–7.

¹³⁰ See UN Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 15–16 [63]–[65]. See generally David Kennedy, ‘War and International Law: Distinguishing Military and Humanitarian Professions’ (2007) 82 *International Law Studies* 3, 4, 9–10, 28–31; Maogoto and Sheehy, ‘Contemporary Private Military Firms Under International Law’, above n 38, 250–1; Thembanani Mbadlanyana, ‘Moralpolitik and Realpolitik: Seeking Common Ground on the Use of Private Military and Security Companies’ in Sabelo Gumedze (ed), *From Market for Force to Market for Peace: Private Military and Security Companies in Peacekeeping Operations* (ISS Monograph Number 183, Institute for Security Studies, Pretoria, South Africa, 1 November 2011) 39, 41–2, 52–3, 63 <<http://www.issafrica.org/uploads/Mono183.pdf>>.

¹³¹ See especially Philip Alston and Ryan Goodman, *International Human Rights: Text and Materials* (Oxford University Press, 2013) 845–7, 856; Michael Bothe, ‘Fact-Finding as a Means of Ensuring Respect for International Humanitarian Law’ in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law*

raises questions about the reliability of international fact-finding.¹³² Facts are epistemologically and politically contestable,¹³³ but rather than use critical legal studies theory¹³⁴ to analyse the possibilities for developing future applications of fact-finding per se, this section will instead evaluate the said possibilities vis-à-vis a salient example of fact-finding, namely, determining the impact of mercenarism and mercenary-related activities on human rights. Although academic,¹³⁵ think-tank¹³⁶ and non-governmental organisation (NGO)¹³⁷ reports on PMSCs are pertinent to an analysis of pressures on fact-finding, including the pressure of collecting information from dispersed sources, this section will focus on UN fact-finding on mercenarism and PMSCs.

Facing New Challenges: Symposium in Honour of Knut Ipsen (Springer, 2007) 249, 249–50, 260–7; Antonio Cassese, ‘Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 295, 295–6, 302–3; Todd Landman, ‘Measuring Human Rights: Principle, Practice, and Policy’ (2004) 26 *Human Rights Quarterly* 906, 906–9, 926–31; Diane F Orentlicher, ‘Bearing Witness: The Art and Science of Human Rights Fact-Finding’ (1990) 3 *Harvard Human Rights Journal* 83, 83–6, 108–9, 122.

¹³² M Cherif Bassiouni, ‘Appraising UN Justice-Related Fact-Finding Missions’ (2001) 5 *Washington University Journal of Law and Policy* 35, 35–8.

¹³³ See, eg, Frans Viljoen, ‘Fact-Finding by UN Human Rights Complaints Bodies — Analysis and Suggested Reforms’ (2004) 8 *Max Plank Yearbook of United Nations Law* 49, 51–3.

¹³⁴ See generally David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harvard Human Rights Journal* 101, 106–10, 114–19, 123–5; Mark Tushnet, ‘Critical Legal Studies: A Political History’ (1991) 100 *Yale Law Journal* 1515, 1516–23, 1537–44; Roberto Mangabeira Unger, ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561, 561–76.

¹³⁵ See, eg, DeWinter-Schmitt, above n 116, 7–11, 17–38, 157–8; Scott Jerbi et al, ‘The International Code of Conduct for Private Security Service Providers’ (Academy Briefing No 2, Geneva Academy of International Humanitarian Law and Human Rights, August 2013) 5–7, 25–44 <http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf>.

¹³⁶ See, eg, Hans Born, *Parliamentary Oversight of the Security Sector* (July 2013) Geneva Centre for the Democratic Control of Armed Forces, 12–13, 20–2, 44–5 <www.dcaf.ch/content/download/153719/2390045/file/EP_Parliamentary_Oversight_Security_Sector_2013_BOH.pdf>; Isenberg, ‘Private Military Contractors’, above n 79, 5, 7–8, 11–13, 37–9, 47–9.

¹³⁷ See, eg, Amnesty International, *Carnage and Despair: Iraq Five Years On* (March 2008) 1–9, 14–15, 18–19, 21–3 <http://psm.du.edu/media/documents/reports_and_stats/ngo_reports/amnesty_international_carnage_and_despair.pdf>; Human Rights Watch, ‘There Are No Investigations Here’: *Impunity for Killings and Other Abuses in Bajo Aguán, Honduras* (February 2014) 5, 15–16, 26–7, 64–70 <<http://www.hrw.org/sites/default/files/reports/honduras0214web.pdf>>; War on Want, *Corporate Mercenaries: The Threat of Private Military and Security Companies* (November 2006) 8–9, 13–16, 19–21 <<http://www.waronwant.org/attachments/Corporate%20Mercenaries.pdf>>.

The UN Working Group, comprised of five independent experts, was established by the Commission on Human Rights in July 2005 to investigate, inter alia, how PMSCs impact ‘on the enjoyment of human rights, particularly the right of peoples to self-determination’.¹³⁸ The ubiquity of the privatisation of force raises far-reaching questions about how to regulate, or whether to prohibit, an industry that has been implicated in human rights abuses in conflict and post-conflict zones.¹³⁹ Under its thematic mandate as a Human Rights Council Special Procedure,¹⁴⁰ and guided by pertinent international legal instruments,¹⁴¹ the UN Working Group: receives communications (including complaints) about PMSCs from governments, NGOs and concerned individuals;¹⁴² holds regional consultations with governments, civil

¹³⁸ *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/RES/2005/2 (7 April 2005) para 12(e). On self-determination as a human right, see especially *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex (‘*United Nations Declaration on the Rights of Indigenous Peoples*’) arts 3–4.

¹³⁹ See, eg, José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 10 [39], 18 [91]; DeWinter-Schmitt, above n 116, 17–33, 161–4; Singer, ‘War, Profits, and the Vacuum of Law’, above n 88, 521–5, 532–9; UN Working Group on the Use of Mercenaries, *Submissions by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 4 [6]–[7]; Zarate, above n 107, 76–81, 116–34, 145–62.

¹⁴⁰ *Mandate of the Working Group of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 7/21, UN GAOR, 7th sess, 41st sess, Supp No 53, UN Doc A/HRC/RES/7/21 (28 March 2008) Preamble para 3; *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 24/13, UN GAOR, 24th sess, 34th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/RES/24/13 (8 October 2013) Preamble para 2.

¹⁴¹ *Additional Protocol I of the Geneva Conventions* arts 47, 75; *Charter of the United Nations* arts 1(1), 2(4); *Mercenaries Convention* arts 1–21; *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) arts 1–3.

¹⁴² Amada Benavides, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on the Resumed First Session (10 to 14 October 2005 and 13 to 17 February 2006) — Addendum*, UN Doc E/CN.4/2006/11/Add.1 (3 March 2006) 4 [2]; *Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 7/21, UN GAOR, 7th sess,

society actors and PMSC industry representatives, about monitoring and regulating PMSCs;¹⁴³ submits annual reports to the UN General Assembly and the Human Rights Council;¹⁴⁴ surveys national legislation relating to PMSCs;¹⁴⁵ and has carried out fact-finding missions in Afghanistan, Chile, Ecuador, Equatorial Guinea, Fiji, Honduras, Iraq, Peru, Somalia, South Africa, the United Kingdom and the United States of America.¹⁴⁶ The UN Working Group tends to carry out country visits by two group members, meeting a wide range of state and non-state actors, within short

41st sess, Supp No 53, UN Doc A/HRC/RES/7/21 (28 March 2008) para 2(b); UN Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/62/301 (24 August 2007) 8 [20].

¹⁴³ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Latin American and Caribbean Regional Consultation on the Effects of the Activities of Private Military and Security Companies on the Enjoyment of Human Rights: Regulation and Monitoring (17–18 December 2007)*, UN Doc A/HRC/7/7/Add.5 (5 March 2008) 5–6 [1]–[9], app I; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Western European and Others Group on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring (14 April 2010)*, UN Doc A/HRC/15/25/Add.6 (5 July 2010) 4–5 [6]–[13], app; Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Eastern European Group and Central Asia Region — Regional Consultation on the Activities of Private Military and Security Companies: Regulation and Oversight (17–18 October 2008)*, UN Doc A/HRC/10/14/Add.3 (26 February 2009) 4 [1]–[4], 7 [18]–[19], 9 [28], app I; Shaista Shameem, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Asia and the Pacific on the Activities of Private Military and Security Companies (26–27 October 2009)*, UN Doc A/HRC/15/25/Add.4 (1 April 2010) 4 [1]–[7], app I; Shaista Shameem, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Africa on the Activities of Private Military and Security Companies: Regulation and Monitoring 3–4 March 2010*, UN Doc A/HRC/15/25/Add.5 (2 June 2010) 4–5 [4]–[10], app I.

¹⁴⁴ UN Working Group on the Use of Mercenaries, *Annual Reports* <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>>.

¹⁴⁵ UN Working Group on the Use of Mercenaries, *National Regulatory Frameworks on PMSCs* <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFrameworks.aspx>>.

¹⁴⁶ UN Working Group on the Use of Mercenaries, *Country Visits* <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CountryVisits.aspx>>.

timeframes.¹⁴⁷ As both the Quakers and Amnesty International have noted of Human Rights Council Special Procedures in general, country visits are

one of the most effective means by which the Special Procedures can assess the protection of human rights at the national and local level and articulate clear, measurable and relevant recommendations.¹⁴⁸

B Pressures on Developing Reliable and Accurate Fact-Finding on PMSCs

UN fact-finding on mercenarism and PMSCs is a microcosm of the manifold pressures on developing credible — reliable and accurate — fact-finding. Fact-finding is important for reasons discussed above, but pressures on fact-finding challenge its effectiveness. Arguably, the pressures on in-country fact-finding and regional consultations stem not from discourses of ‘official denial’¹⁴⁹ of human rights problems or from lacunae in official cooperation with the UN Working Group¹⁵⁰ — generally, its reports on country visits note the cooperation of

¹⁴⁷ See, eg, Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United States of America (20 July to 3 August 2009)*, UN Doc A/HRC/15/25/Add.3 (15 June 2010) 4 [1]–[4].

¹⁴⁸ *Joint Written Statement Submitted by the Friends World Committee for Consultation (Quakers), a Non-Governmental Organization in General Consultative Status, Amnesty International, a Non-Governmental Organization in Special Consultative Status*, UN Doc A/HRC/19/NGO/24 (15 February 2012) 2. See generally *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’: Letter Dated 18 May 2007 Addressed by the Rector of the United Nations University to the President of the Human Rights Council*, UN Doc A/HRC/5/18 (13 June 2007) annex (‘Lund Statement to the United Nations Human Rights Council on the Human Rights Special Procedures’); Ted Piccone, *Catalysts for Change: How the UN’s Independent Experts Promote Human Rights* (Brookings Institution Press, 2012) 18–44; UN Office of the High Commissioner for Human Rights, *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (2008) 107–36 <http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf>.

¹⁴⁹ See generally Stanley Cohen, ‘Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims’ (1996) 18 *Human Rights Quarterly* 517, 522–34; Thomas Risse and Kathryn Sikkink, ‘The Socialization of International Human Rights Norms Into Domestic Practices: Introduction’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1, 22–4.

¹⁵⁰ Cf Cockayne and Mears, above n 116, 4–5; José Luis Gómez del Prado, Chairperson/Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/18/32 (4 July 2011) 6 [14]; UN Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/15/25/Add.1 (2 September 2010) 4 [10], 6 [27], 9 [46], [49].

governments¹⁵¹ — but rather from dealing with ‘information dispersal’.¹⁵² This term refers to how

there is a much broader array of actors relevant to any given human rights situation who possess highly relevant information which is not able to be made available in a meaningful way and injected into the broader information database on which decisions are based.¹⁵³

¹⁵¹ Amada Benavides de Pérez, Chairperson, *Report of the Working Group on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Mission to Ecuador*, UN Doc A/HRC/4/42/Add.2 (23 February 2007) 4 [1], 19 [52]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Fiji (14–18 May 2007)*, UN Doc A/HRC/7/7/Add.3 (8 January 2008) 4 [1]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Peru (29 January to 2 February 2007)*, UN Doc A/HRC/7/7/Add.2 (4 February 2008) 19 [63]; José Luis Gómez del Prado, Chairperson, *Report of the Working Group on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Chile (9–13 July 2007)*, UN Doc A/HRC/7/7/Add.4 (4 February 2008) 19 [54]; Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United Kingdom of Great Britain and Northern Ireland (26–30 May 2008)*, UN Doc A/HRC/10/14/Add.2 (19 February 2009) 4 [1]; Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Afghanistan*, UN Doc A/HRC/15/25/Add.2 (14 June 2010) 4 [2]; Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United States of America (20 July to 3 August 2009)*, UN Doc A/HRC/15/25/Add.3 (15 June 2010) 4 [2]. Cf Amada Benavides de Pérez, Chair-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Equatorial Guinea (16–19 August 2010)*, UN Doc A/HRC/18/32/Add.2 (4 July 2011) 11 [34], 15 [52]; UN Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Honduras (18–22 February 2013)*, UN Doc A/HRC/24/45/Add.1 (5 August 2013) 5–6 [9]–[11].

¹⁵² Philip Alston and Colin Gillespie, ‘Global Human Rights Monitoring, New Technologies, and the Politics of Information’ (2012) 23 *European Journal of International Law* 1089, 1092–5, 1103–4. See also Cass R Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford University Press, 2006) 7–8, 15–16, 18–19.

¹⁵³ Alston and Gillespie, above n 152, 1093.

Legal and political theorists note that, while deliberation is a path to the aggregation of information,¹⁵⁴ processes of, and pressures on, deliberation — arising from ‘hegemonic contestation’¹⁵⁵ — have the potential to skew the reliability and accuracy of knowledge that is aggregated through deliberation.¹⁵⁶ In other words, and the importance of the UN Working Group’s mandate notwithstanding, the question can be raised as to whether the pressures of coordinating data collection from a range of actors in what are often conflict and post-conflict zones — using the ‘reasonable grounds’ standard of proof when making factual determinations — undercuts the reliability of the data.¹⁵⁷ Indeed, as the UN Working Group has noted vis-à-vis concerns raised about PMSC activities in Iraq and Equatorial Guinea, ‘there have been serious difficulties in collecting evidence and finding witnesses in the countries concerned, especially in conflict areas.’¹⁵⁸ The above ‘difficulties’ are pressures that operate on a micro level (as they impact on individuals),

¹⁵⁴ Sunstein, above n 152, 54–5, 60–4. See also Alston and Gillespie, above n 152, 1091–2, 1094. See generally John S Dryzek, ‘Democratization as Deliberative Capacity Building’ (2009) 42 *Comparative Political Studies* 1379, 1381–8; Ian Johnstone, ‘The Power of Interpretive Communities’ in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press, 2005) 185, 193–204; Jürg Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (Cambridge University Press, 2012) 219–46.

¹⁵⁵ Koskeniemi, above n 14, 221–5, 232–5. See also Jose E Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97 *American Journal of International Law* 873, 873–74, 886–7; Detlev F Vagts, ‘Hegemonic International Law’ (2001) 95 *American Journal of International Law* 843, 843–8.

¹⁵⁶ Sunstein, above n 152, 57–8. See also Alston and Gillespie, above n 152, 1092–4, 1099, 1103–4. See generally Dryzek, above n 154, 1396–9; Koskeniemi, above n 14, 110–11; Steiner, above n 154, 125–7, 153–66. But see Lyotard, above n 60, 8, 27–31, 35–6, 46–7.

¹⁵⁷ See generally Alston and Gillespie, above n 152, 1101–9; Théo Boutruche, ‘Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice’ (2011) 16 *Journal of Conflict and Security Law* 105, 106–7, 110–27, 139–40; Viljoen, above n 133, 81–9. On the ‘reasonable grounds’ standard of proof, see generally Boutruche, above n 157, 112–15; Michael Kirby, Sonja Biserko and Marzuki Darusman, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, UN Doc A/HRC/25/CRP.1 (7 February 2014) 16–17 [67]–[76]; Viljoen, above n 133, 85–9; Stephen Wilkinson, ‘Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions’ (Research Project, Geneva Academy of International Humanitarian Law and Human Rights, 2012) 14, 16, 19–23, 53–4 <<http://www.geneva-academy.ch/docs/reports/Standards%20of%20proof.pdf>>.

¹⁵⁸ Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to South Africa (10 to 19 November 2010)*, UN Doc A/HRC/18/32/Add.3 (4 July 2011) 12 [38]. See generally Boutruche, above n 157, 120–2.

but are shaped by meso level pressures,¹⁵⁹ including the persistence of ethno-nationalist drivers of conflict¹⁶⁰ and the dynamics of different regime types.¹⁶¹ The tension between state sovereignty and global civil society places further pressure on the efficacy of fact-finding;¹⁶² the tension raises macro level abstractions about the nature of power and influences individual actors via meso level pressures.¹⁶³

C *Where to Next?*

The above manifold pressures on fact-finding are common to fact-finding per se,¹⁶⁴ however, some pressures are specific to fact-finding on the old and new modalities of mercenarism. Pressures on informational transparency regarding PMSCs stem, for example, from the difficulty of unravelling the ‘labyrinth of layers of contracts and subcontracts’ under which PMSCs operate.¹⁶⁵ On the one hand, contracts are a potential tool for contracting states and other contracting clients, including the

¹⁵⁹ To evaluate the matters addressed in the section, it is helpful to use international relations and sociological terminology here, ie, ‘micro’, ‘meso’ and ‘macro’ level dynamics. On micro-meso dynamics, see generally D Brent Smith, Benjamin Schneider and Marcus W Dickson, ‘Meso Organizational Behaviour: Comments on the Third Paradigm’ in Stewart R Clegg et al (eds), *The Sage Handbook of Organization Studies* (Sage, 2nd ed, 2006) 149, 149–50, 152–3, 156; Moshe Hirsch, ‘The Sociology of International Law: Invitation to Study International Rules in Their Social Context’ (2005) 55 *University of Toronto Law Journal* 891, 897–906, 931–9; J David Singer, ‘The Level-of-Analysis Problem in International Relations’ (1961) 14 *World Politics* 77, 77–92.

¹⁶⁰ See above n 56.

¹⁶¹ See generally Freedom House, *Freedom in the World 2014*, 1–5, 15–17 <<http://www.freedomhouse.org/sites/default/files/Freedom%20in%20the%20World%202014%20Booklet.pdf>>; Alex Hadenius and Jan Teorell, ‘Pathways from Authoritarianism’ (2007) 18 *Journal of Democracy* 143, 145–54.

¹⁶² See Alston and Goodman, above n 131, 846, 883–4. On the above tension, see generally Koskeniemi, above n 14, 44–62, 90–1, 219–28, 246–9, 316–18; Christian Reus-Smit, ‘The Politics of International Law’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 14, 35–43; Wayne Sandholtz and Alec Stone Sweet, ‘Law, Politics, and International Governance’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 238, 238–41, 245–6, 258–64.

¹⁶³ See, eg, Sandholtz and Sweet, above n 162, 245–6. On macro level dynamics, see generally Smith, Schneider and Dickson, above n 159, 149–57.

¹⁶⁴ See, eg, Alston and Goodman, above n 131, 846–7, 858, 877–83; Boutruche, above n 157, 107–8, 110–20.

¹⁶⁵ Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 437. See also Holmqvist, above n 50, 18–19, 28, 30–1. On informational transparency, see Cottier, above n 115, 638, 644–5, 660–1; José L Gómez del Prado, ‘A UN Convention to Regulate PMSCs?’ (2012) 31 *Criminal Justice Ethics* 262, 266, 269, 273; DeWinter-Smith, above n 116, 17–18, 19, 28–9, 51–2, 58; Isenberg, ‘Private Military Contractors’, above n 79, 7, 23–7, 44–5, 49; Allison Stanger, ‘Transparency as a Core Public Value and Mechanism of Compliance’ (2012) 31 *Criminal Justice Ethics* 287, 288, 297–300.

UN (which contracts PMSCs when necessary to assist humanitarian and peacekeeping operations),¹⁶⁶ to make PMSCs answerable for their conduct.¹⁶⁷ On the other hand, complicating the prospects for improved informational transparency is how the transnational scope of PMSC contracts can make it difficult to establish individual responsibility for human rights transgressions brought to light by fact-finding efforts.¹⁶⁸ Further complicating the prospects for improved informational transparency is the omission from the *Montreux Document* of the creation of a ‘central registry’ of PMSC contracts.¹⁶⁹ Pressures on informational transparency have also arisen from the lack of widespread international support for the *Mercenaries Convention* and the reluctance of Western states to heed repeated requests from the UN Working Group to amend the strict definition of mercenary to reflect the privatisation of force.¹⁷⁰

¹⁶⁶ See, eg, Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies* (2011) Geneva Centre for the Democratic Control of Armed Forces, 8–18, 48, 58–63 <www.dcaf.ch/content/download/45662/678940/file/SSR_PAPER3.pdf>; UN Department of Safety and Security, *United Nations Security Management System: Security Policy Manual — Chapter IV — Security Management, Section I: Armed Private Security Companies* (8 November 2012) 1 [1]–[3] <<http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/UNSecurityPolicyManual.pdf>>; UN Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 9 [38]–[41].

¹⁶⁷ Cottier, above n 115, 638–40. *Contra* Marcus Hedahl, ‘Unaccountable: The Current State of Private Military and Security Companies’ (2012) 31 *Criminal Justice Ethics* 175, 178–82.

¹⁶⁸ See, eg, Commission on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, UN ESCOR, 61st sess, 3rd mtg, Agenda Item 5, UN Doc E/CN.4/2005/23 (18 January 2005) 8 [12]–[14]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/7/7 (9 January 2008) 20–1 [50]–[51]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 6 [17], 9–10 [34]–[40].

¹⁶⁹ Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 447.

¹⁷⁰ See especially Enrique Bernales Ballesteros, Special Rapporteur, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*; *Report Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur*, UN Doc E/CN.4/2004/15 (24 December 2003) 12–15 [37]–[47]; *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 15; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 67/159, UN GAOR, 67th sess, 60th plen mtg, Agenda Item

The manifold pressures on fact-finding are, put differently, pressures on the discursive boundaries for the possibilities of future fact-finding. The status of corporate human rights compliance is inchoate,¹⁷¹ as are international initiatives to regulate PMSCs.¹⁷² In November 2010, the Human Rights Council created an Intergovernmental Working Group on the ‘possibility’ of creating a legally binding instrument for regulating PMSCs,¹⁷³ but such an instrument has yet to come to fruition. Follow-up on fact-finding by the UN Working Group occurs inasmuch as it, inter alia, delivers annual reports on its actions to the Human Rights Council and the UN General Assembly and receives communications from governments in response to the Working Group’s requests for information about PMSC activities.¹⁷⁴ Yet, significant gaps in international law vis-à-vis PMSCs persist — the ‘gaps’ being the lack of ‘provisions’ in international law regarding ‘the outsourcing of State functions to

67/159, Supp No 49, UN Doc A/RES/67/159 (26 February 2013) para 15. See also Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 439–40; War on Want, above n 137, 18; Zarate, above n 107, 131–5, 159.

¹⁷¹ *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, Agenda Item 3, Supp No 53, UN Doc A/HRC/RES/17/4 (6 July 2011) paras 4–6; John Ruggie, Special Representative, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie — *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex (‘*Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*’). See also Andrew Clapham, ‘Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups’ (2008) 6 *Journal of International Criminal Justice* 899, 902–7, 912–19; *Contribution of the United Nations System as a Whole to the Advancement of the Business and Human Rights Agenda and the Dissemination and Implementation of the Guiding Principles on Business and Human Rights — Report of the Secretary-General*, 21st sess, Agenda Items 2 and 3, UN Doc A/HRC/21/21 (2 July 2012) 3 [1]–[5], 4–5 [10]–[16], 11–12 [53]–[56], 17–18 [92]–[98].

¹⁷² See above Part II(D).

¹⁷³ *Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*, HRC Res 15/16, UN GAOR, 15th sess, 34th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/RES/15/26 (1 October 2010) para 4.

¹⁷⁴ For examples of annual reports, see Anton Katz, Chairperson/Rapporteur, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/24/45 (1 July 2013) 3–4 [1]–[10]; UN Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 3–5 [1]–[11]. For examples of communications, see Letter from Eileen Chamberlain Donahoe, US Ambassador to the UN, to Faiza Patel, Chair-Rapporteur of the Working Group on the Use of Mercenaries, 1 June 2012, 1–6 <[https://spdb.ohchr.org/hrdb/21st/USA_01.06.12_\(22.2011\).pdf](https://spdb.ohchr.org/hrdb/21st/USA_01.06.12_(22.2011).pdf)>; Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as*

PMSCs', and the lack of specificity in 'general international law obligations' upon states 'to ensure that PMSCs do not violate humanitarian and human rights law'.¹⁷⁵ Whether the gaps will be closed in the near future is unclear, but it suffices to say that the very existence and persistence of the gaps underscores the pressures on the efficacy of future fact-finding on PMSC activities.

As a way of bearing witness to transgressions of human rights and international humanitarian law, credible fact-finding is paramount.¹⁷⁶ Delineating a way forward with regard to fact-finding methodology per se is beyond the scope of this article, but it is worth adding here that fact-finding methods of various human rights organisations warrant close scrutiny with regard to epistemic and procedural matters — as Théo Boutruche explains, 'for any type of fact-finding to be meaningful it needs to be credible.'¹⁷⁷ The pressures of dealing with the exigencies of information dispersal, for instance, gathering data in conflict and post-conflict zones, problematises the prospects of PMSCs being held accountable for human rights violations.¹⁷⁸

The question, then, is whether the possibilities for developing reliable and accurate fact-finding in the future are real or chimerical, or somewhere on a spectrum

a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 3–14 [6]–[51].

¹⁷⁵ UN Working Group on the Use of Mercenaries, *Submissions by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 4 [8]. See generally Gómez del Prado, 'A UN Convention to Regulate PMSCs?', above n 165, 272–3, 275, 280–1; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 9–10 [32]–[41], 11–13 [48]–[56]; Benjamin Perrin, 'Mind the Gap: Lacunae in the International Legal Framework Governing Private Military and Security Companies' (2012) 31 *Criminal Justice Ethics* 213, 213–32.

¹⁷⁶ Antonio Cassese, 'Gathering Up the Main Thread' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 645, 672; Orentlicher, above n 131, 83–6. On credible fact-finding, see also Alston and Gillespie, above n 152, 1089, 1094, 1108, 1117–18; Boutruche, above n 157, 105–12; Landman, above n 131, 916–17.

¹⁷⁷ Boutruche, above n 157, 106. See also Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2nd ed, 2000) 602–10.

¹⁷⁸ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 6 [13]–[17], 9–10 [32]–[41]; DeWinter-Schmitt, above n 116, 27; Jägers, above n 86, 308–10, 313–14; Faiza Patel, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/21/43 (2 July 2012) 6–7 [19]–[22].

between the two poles. The persistence of pressures on fact-finding per se and on fact-finding on PMSCs in particular, coupled with existence of gaps in international law regarding corporate business actors and PMSCs, suggests that future directions on developing reliable fact-finding are ‘essentially contestable’.¹⁷⁹ Nonetheless, fact-finding is a key part of the architecture of emerging norms on the new rules on PMSCs. Given the nature and scope of the mandate of the UN Working Group as a Human Rights Council Special Procedure (and considering the role of civil society actors in shaping emerging norms on the international regulation of PMSCs), this much can be said about identifying the *need* to find a way forward: by virtue of carrying out fact-finding missions in post-conflict and other situations and engaging in follow-up undertakings to gauge the transparency of state action vis-à-vis cooperating with its various fact-finding endeavours,¹⁸⁰ the UN Working Group encourages state and non-state actors involved in contracting PMSCs to adopt new rules on the use of force. The UN Working Group and other fact-finding parties regarding PMSCs¹⁸¹ serve as ‘norm entrepreneurs’ by shaping norms on the role of human rights law and international humanitarian law in the marketplace for force.¹⁸² Whether norm entrepreneurship is not just a necessary condition but also a sufficient condition for achieving progress on efforts to form new rules to deal with PMSCs is an open question — and efforts to shape those conditions, whether sufficient or necessary, point to the ineluctable nexus between politics and law.

IV THE POLITICS OF LAW IN AUSTRALIAN RESPONSES TO MERCENARISM AND PMSCs

A Australian Domestic Law Regarding Mercenaries

Just as it can be argued that international law would benefit from reforms to clarify the status of PMSCs, it can be argued that Australian domestic law would benefit

¹⁷⁹ On the term ‘essentially contestable’, see especially W B Gallie, ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167, 167–9, 171–3, 183–7. See also Gunnar Beck, ‘The Mythology of Human Rights’ (2008) 21 *Ratio Juris* 312, 312–14, 325–46. Cf John Gray, ‘On Liberty, Liberalism and Essential Contestability’ (1978) 8 *British Journal of Political Science* 385, 388–95.

¹⁸⁰ For those endeavours, see above nn 141–7.

¹⁸¹ See above nn 135–7.

¹⁸² See generally Elke Krahmann, ‘Private Security Companies and the State Monopoly on Violence: A Case of Norm Change’ (PRIF-Reports No 88, Peace Research Institute Frankfurt, 2009) 2–5, 15–17 <http://edoc.vifapol.de/opus/volltexte/2011/2729/pdf/prif88_01.pdf>. But see Sarah V Percy, ‘Strong Norm, Weak Law’ (2007) 61 *International Organization* 367, 367–9, 388–94. On the concept of norm change and its basis in international relations theory, see especially Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organisation* 887, 887–917; Risse and Sikkink, above n 149, 11, 17–35.

from legislative reforms with regard to PMSCs.¹⁸³ Australian domestic law addresses key legal issues about mercenarism, including how to apportion responsibility for mercenary activities; however, the legislative history of domestic laws on mercenarism shows that achieving progress on dealing with mercenarism is the product of the politics of law. In light of recent international initiatives to regulate PMSCs, there is, as this section further argues, scope for improvement with regard to clarifying the status of PMSCs in Australian domestic law.

Australia does not have the exact equivalent of New Zealand and South African anti-mercenary legislation,¹⁸⁴ but has laws that are relevant to dealing with mercenarism, which may also help regulate PMSCs. Those laws include the *Crimes (Overseas) Act 1964* (Cth) ('CO Act'), *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ('CFIR Act') and *Defence Force Discipline Act 1982* (Cth) ('DFD Act'). Under ss 9 and 61 of the *DFD Act*,¹⁸⁵ Australian criminal law¹⁸⁶ has extraterritorial application to Australian Defence Force ('ADF') members and 'defence civilians':

defence civilian means a person (other than a defence member) who:

- (a) with the authority of an authorized officer, accompanies a part of the Defence Force that is:
 - (i) outside Australia; or
 - (ii) on operations against the enemy; and
- (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.¹⁸⁷

¹⁸³ I wish to acknowledge that Part IV is indebted to Tim McCormack and Rain Liivoja, 'Australia: Regulating Private Military and Security Companies' in Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay Between International, European and Domestic Norms* (Hart Publishing, 2012) 507; Don Rothwell, 'Legal Opinion on the Status of Non-Combatants and Contractors Under International Humanitarian Law and Australian Law' (Legal Opinion, Australian Strategic Policy Institute, 21 December 2004) <http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf>; Mark Thomson, 'War and Profit: Doing Business on the Battlefield' (Report, Australian Strategic Policy Institute, March 2005) <http://www.aspi.org.au/htmlver/20937war_and_profit/_lib/pdf/ASPI_War_and_Profit.pdf>. McCormack and Liivoja is an updated version of Tim McCormack, 'Australian Report on National Legislation and Judicial Practice' (PRIV-WAR Report, National Report Series 10/09, European University Institute and Academy of European Law, 20 May 2009) <<http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-10-09-aus.pdf>>.

¹⁸⁴ *Mercenary Activities (Prohibition) Act 2004* (New Zealand); *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 2006* (South Africa), repealing *Regulation of Foreign Military Assistance Act 1998* (South Africa).

¹⁸⁵ *DFD Act* s 61, as repealed and substituted by *Defence Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) sch 1 pt 1.

¹⁸⁶ See *Criminal Code Act 1995* (Cth) ch 2 pt 1 div 1.

¹⁸⁷ *DFD Act* s 3(1) (definition of 'defence civilian').

PMSC personnel accompanying the ADF on deployments may be regarded as 'defence civilians' if they choose to be so designated and were contracted by the ADF and not by other Commonwealth agencies.¹⁸⁸

Parliamentary debates on the Crimes (Overseas) Bill 1964 (Cth) dwelled not on mercenarism as such but instead on giving effect to arrangements between the Commonwealth and the UN for Australians to serve with the UN in Cyprus. Australian criminal law was to cover Australian police serving with the UN in Cyprus, prosecuting them for breaches of the law committed in Cyprus as if the breaches had been committed in Australia.¹⁸⁹ In essence, the broad purpose of the Bill was 'to deal with offences committed outside Australia by Australian civilians in other countries for the performance of our international obligations.'¹⁹⁰

Importantly, the *CO Act* was amended in 2003 to give extraterritorial application of Australian criminal law to 'Australians' (Australian citizens and permanent residents)¹⁹¹ in foreign countries in 'certain situations', viz 'generally ... humanitarian or security operations.'¹⁹² Second reading arguments on the Crimes (Overseas) Amendment Bill 2003 (Cth) questioned whether the Bill was 'excessively legalistic' and 'complicated and tortuous',¹⁹³ or just 'a technical amendment'.¹⁹⁴ These arguments indicate tensions in Parliament about the Bill's logic and scope. The legislation¹⁹⁵ applies to Australians with diplomatic, consular or similar immunity¹⁹⁶ and to Australians undertaking tasks in a foreign country 'under a relevant agreement or arrangement'¹⁹⁷ or for the Commonwealth.¹⁹⁸ The legislation does not apply to ADF members or to staff members of the Australian Secret Intelligence Service ('ASIS'), Defence Imagery and Geospatial Organisation ('DIGO') or Defence Signals Directorate ('DSD').¹⁹⁹ According to Tim McCormack, Rain Liivoja and Don Rothwell, the operation of the *CO Act* is sufficiently expansive to apply to employees of Commonwealth agencies (but not the ADF,

¹⁸⁸ McCormack and Liivoja, above n 183, 519; Rothwell, above n 183, [34]–[36].

¹⁸⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 October 1964, 2478–9 (Billy Snedden, Attorney-General).

¹⁹⁰ Commonwealth, *Parliamentary Debates*, Senate, 12 November 1964, 1725 (Lionel Murphy). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 29 October 1964, 2479 (Billy Snedden).

¹⁹¹ *CO Act* s 3 (definition of 'Australian').

¹⁹² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2003, 19 814 (Daryl Williams, Attorney-General).

¹⁹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2003, 20 341 (Michael Organ).

¹⁹⁴ *Ibid* 20 345 (Daryl Williams).

¹⁹⁵ See especially *CO Act* s 3A, as inserted by *Crimes (Overseas) Amendment Act 2003* (Cth) sch 1 item 16.

¹⁹⁶ *CO Act* s 3A(1).

¹⁹⁷ *Ibid* ss 3A(3)–(4).

¹⁹⁸ *Ibid* ss 3A(5)–(6).

¹⁹⁹ *Ibid* s 3A(10).

ASIS, DIGO and DSD) and encompasses the personnel of PMSCs ‘engaged’ by the agencies (also with the above exceptions).²⁰⁰

Parliamentary debates on the Crimes (Foreign Incursions and Recruitment) Bill 1977 (Cth) drew critical attention to mercenarism. The Bill lapsed at the end of the 30th Parliament (which closed on 8 November 1977) and was reintroduced in 1978. The Bill’s broad purpose, in both versions, was twofold: ‘to prohibit persons preparing for or engaging in incursions into foreign countries’ and ‘to prohibit the recruiting in Australia of persons to serve in armed forces in a foreign country.’²⁰¹ The Australian Government, like the 1976 *Diplock Report*, declined to distinguish between different types of motives. At the time, it was deemed too difficult to define differences in motives ‘between the professional free-lance soldier and the soldier of conscience.’²⁰² The *CFIR Act* does not define or even mention the term ‘mercenary’; however, what loomed large in its second reading debates were concerns about preventing the recruitment in Australia of Australians to fight abroad as mercenaries against recognised states, such as Yugoslavia²⁰³ (which had happened in 1963 and 1972²⁰⁴), or in independence conflicts in Africa (for instance, on behalf of Ian Smith’s white minority regime in the guerrilla war in Rhodesia.²⁰⁵) Coupled with moral

²⁰⁰ See McCormack and Liivoja, above n 183, 519; Rothwell, above n 183, [39]–[40].

²⁰¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 1977, 342 (Robert Ellicott, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 7 March 1978, 363 (Peter Durack, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1978, 597 (Ian Viner).

²⁰² Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1977, 693 (Raymond Groom); *Diplock Report*, above n 27, 2 [5]–[6]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 1977, 343 (Robert Ellicott); Commonwealth, *Parliamentary Debates*, Senate, 31 March 1977, 715 (Thomas Tehan); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1978, 598–9 (Ian Viner).

²⁰³ The concern was that Australian Croats would seek to overthrow the Tito regime or assassinate President Tito: see Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1977, 686 (Lionel Bowen), 688–9 (Reginald Birney), 691, 692 (Keith Johnson), 695 (Henry Jenkins), 698 (Albert James), 704 (Gordon Scholes); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1977, 744 (Gordon Bryant), 752–3 (Lionel Bowen); Commonwealth, *Parliamentary Debates*, Senate, 31 March 1977, 708 (James McClelland), 713 (John Wheeldon), 720 (Peter Durack); Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1180 (Michael Hodgman), 1181–2 (Allan Holding).

²⁰⁴ Commonwealth, *Parliamentary Debates*, Senate, 31 March 1977, 720 (Peter Durack).

²⁰⁵ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1977, 684–5, 687 (Lionel Bowen), 688–9 (Reginald Birney), 690, 691 (Keith Johnson), 694–5 (Henry Jenkins), 698 (Albert James), 704 (Gordon Scholes); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1977, 750 (Lionel Bowen); Commonwealth, *Parliamentary Debates*, Senate, 31 March 1977, 704 (John Button), 714 (John Wheeldon), 722, 723, 724, 726 (Peter Durack), 724 (Alan Missen); Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1179 (Michael Hodgman).

disquiet about the problem of mercenarism in Africa was, it seems, the pragmatic consideration of maintaining Australia's international image. In the words of one parliamentarian, '[w]e do not want Australians engaging in actions throughout the world where they can be an embarrassment to this country.'²⁰⁶ The concern here was that Australians risked placing 'themselves into a position where they are subject to trial for war crimes or because they were mercenaries.'²⁰⁷

Parliamentary debates in 1977 and 1978 on the Crimes (Foreign Incursions and Recruitment) Bill also raised concerns about Australians engaging in acts of terrorism overseas. The incursions the legislation sought to proscribe included 'acts of terrorism by Australians in other countries.'²⁰⁸ In 2004, three years after the capture of David Hicks in Afghanistan by Northern Alliance fighters,²⁰⁹ the *CFIR Act* was amended to make it an offence for an Australian to enter a foreign state to support a 'prescribed' — viz. terrorist — organisation,²¹⁰ even if it 'was part of the armed forces of a foreign state'.²¹¹ In his second-reading speech of the Anti-Terrorism Bill 2004 (Cth), the then Attorney-General, Philip Ruddock, did not mention David Hicks by name. Clearly, though, the Bill sought to deal with the reoccurrence of a Hicks-like situation:²¹² 'Engaging in hostile activities while in or with a prescribed organisation will not be excused on the basis that the organisation was part of the armed forces of a foreign state under the regime to be introduced here.'²¹³

Outcomes of applying the *CFIR Act* with respect to Australians fighting for anti-regime forces in the continuing conflict in Syria remain to be seen. It would appear, though, from parliamentary debates regarding Australians fighting in Syria,²¹⁴ parliamentary

²⁰⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1977, 749 (Lionel Bowen).

²⁰⁷ Ibid.

²⁰⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 1977, 342 (Robert Ellicott, Attorney-General). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1184–5 (Robert Ellicott). Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1186–7 (Lionel Bowen).

²⁰⁹ See McCormack and Liivoja, above n 183, 514.

²¹⁰ *CFIR Act* ss 6(5)–(8), as inserted by *Anti-Terrorism Act 2004* (Cth) sch 1 item 15.

²¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27 659 (Philip Ruddock, Attorney-General).

²¹² Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2004, 28 599–600 (Steven Ciobo), 28 603–4 (Duncan Kerr). Cf also Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24 170–1 (Joe Ludwig); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2007, 61 (Maria Vamvakinou), 62 (Cameron Thompson).

²¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27 659 (Philip Ruddock).

²¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2014, 2–3 (Dan Tehan); Commonwealth, *Parliamentary Debates*, Senate, 12 February 2014, 276–7 (David Fawcett); Commonwealth, *Parliamentary Debates*, House of

debates about the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014²¹⁵ and Parliamentary Committee Reports on the listing of certain organisations as terrorist groups under s 102.1A of the *Criminal Code Act 1995* (Cth),²¹⁶ that Australian authorities are concerned here not with the very phenomenon of mercenarism as such (in either its old or new modalities) but instead with the radicalisation of Australians and what Australians fighting for either side of the conflict in Syria might do with their fighting skills upon returning to Australia.

B *The Sandline Affair*

Australia's own geographical sphere of influence has not been immune from the spectre of mercenarism. On 31 January 1997, after years of secessionist ferment from the Bougainville Revolutionary Army, which had taken control of Bougainville Island in 1990, the Papua New Guinea ('PNG') Government signed a contract with Sandline International, a London-based military consultancy company, to provide logistical, intelligence gathering and operational support to the PNG Defence Force ('PNGDF'). The Government's aim was to re-establish PNG's control over the Panguna copper mine on Bougainville.²¹⁷ The initial contract period of US\$36 million dwarfed the

Representatives, 19 March 2014, 2453–4 (Julie Bishop, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2014, 34 (Julie Bishop); Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2014, 62 (Julie Bishop); Commonwealth, *Parliamentary Debates*, House of Representatives, 14 July 2014, 7872 (Luke Simpkins), 7873–4 (Michael Danby), 7875–6 (Anthony Byrne), 7877 (Stephen Irons), 7879 (Nicholas Champion); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2014, 54 (Tony Abbott, Prime Minister); Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 101–2 (Jason Wood), 105 (Ann Sudmalis); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 55 (Julie Bishop), 57 (Michael Keenan, Minister for Justice); Commonwealth, *Parliamentary Debates*, Senate, 25 June 2014, 42 (George Brandis, Attorney-General).

²¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 65–8 (George Brandis); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 104 (Stephen Irons), 107–8 (Michael Danby); Evidence of Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 3 October 2014, 47, 49 (George Williams), 58 (Phillip Boulton).

²¹⁶ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 26 May 2014, 65–8 (David Irving, Director-General of Security, ASIO); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Listing of Jabhat al-Nusra and the Re-Listing of Six Terrorist Organisations and Review of the Re-Listing of Al-Qa'ida in the Arabian Peninsula* (2014) 1–2, 16–21. Another listed group is Islamic State, formerly known as the Islamic State of Syria and the Levant.

²¹⁷ *Agreement for the Provision of Military Assistance Dated This 31 Day of January 1997 Between the Independent State of Papua New Guinea and Sandline International* (31 January 1997) <<http://coombs.anu.edu.au/SpecialProj/PNG/htmls/Sandline.html>>, cited in McCormack and Liivoja, above n 183, 522.

annual US\$23 million budget of the PNGDF.²¹⁸ The PNG Government deputised Sandline operatives as ‘special constables’, thereby circumventing the legal definition of ‘mercenary’.²¹⁹ On 16 March 1997, the PNGDF’s commander, Brigadier General Jerry Singirok, and other senior officers, upset at the treatment of their soldiers, who had been receiving inadequate pay and equipment for months, refused to cooperate with Sandline, which had contracted Executive Outcomes (a South African company) to supply mercenaries. On 17 March, Singirok called for the resignation of the Prime Minister, Sir Julius Chan.²²⁰ Singirok, who had been involved with the contract negotiations with Sandline,²²¹ later claimed that Sandline was motivated more by the prospect of gaining natural resource concessions on Bougainville than by resolving the conflict on Bougainville Island.²²² The PNG Cabinet dismissed Singirok on 17 March, a decision that the Australian Government supported as being within the purview of a democratically elected government.²²³

Questions were raised in the Australian Parliament at the time of the Sandline Affair as to whether the Australian Government in decrying the use of mercenaries on Bougainville was not so much reacting out of moral disquiet about mercenarism as it was concerned about maintaining regional stability and Australia’s international image.²²⁴

²¹⁸ Sinclair Dinnen, ‘Money, Guns and Politics — Mercenary Times in Papua New Guinea’ (1997) 9 *Current Issues in Criminal Justice* 170, 175.

²¹⁹ Singer, ‘War, Profits, and Vacuum of Law’, above n 88, 533; UK Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation* (London: Stationary Office, 2002) 7 [6] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228598/0577.pdf>; Ian Wing, ‘Private Military Companies and Military Operations’ (Working Paper No 138, Land Warfare Studies Centre, Commonwealth of Australia, October 2010) 27 n 92 <<http://www.army.gov.au/%20Our-future/DARA/Our-publications/~//media/Files/Our%20future/DARA%20Publications/%20WP/wp138.ashx>>.

²²⁰ See McCormack and Liivoja, above n 183, 523.

²²¹ Zarate, above n 107, 98.

²²² Dinnen, above n 218, 175, citing *The Sydney Morning Herald*, 10 April 1997, 10. For the citation here, see Craig Skehan, ‘Chan Wanted Elite Guard, Inquiry Told’, *The Sydney Morning Herald* (online), 10 April 1997 <http://newsstore.smh.com.au/apps/viewDocument.ac?page=1&sy=smh&kw=Chan+Wanted+Elite+Guard&pb=all_ffx&dt=selectRange&dr=entire&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=news970409_0035_8883>.

²²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1997, 2263 (John Howard, Prime Minister). In addition to the above cited sources in this paragraph, I have drawn upon Sinclair Dinnen, Ron May and Anthony J Regan (eds), ‘Challenging the State: The Sandline Affair in Papua New Guinea’ (Pacific Policy Paper No 30, National Centre of Development Studies, Australian National University; Regime Change/Regime Maintenance Discussion Paper No 21, Department of Political and Social Change, Australian National University).

²²⁴ Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Dee Margetts). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 6 June 2000, 17 099–100 (Laurie Brereton).

However, it is a matter of record that the Australian Government regarded the Bougainville crisis as deeply troubling:

Australia, of course, recognises that Papua New Guinea is a sovereign state and its affairs are its own matter, but we cannot stand idly by and see the employment of assassination groups to solve what are essentially political problems.²²⁵

The Australian Government regarded the mercenary presence on Bougainville as ‘a retrograde and an extremely regrettable step’²²⁶ and supported a diplomatic solution, not a military solution, to the Bougainville crisis.²²⁷

After the Sandline Affair, the Australian Government, on 14 July 1997, announced that it intended to support the *Mercenaries Convention*.²²⁸ However, when the *Mercenaries Convention* entered into force on 20 October 2001, Australia still had not acceded to it (and still has yet to do so). This was despite Australia having participated in an early UN effort to deal with decolonisation issues, including matters relating to mercenarism: Australia was a member of the General Assembly Special Committee on Decolonization from 1961 to January 1985,²²⁹ albeit with a hiatus from 1969–72.²³⁰ UN General Assembly Resolution 1654 established the Special Committee in 1961,²³¹ to monitor progress on the application of UN General Assembly Resolution 1514 on the granting of independence to colonial countries and

²²⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Papua New Guinea Update — Report on Proceedings of a Seminar 11 and 12 November 1996*, Canberra (1997) 817.

²²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1997, 2263 (John Howard). See also Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Robert Hill).

²²⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 1997, 3150 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, House of Representatives, 20 October 1997, 9213 (Alexander Downer); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1997, 10 619 (Alexander Downer).

²²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 1997, 7406 (Alexander Downer); Genevieve Ebbeck, ‘Mercenaries and the “Sandline Affair”’ [1998] (133) *Australian Defence Force Journal* 5, 5, 10, 17, 21 n 3.

²²⁹ UN Department of Political Affairs, Trusteeship and Decolonisation, ‘Thirty Years of the Declaration on the Granting of Independence to Colonial Countries and Peoples’ [1990] (39) *Decolonization* 1, 8 <http://www.un.org/en/decolonization/pdf/decolonization/decon_num_26-3.pdf>.

²³⁰ UN Department of Political Affairs, Trusteeship and Decolonisation, ‘Twenty-Five Years of the Declaration on the Granting of Independence to Colonial Countries and Peoples’ [1985] (26) *Decolonization* 1, 40 <http://www.un.org/en/decolonization/pdf/decolonization/decon_num_26-2.pdf>.

²³¹ *The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654 (XVI), UN GAOR, 16th sess, 1066th plen mtg, Agenda Item 88, UN Doc A/RES/1654(XVI) (27 November 1961) para 3.

peoples.²³² Reaffirming Resolution 1514, the UN General Assembly in 1968, and again in 1969 and 1970, called for all states to implement measures and enact laws that proscribe the recruitment and use of mercenaries.²³³ Arguably, the Australian Government declined to support the *Mercenaries Convention* in 1989 because it believed that the *Mercenaries Convention* would be 'of little practical use' due to the cumulative definition of mercenary,²³⁴ and held that Australia had already adopted, with the *CFIR Act*, a strong position against mercenarism.²³⁵ The *CFIR Act* criminalised what the *Mercenaries Convention* would later forbid: namely, the recruitment and training of mercenaries.²³⁶ The *CFIR Act* set out the penalty of imprisonment for 14 years (the penalty is now 20 years)²³⁷ for an Australian who entered 'a foreign state with intent to engage in a hostile activity in that foreign State'²³⁸ or did in fact 'engage in a hostile activity in a foreign State.'²³⁹ The penalty for preparatory acts is imprisonment for 10 years.²⁴⁰

²³² *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, Agenda Item 87, UN Doc A/RES/1514(XV) (14 December 1960).

²³³ *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2465 (XXIII), UN GAOR, 23rd sess, 1751st plen mtg, Agenda Item 23, UN Doc A/RES/2465(XXIII) (20 December 1968) paras 1, 8; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2548 (XXIV), UN GAOR, 24th sess, 1829th plen mtg, Agenda Item 23, UN Doc A/RES/2548(XXIV) (11 December 1969) paras 1, 7; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2708 (XXV), UN GAOR, 25th sess, 1929th plen mtg, Agenda Item 23, UN Doc A/RES/2708(XXV) (14 December 1970) paras 1, 8. For a concise overview of the above Resolutions, see Maogoto and Sheehy, 'Contemporary Private Military Firms Under International Law', above n 38, 255–7.

²³⁴ Thomson, above n 183, 48.

²³⁵ Commonwealth, *Parliamentary Debates*, Senate, 27 September 1989, 1411 (Michael Tate, Minister for Justice). See generally *Summary Record of the 13th Meeting*, UN GAOR, 6th Comm, 42nd sess, 13th mtg, Agenda Item 134, UN Doc A/C.6/42/SR.13 (13 October 1987) 11 [53]; *Summary Record of the 27th Meeting*, UN GAOR, 3rd Comm, 42nd sess, 27th mtg, Agenda Item 160, UN Doc A/C.3/42/SR.27 (28 October 1987) 16 [75]; *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Report of the Secretary-General*, 42nd sess, Agenda Item 9, UN Doc E/CN.4/1986/44 (17 December 1985) 2 [3]. Cf *Measures to Eliminate International Terrorism: Report of the Secretary-General — Addendum — Part 2: Measures Taken at the National and International Levels Regarding the Prevention and Suppression of International Terrorism and Information on Incidents Caused by International Terrorism*, 54th sess, Agenda Item 160, UN Doc A/54/301/Add.1 (28 October 1999) 2 [8].

²³⁶ *CFIR Act* ss 8–9; *Mercenaries Convention* art 3.

²³⁷ *CFIR Act* s 6(1)(a).

²³⁸ *Ibid.*

²³⁹ *Ibid* s 6(1)(b).

²⁴⁰ *Ibid* s 7.

A further explanation for why Australia declined to support the *Mercenaries Convention* in 1989 is that supporting it may have been inconsistent with certain aspects of Australian foreign policy of the time. On 24 July 1989, the then Attorney-General, Lionel Bowen, published a notice in the Commonwealth Gazette declaring that the PNG Government would be allowed to recruit Australians in Australia to serve in the PNGDF to service Iroquois helicopters supplied by the Australian Government.²⁴¹ Section 9(2) of the *CFIR Act* stipulates:

If the Minister has, by instrument signed by the Minister and published in the *Gazette*, declared that it is in the interests of the defence or international relations of Australia to permit the recruitment in Australia, either generally or in particular circumstances or subject to specified conditions, of persons to serve in or with a specified armed force, or to serve in or with a specified armed force in a particular capacity, subsection (1) does not apply, or does not apply in those circumstances or where those conditions are complied with, as the case may be, to or in relation to recruitment to serve, or the publication of an advertisement containing information with respect to service, in or with that armed force, or in or with that armed force in that capacity, as the case may be.

Essentially, sub-s (1) proscribes the recruitment in Australia of Australians to serve in the armed forces of a foreign state. Referring to the above notice of exemption from s 9(1), Senator Dee Margetts said in Parliament in 1997:

Does this issue not highlight the hypocrisy of both the current government and the previous government in giving support for mercenaries, for the blockade of Bougainville and for our continuing military support for the Papua New Guinea defence forces despite repeated evidence of atrocities being committed by these forces on the island of Bougainville?²⁴²

Senator Robert Hill replied thus:

We do not give support for mercenaries, and I did not realise that the previous government gave support for mercenaries. I will otherwise continue to raise the issues that you mention and see if I can get further information.²⁴³

C The Politics of Law: Whither to Now with PMSCs?

Exigencies of politics have shaped, if not attenuated, parliamentary action on the myriad of legal issues regarding mercenarism. The above survey of Australian responses to mercenarism shows that Parliament's response to the old modalities of mercenarism encompasses what the UN regards as key legal issues about

²⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1994, 2432 (Ted Mack); Commonwealth, *Parliamentary Debates*, Senate, 11 December 1996, 7249 (Amanda Vanstone).

²⁴² Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Dee Margetts).

²⁴³ Ibid (Robert Hill).

mercenarism. These issues include: how to define the term ‘mercenary’; whether to prohibit or to regulate mercenarism; whether mercenarism is a ‘specific offence’ or can be dealt with by existing criminal law; and how to apportion responsibility for mercenary activities (‘to the mercenaries themselves or, in addition, those who recruit, use, finance and train them?’).²⁴⁴ Australia lodged its ratification of *Additional Protocol I of the Geneva Conventions* on 21 June 1991, and did not lodge a reservation to art 47,²⁴⁵ which defined ‘mercenary’. Australian legislation that predates Australia’s ratification of art 47 defined various elements of the term mercenary but without using the very term mercenary: the *CFIR Act* apportions responsibility for mercenary activities to Australians recruited in Australia who engage in incursions into foreign states for hostile purposes²⁴⁶ (or prepare to do so)²⁴⁷ and to those who recruit Australians in Australia for hostile foreign incursions.²⁴⁸

Australian responses to matters raised in various UN fora on how to deal with mercenarism and PMSCs further underscores the interplay between exigencies of politics and how to take action on the legal issues in question. In April 2005, Australia voted against a draft resolution introduced by Cuba in a meeting of the Commission on Human Rights. The Resolution, adopted 35 votes to 15 (with two abstentions), recommended, inter alia, that the UN Special Rapporteur on the Question of the Use of Mercenaries be replaced by a Working Group on the Use of Mercenaries.²⁴⁹ In November 2012, Australia voted against another draft resolution introduced by Cuba in a meeting of the Third Committee. This Resolution, adopted 122 votes to 52 (with five abstentions), welcomed the initiatives to frame a legally binding international regulatory framework to deal with PMSCs and their

²⁴⁴ Office of the High Commissioner for Human Rights, ‘Human Rights — The Impact of Mercenary Activities on the Right of Peoples to Self-Determination’ (Human Rights Fact Sheet No 28) 11–12 <<http://www.ohchr.org/Documents/Publications/FactSheet28en.pdf>>.

²⁴⁵ Australian Government, *Notification by the Depositary Addressed to the ICRC on 24 June 1991*, International Committee of the Cross <<http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=10312B4E9047086EC1256402003FB253>>. *Additional Protocol I* entered into force for Australia on 21 December 1991.

²⁴⁶ *CFIR Act* s 6.

²⁴⁷ *Ibid* s 7.

²⁴⁸ *Ibid* ss 8–9.

²⁴⁹ *Draft Resolution — The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, 61st sess, Agenda Item 5, UN Doc E/CN.4/2005/L.6 (4 April 2005) 4 [11]. For the voting results, see Diedre Kent, Rapporteur, *Report to the Economic and Social Council on the Sixty-First Session of the Commission: Draft Report of the Commission — Rapporteur: Ms Deirdre Kent (Canada)*, UN Doc E/CN.4/2005/L.10/Add.5 (7 April 2005) 3–4 [14].

activities.²⁵⁰ This Resolution also, inter alia, called for ‘a new legal definition of mercenary’²⁵¹ in line with the proposal that Enrique Bernales Ballesteros had outlined nearly a decade earlier, in his final report as the UN Special Rapporteur on the Question of the Use of Mercenaries.²⁵²

Critical questions may be, and have been, asked about the tenor of Australian Government responses to the matter of regulation of PMSCs. Unity Resources Group (‘URG’) is an Australian owned PMSC based in the United Arab Emirates, in Dubai, which was founded by a retired Australian Special Air Services commander, Gordon Conroy, in 2000. In 2006, a URG operative shot dead an Australian-Iraqi academic at a checkpoint in Baghdad, believing him to be a suicide bomber. In 2007, URG operatives were involved in two shooting deaths in Baghdad; civilians in a taxi had strayed too close to a URG-protected convoy and URG operatives fired upon the taxi after its driver ignored warnings to move away from the convoy.²⁵³ On 25 October 2007, the UN Working Group wrote to the Iraqi and Australian Governments regarding the 2007 deaths. In its reply of 13 March 2008, the Iraqi Government noted that URG had made unsuccessful efforts to contact the victims’ families with offers of compensation, and that ‘[t]he investigating judge decided to “close the case definitively”’.²⁵⁴ In its reply of 4 December 2007, the Australian Government noted that Australia had enacted legislation²⁵⁵ to reflect its ratification of the *Rome Statute* and had ‘criminalize[d] in

²⁵⁰ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 14. For the voting results, see Suljuk Mustansar Tarar, Rapporteur, *Right of Peoples to Self-Determination: Report of the Third Committee*, UN Doc A/67/456 (7 December 2012) 4–5 [17].

²⁵¹ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 15.

²⁵² Enrique Bernales Ballesteros, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination; Report Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur*, UN Doc E/CN.4/2004/15 (24 December 2003) 13–15 [43]–[47].

²⁵³ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/7/7/Add.1 (13 February 2008) 3–4 [7]–[9]; Dylan Welch, ‘Security Outfit Killed Civilians, Gets Embassy Job’, *The Age* (online), 19 August 2010 <<http://www.theage.com.au/national/security-outfit-killed-civilians-gets-embassy-job-20100818-12f4w.html>>.

²⁵⁴ Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 10 [27].

²⁵⁵ *International Criminal Court Act 2002* (Cth).

Australian domestic law the crimes over which the International Criminal Court has jurisdiction'.²⁵⁶ I would add here, though, that div 268 of the *Criminal Code Act 1995* (Cth) does not explicitly refer to what the *Rome Statute* calls 'crimes of aggression';²⁵⁷ instead, div 268 addresses 'genocide', 'crimes against humanity', 'war crimes' and 'crimes against the administration of the justice of the International Criminal Court'.

Given Australia's support for the *Montreux Document*, an opportunity exists to create a new legal regime on PMSCs.²⁵⁸ Yet, in the letter of 4 December 2007 (mentioned above) the Australian Government had stated: 'There are no legislative initiatives in Australia which are aimed at further regulating and providing oversight of PMSCs and their employees.'²⁵⁹ This statement is telling against the likelihood of political resolve to deal with PMSCs gathering significant further momentum. Also telling are the at times tardy responses of the Australian Government to requests for information from the UN Working Group, with regard to Australian involvement in PMSC activities. On 14 July 2008, the UN Working Group contacted the Australian Government to determine whether the Government had verified the nationality of the URG personnel involved in the Baghdad shooting deaths;²⁶⁰ yet, 'over two years' later, the Government still had not replied to the UN Working Group's request for information about the matter.²⁶¹ On 11 February 2010, the UN Working Group again contacted the Australian Government, this time with regard to Fijian guards working in PNG for an Australian-based security company, Allied Gold Limited, at a gold mine in Port Moresby. A month earlier the guards had been hired, 'reportedly', after 'disputes with local landowners', and the Working Group was concerned about reports that the guards were 'in

²⁵⁶ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/7/7/Add.1 (13 February 2008) 5 [18].

²⁵⁷ *Rome Statute* arts 5(d), 8 bis (2)(g).

²⁵⁸ McCormack and Liivoja, above n 183, 507–8, 526.

²⁵⁹ Quoted in José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/7/7/Add.1 (13 February 2008) 5 [22].

²⁶⁰ Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council': Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 4 [9]–[10].

²⁶¹ Jessicah Mendes and Scott Mitchell, 'Who is Unity Resources Group?', *ABC News* (online), 15 September 2010 <<http://www.abc.net.au/news/2010-09-15/who-is-unity-resources-group/2261606>>.

possession of firearms.’²⁶² On 2 September 2010, the UN Working Group noted that it had not received a reply from the Government.²⁶³

The parliamentary response to the *Montreux Document* seems not to have progressed beyond the level of Parliamentary Committees questioning whether Government agencies comply with criteria of the *Montreux Document*.²⁶⁴ Salient criteria include that a Home State ought to ensure the probity of PMSCs²⁶⁵ and that a Contracting State ought to ensure that a contracted PMSC has ‘no reliably attested record of involvement in serious crime.’²⁶⁶ On 19 October 2010, the Senate Standing Committee on Foreign Affairs, Defence and Trade questioned whether the Department of Defence had fully investigated URG before awarding it the contract to provide security protection for the Australian Embassy in Baghdad.²⁶⁷ URG, which used ‘about 60 Chilean veterans’ for the contract,²⁶⁸ had declared in its tender that Iraqi authorities had cleared the company of any wrongdoing over the 2006 and 2007 shooting deaths.²⁶⁹ Iraqi authorities labelled URG as ‘reckless’,²⁷⁰ but declined to pursue court action against URG,²⁷¹ and URG had, as the Senate Committee noted, ‘observed and complied with’ the *Montreux Document*.²⁷²

A lacuna of authority to legislate with regard to PMSCs does not explain the apparent lack of significant progress on creating a specific legal regime on PMSCs. It is highly

²⁶² *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/15/25/Add.1 (2 September 2010) 4 [7]–[8].

²⁶³ *Ibid* 4 [10].

²⁶⁴ Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 18 October 2010, 44–7 (Richard Rowe, Acting First Assistant Secretary, International Organisations and Legal Division and Senior Legal Adviser); Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Supplementary Budget Estimates Hearing*, 19 October 2010, 42–4.

²⁶⁵ *Montreux Document* pt 2 para 57.

²⁶⁶ *Ibid* pt 2 para 6(a).

²⁶⁷ Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Supplementary Budget Estimates Hearing*, 19 October 2010, 42–4.

²⁶⁸ Mendes and Mitchell, above n 261.

²⁶⁹ Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Supplementary Budget Estimates Hearing*, 19 October 2010, 44.

²⁷⁰ Mendes and Mitchell, above n 261.

²⁷¹ Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 10 [27].

²⁷² Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Supplementary Budget Estimates Hearing*, 19 October 2010, 44.

doubtful that such a lacuna exists. As Tim McCormack and Rain Liivoja point out, a precedent for regulating PMSCs is evident as Parliament

already places stringent export controls on general military hardware and militarily applicable technology, and specific measures are in place to control the export of both goods and services that may assist the proliferation of weapons of mass destruction. Thus, there appears to be no legal impediment to legislation controlling the export of military services in general.²⁷³

These controls and measures give voice to Australia's ratification of various conventions on weapons of mass destruction.²⁷⁴ For instance, the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) implemented Australia's obligations under the *Treaty on the Non-Proliferation of Nuclear Weapons*.²⁷⁵ As Don Rothwell points out, the overseas trade and commerce,²⁷⁶ corporations²⁷⁷ and external affairs powers²⁷⁸ in the *Constitution* provide a footing for laws on PMSCs that operate in the vein of the *CFIR Act*.²⁷⁹ Importantly, capacity to impact on foreign relations is itself a 'matter of international concern';²⁸⁰ hence, if failure to regulate PMSCs ran afoul of Australia's international human rights obligations and affected Australia's relations with other countries, the external affairs power may be enlivened to support the creation of a domestic legal regime on PMSCs.²⁸¹ If Australians working as PMSC personnel,

²⁷³ McCormack and Liivoja, above n 183, 515–16, quoting Thomson, above n 183, 49.

²⁷⁴ McCormack and Liivoja, above n 183, 516. See especially *Measures to Eliminate International Terrorism: Report of the Secretary-General — Addendum — Part 2: Measures Taken at the National and International Levels Regarding the Prevention and Suppression of International Terrorism and Information on Incidents Caused by International Terrorism*, 54th sess, Agenda Item 160, UN Doc A/54/301/Add.1 (28 October 1999) 1–2 [1]–[7].

²⁷⁵ McCormack and Liivoja, above n 183, 516. See especially *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) ('*Nuclear Non-Proliferation Treaty*'); *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) s 4(1) sch 2 (definitions of 'Agency Agreement' and 'Non-Proliferation Treaty').

²⁷⁶ *Constitution* s 51(i).

²⁷⁷ *Constitution* s 51(xx).

²⁷⁸ *Constitution* s 51(xxix).

²⁷⁹ Rothwell, above n 183, [33].

²⁸⁰ Elise Edson, 'Section 51(xxix) of the *Australian Constitution* and "Matters of International Concern": Is There Anything to be Concerned About?' (2008) 29 *Adelaide Law Review* 269, 276, 286–95, 302. Cf Sarah Murray, 'Back to ABC After XYZ: Should We Be Concerned About "International Concern"?' (2007) 35 *Federal Law Review* 317, 323–8.

²⁸¹ Rothwell, above n 183, [27]–[33]. See generally Thomson, above n 183, 47–9, 55–6; Leslie Zines, 'The *Tasmanian Dam Case*' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 262, 268–71. Regarding the above constitutional principles, see *Commonwealth v Tasmania* (1983) 158 CLR 1, 131–2 (Mason J), 172 (Murphy J), 258–60 (Deane J); *Koowarta v*

for instance, on behalf of an Australian government agency or a foreign non-state actor (such as a humanitarian organisation), were alleged to have been involved in criminal acts (that is, acts that are criminal under the domestic legal system of the host country in question) or human rights abuses, or both, and Australian authorities did not facilitate efforts to hold accused Australians accountable for alleged offences, it is not inconceivable that foreign relations could suffer as a result.

Using Ockham's razor as a heuristic tool,²⁸² one might attribute the glacial pace of legislative progress on the *Montreux Document* to a simple explanation: the Australian Government believes that effective legislative steps (discussed above) against mercenarism have already been taken and that those measures coupled with policy measures as regards government outsourcing are appropriate for regulating PMSCs. The corollary is Parliament lacks the resolve to produce a specific legal regime on PMSCs. Generally, policy development, implementation and evaluation requires political resolve to transform opportunity for policy change into concrete action.²⁸³ Given that the Commonwealth already has in place risk analysis and reporting principles in Defence procurement,²⁸⁴ and has outlined procurement rules, including requirements to keep detailed records on the expenditure of public funds, with which all government agencies must comply when procuring goods

Bjelke-Petersen (1982) 153 CLR 168, 217 (Stephen J); *Polyukhovich v Commonwealth* (1991) 172 CLR 510, 560–1 (Brennan J); *XYZ v Commonwealth* (2006) 227 CLR 532, 572–78 (Kirby J).

²⁸² See generally Simon Fitzpatrick, 'Kelly on Ockham's Razor and Truth-Finding Efficiency' (2013) 80 *Philosophy of Science* 298, 298–9, 302–3; William H Jefferys and James O Berger, 'Ockham's Razor and Bayesian Analysis' (1992) 80 *American Scientist* 64, 64.

²⁸³ On the relationship between political resolve and policy change, see, eg, Ewen J Michael, *Public Policy: The Competitive Framework* (Oxford University Press, 2006) 1–9, 107, 206–12, 216–19.

²⁸⁴ For the above procurement principles, see Department of Defence (Cth), *Defence Capability Development Handbook* (December 2012) <<http://www.defence.gov.au/publications/DefenceCapabilityDevelopmentHandbook2012.pdf>>; Department of Defence (Cth), *Defence Procurement Policy Manual: Mandatory Procurement Guidance for Defence and DMO Staff* (2013) <http://www.defence.gov.au/dmo/gc/dppm/DPPM1Jul2013_Final.pdf>; Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 29 May 2012, 29 (Air Vice Marshall Colin Thorne, Head Aerospace Systems Division, Defence Materiel Organisation, Department of Defence), 29–31, 32 (Harry Dunstall, Deputy Chief Executive Officer, General Manager Commercial, Defence Materiel Organisation), 34 (Warren King, Chief Executive Officer, Defence Materiel Organisation); Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 13 February 2013, 87–8 (Dennis Richardson, Secretary, Department of Defence), 99–100 (Rear Admiral Rowan Moffit, Head Future Submarine Program, Defence Materiel Organisation), 105 (Steve Grzeskowiak, Deputy Secretary Defence Support, Department of Defence); Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 4 June 2013, 64, 64–5 (Major General John Caligari, Acting Chief, Capability Development Group, Department of Defence).

and services,²⁸⁵ perhaps Parliament regards legislating with respect to PMSCs as redundant. On the one hand, whether the Commonwealth needs, then, to formulate a specific Australian legal regime for dealing with PMSCs is open to question. Yet, recent experiences regarding the use of PMSCs by Australian authorities in relation to immigration detention facilities raises questions about the need for legislation to provide for independent scrutiny of how private contractors operate immigration detention facilities.²⁸⁶ A distinction could be made, though, between PMSCs deployed in conflict and post-conflict zones and PMSCs only involved in security or immigration detention. On the other hand, the Commonwealth's 'comprehensive yet specific' legislative response to weapons of mass destruction²⁸⁷ shows, as Tim McCormack and Rain Liivoja note, what can come when resolve exists to create a decisive policy outcome: 'If a similar level of resolve existed in relation to the particular problem of the legal regulation of the activities of PMSCs, there is no doubt that an effective legal regime could materialise.'²⁸⁸

V CONCLUSION

'Cry havoc and let slip the dogs of war',²⁸⁹ Shakespeare wrote epigrammatically in *Julius Caesar*, prophesying bloody fury and strife when monarchs order their soldiers to give no quarter to the enemy. The phrase now denotes moral opprobrium

²⁸⁵ McCormack and Liivoja, above n 183, 512–13. See generally Financial Management Group, Department of Finance and Deregulation (Cth), *Commonwealth Procurement Guidelines: Achieving Value for Money* (1 July 2012) 8 [2.3], [2.4], 20 [7.1]–[7.4] <http://www.finance.gov.au/sites/default/files/cpr_commonwealth_procurement_rules_july_2012.pdf>.

²⁸⁶ Australian Human Rights Commission, Submission No 25 to Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth)*, 7 April 2015, 3 [4], 6–8 [9]–[21], 29 [133]–[136]; Department of Parliamentary Services (Cth), *Bills Digest*, No 86 of 2014–16, 23 March 2015, 18–19; Nick Evershed, 'Mandatory Immigration Detention is a Billion-Dollar Business — Analysis', *The Guardian* (online), 25 August 2014 <<http://www.theguardian.com/news/datablog/2014/aug/25/-sp-mandatory-immigration-detention-is-a-billion-dollar-business-analysis>>; Sarah Whyte, David Wroe and Ben Butler, 'PNG Staff to Keep Security Jobs at Manus Island Detention Centre', *The Sydney Morning Herald* (online), 25 February 2014 <<http://www.smh.com.au/federal-politics/political-news/png-staff-to-keep-security-jobs-at-manus-island-detention-centre-20140224-33d5e.html>>.

²⁸⁷ McCormack and Liivoja, above n 183, 517.

²⁸⁸ Ibid. McCormack and Liivoja draw particular attention to the *Weapons of Mass Destruction (Prevention of Proliferation Act 1995)* (Cth) and the export control mechanism set out in *Customs (Prohibited Exports) Regulation 1958* (Cth). The latter was made under the *Customs Act 1901* (Cth) s 112, which confers power on the Governor-General to prohibit, inter alia, 'the exportation of goods [from Australia] absolutely' or 'in specified circumstances' (*Customs Act 1901* (Cth) ss 112(2)(a), (aa)).

²⁸⁹ T S Dorsch (ed), *The Arden Edition of the Works of William Shakespeare: Julius Caesar* (Methuen, 6th rev ed, 1958) act III, scene 1, line 273.

of mercenaries. The legal definition of mercenary shares that opprobrium, but the strictness of the definition has limited, and continues to limit, its use for regulating PMSCs and dealing with the impact of mercenary-related activities on human rights. The *Montreux Document*, *Draft PMSC Convention*, *ICoC* and *Draft ICoC Charter* seek to fill that regulatory gap, but the initiatives are recent in origin and, therefore, their efficacy remains to be seen.

Australia's legal regime for dealing with mercenarism stems from moral disquiet about mercenarism and political disquiet about damage to Australia's reputation arising from the recruitment in Australia of Australians for mercenary activities. Parliament has questioned whether the primary motivation for the regime is moral disquiet or pragmatic politics (such as maintaining Australia's international image).²⁹⁰ Political motivations aside, it is clear that the *CFIR Act*, though it does not mention the very term 'mercenary', was, as its second reading debates show, designed to counter the mischief of Australians being recruited in Australia to engage in mercenary activities overseas.²⁹¹ The *CO Act* was not originally aimed at that mischief, but early in the new millennium, the *CO Act* was amended to give extraterritorial application of Australian criminal law to Australians in 'humanitarian or security operations' overseas.²⁹² Hence, the *CO Act* is pertinent to the regulation of PMSCs and their personnel, as is the *DFD Act*, which provides for extraterritorial application of Australian criminal law to 'defence civilians' on overseas deployments with the ADF.²⁹³

That Australia supported the *Montreux Document* in 2008 but had declined to support the *Mercenaries Convention* in 1989 (and still has not acceded to it) and yet had ratified *Additional Protocol I of the Geneva Conventions* in 1991 may be, then, not a real paradox but instead a conundrum arising from differences in legal and political climes. Leaving in abeyance whether the *CO Act*, *CFIR Act* and *DFD Act* are necessary or sufficient for Australian authorities to regulate PMSCs in the absence of a specific legal regime on PMSCs, what is clear is that achieving legislative progress is inextricably linked with the politics of law.

²⁹⁰ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1181–2 (Allan Holding); Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Dee Margetts).

²⁹¹ An interesting postscript to this article is that the passage of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 makes a range of amendments to a number of Acts, including the *CFIR Act*, which has been repealed and its provisions re-enacted in the *Criminal Code Act 1995* (Cth) pt 5.5. However, because the passage of the Bill through both Houses of Parliament on 3 November 2014 occurred after this article was submitted for publication, the article does not evaluate the Bill or amendments to the *CFIR Act*.

²⁹² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2003, 19814 (Daryl Williams, Attorney-General).

²⁹³ See *DFD Act* ss 9, 61.

THE HIGH COURT'S CONSTRUCTIVE TRUST TRICENARIAN:

ITS LEGACY FROM 1985–2015

ABSTRACT

The last 30 years or so has witnessed the High Court of Australia devote more of its energies to the constructive trust than in the preceding 80 years since its inception. As 2015 represents the Court's tricenarian since its judgment in *Muschinski v Dodds*, in which Deane J enunciated what remains essentially the only probing analysis of the nature of the constructive trust in High Court jurisprudence, this article seeks to inquire into the progeny of his Honour's analysis.

I JUSTIFYING THE FOCUS

In an article published in volume 36(1) of the *Adelaide Law Review* in 2015, I sought to catalogue the developments in the law of express and resulting trusts in the High Court of Australia over the span of the 30 years, culminating in 2014. That article identified various themes emerging from judgments of the Court in that time.

High Court authority was examined for the obvious reason that the ratio decidendi of High Court decisions (and, it seems, also its 'considered dicta')¹ determine Australian law, including the law of trusts. While not downplaying the weight given to decisions of state and territory appellate courts, and those of the Full Court of the Federal Court of Australia, these courts must yield, in approaching the general law of trusts, to the High Court. And it follows that anything other than incremental steps in the development of the general law are to remain its sole domain.

* Faculty of Law, University of Tasmania.

¹ The Court so declared in a case involving constructive trusts in the context of 'recipient liability': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 148–59 [130]–[158] (*Farah Constructions*) (where the Full Court chastised the New South Wales Court of Appeal for propounding an unjust enrichment analysis of recipient liability in place of the accepted approach grounded in inquiry into knowledge; see Part IV.D).

Beyond mere expediency, the 30-year period straddling 1984 to 2014 was selected for the earlier article for various reasons. Reference was made to the introduction in 1984 of s 35A of the *Judiciary Act 1903* (Cth), which prescribed criteria for the grant of special leave to appeal to the High Court. Since 1984 the only (trusts) cases heard by the Court are those that, in the language of s 35A, involve a question of law that is either of ‘public importance’ or in respect of which there is a need to resolve differences of opinion between lower courts or the judges therein, and the ‘interests of the administration of justice’ require its consideration. In other words, the appeal must warrant the leadership of the peak court in the hierarchy. In turn, the trusts case law within the last 30 years or so should, at least in theory, target areas greatest in need of this leadership.

The article also noted that the alignment of a 30-year time frame with the time span of a single generation may reveal a sufficient breadth of generational thinking. Speaking of generations, it also equated to approximately twice the average tenure of a High Court judge since the Court was constituted,² and three times the average tenure of its Chief Justice.³ It may well be reasonable, as a result, to expect a breadth of judicial opinion in a time frame within which on average the court has twice altered its constitution and been under the stewardship of three Chief Justices.

Given the generality of the above remarks, they remain extant when speaking of the law governing constructive trusts. The passage of a year, however, dictates a focus on the 30-year time frame between 1985 and 2015. Charting High Court authority from 1985 can, in any case, evince an independent justification. That year saw the Court decide *Muschinski v Dodds*,⁴ a case that proved seminal in the recognition of the so-called ‘remedial constructive trust’ in Australian law. The crucial judgment was that of Deane J, whose reasons remain the only concerted effort within the High Court — not merely within the last three decades, but in the history of the Court itself — to probe the jurisprudential nature of the constructive trust in Australian law. This explains why the substance of this article commences with a review of Deane J’s observations as to the nature and function of the constructive trust. Against the backdrop of these observations, the article investigates the extent to which Deane J’s conceptualisation of the constructive trust has proven influential in the development of the constructive trust in Australian law.

There is another reason why the immediately preceding 30 years present as a fitting time frame within which to analyse that development. A search of High Court cases in which the expression ‘constructive trust’ appears in the catchwords of the Commonwealth

² Calculated in 2014 on the basis of non-currently sitting High Court judges since the institution of the court, namely 38 judges, equating to approximately 15.2 years average tenure.

³ Calculated in 2014 on the basis of non-currently sitting High Court Chief Justices since the institution of the court, namely 11 judges, equating to approximately 10.5 years average tenure.

⁴ (1985) 160 CLR 583.

Law Reports reveals nine cases since 1985.⁵ If one ‘cheats’ just a little, and includes 1984, the number increases to eleven.⁶ One of those 1984 cases, *Chan v Zacharia*,⁷ is significant, in part because it represented Deane J’s entry into constructive trusts jurisprudence within the High Court. It is apt to be read in tandem with his Honour’s (expanded) views in the ensuing year in *Muschinski v Dodds*. Nor can the remarks of Mason J, dissenting in *Hospital Products*⁸ four months after *Chan v Zacharia*, be overlooked as they paralleled concepts espoused by Deane J in *Chan v Zacharia*.

It follows that the constructive trust has seen exposure in the High Court not infrequently within the last 30 (or so) years. Perhaps more telling, however, is that between the date of its first sitting on 6 October 1903 and June 1984 (when *Chan v Zacharia* was decided) — some 81 years — the expression ‘constructive trust’ was a much less frequent visitor before the High Court. A brief catalogue of its appearances reveals either peripheral remarks or otherwise quite specific applications of the constructive trust concept, the latter invariably proceeding more by way of assumption than analysis.

Its earliest appearance, found six years into the Court’s tenure in *Nicholson v Gander*,⁹ was against the backdrop of fiduciary issues within a mining syndicate. Yet two of the three judges made no mention of the constructive trust.¹⁰ One openly conceded that ‘[t]here is no question of law involved in the case’, which ‘depends entirely upon the proper inference to be drawn from the facts proved’.¹¹ And the remarks of the third judge contain little that genuinely survey the nature of the constructive trust, whether in the particular context or more generally.¹²

⁵ Namely, in chronological order, *Muschinski v Dodds* (1985) 160 CLR 583; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 (*‘Bathurst City Council’*); *Giumelli v Giumelli* (1999) 196 CLR 101 (*‘Giumelli’*); *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545 (further reference to this case is omitted in this article because the judgments contain little in principle directed to the general law of constructive trusts); *Farah Constructions* (2007) 230 CLR 89; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269; *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 (*‘John Alexander’s Clubs’*). Though the catchwords in *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 make no mention of the constructive trust, three of the five judges addressed the constructive trust as a vehicle to give effect to an acknowledgement of a third party’s contractual right to repurchase land. Reference is accordingly made of *Bahr v Nicolay [No 2]* in the article, albeit by way of footnote.

⁶ Namely, in chronological order, *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (*‘Hospital Products’*).

⁷ (1984) 154 CLR 178.

⁸ (1984) 156 CLR 41.

⁹ (1909) 8 CLR 648.

¹⁰ Per Griffith CJ and O’Connor J.

¹¹ *Nicholson v Gander* (1909) 8 CLR 648, 664 (O’Connor J).

¹² *Ibid* 668–70 (Higgins J).

Nor can much be gleaned, to this end, in two other cases in which 'constructive trust' appears in the catchwords. In the Court's 1980 decision in *Everett v Federal Commissioner of Taxation*,¹³ that appearance is belied by its absence in the actual reasons of the Court. The same may be said of the Privy Council's advice in *Stuart v Kingston*,¹⁴ reported in the Commonwealth Law Reports in 1924. While the several judgments of the High Court that prompted the appeal to the Privy Council did make reference to the 'constructive trust', this was primarily in the context of its use in real property legislation.¹⁵ What is, in any case, telling regarding the (in)significance of the decision — at least so far as constructive trusts jurisprudence is concerned — is evident from the fact that the author of the headnotes omitted any reference to the constructive trust. In a later case also involving constructive trusts against a statutory backdrop, *Mayne v Public Trustee*,¹⁶ the headnoter did likewise.

In effect, pre-1984 saw the High Court address the application of the constructive trust on only two occasions. The first of these, its venerable 1937 decision in *Birmingham v Renfrew*,¹⁷ targeted the constructive trust as a vehicle for a third party to enforce an inter vivos promise — contained in a mutual will — as to future testamentary dispositions. The case remains the only High Court authority directly on this specific point and contributes relatively little to broader constructive trusts jurisprudence. There the constructive trust was assumed by each judge more as a matter of course than any product of principled analysis. In any case, reasons in principle exist to argue that a mutual will should be seen as enforceable by way of an express (rather than a constructive) trust.¹⁸ It rests, after all, on an expression of (usually inferred) intention stemming from an agreement between will-makers.

The remaining pre-1984 High Court decision to consider the constructive trust was *Consul Development Pty Ltd v DPC Estates Pty Ltd*.¹⁹ Prior the Court's 2007 decision in *Farah Constructions*,²⁰ *Consul Development* represented the Court's only substantive foray into the law of constructive trusts in its application to render third parties liable to account to, or compensate, a person against whom fiduciary obligations had been breached. Yet apart from highlighting the breadth of the concept of accessory liability (to encompass knowing assistance in not merely breaches of trust, but breaches of fiduciary duty more broadly) and addressing the 'knowledge threshold' for accessory liability, the judgments do little more than assume the aptness of constructive trusteeship in this context, lacking a more sophisticated inquiry into its juridical nature. Indeed, even the four majority judgments did not entirely speak

¹³ (1980) 143 CLR 440.

¹⁴ (1924) 34 CLR 394.

¹⁵ *Stuart v Kingston* (1923) 32 CLR 309.

¹⁶ (1945) 70 CLR 395 (in the context of limitations legislation).

¹⁷ (1937) 57 CLR 666.

¹⁸ See Gino E Dal Pont, 'Equity's Chameleon — Unmasking the Constructive Trust' (1997) 16 *Australian Bar Review* 46, 76–8.

¹⁹ (1975) 132 CLR 373 ('*Consul Development*').

²⁰ (2007) 230 CLR 89.

with one voice regarding these matters. As foreshadowed above, in any event, the High Court seized the opportunity (upon ‘provocation’ by the New South Wales Court of Appeal) to revisit various aspects of third party liability via constructive trusteeship in its 2007 judgment in *Farah Constructions*.

II JUSTICE DEANE’S CONSTRUCTIVE TRUSTS JURISPRUDENCE

A Distinguishing the Constructive Trust

In approaching Deane J’s explanation in *Muschinski v Dodds* of the juridical nature of the constructive trust, it is important at the outset to appreciate what the constructive trust *is not*. Stated comprehensively, the constructive trust has no role in inhabiting the same sphere as, or otherwise mimicking, the express trust or resulting trust. The very fact of identifying a ‘constructive trust’ suggests it to be qualitatively distinct from both an ‘express trust’ and a ‘resulting trust’.

It is chiefly how each of these trusts comes into being that justifies their discrete nomenclature. What marks a trust as ‘express’ is its creation pursuant to the express or inferred intention of a settlor (whether or not in tandem with that of the intended trustee).²¹

What brands a trust as ‘resulting’ is a presumption or implication as to intention the law makes in a particular type of transaction, wherein a gap in beneficial ownership is filled by recognising trusteeship over property. But any presumed or implied intention in this regard must yield to inconsistent actual or inferred intention.

It stands to reason that constructive trusts, to retain their jurisprudential uniqueness (and thus justification), must derive other than from an inquiry into express or inferred intention,²² or from a (rebuttable) presumption or implication as to intention

²¹ Cf the potentially misleading reference to ‘imputing’ an intention, under the guise of an express trust, by French CJ in the High Court’s most recent foray into express trusts: *Korda v Australian Executor Trustees (SA) Ltd* (2015) 317 ALR 225, 228 [3], 229 [8], 231 [11]. Ultimately, though, aside from the fact that the other judges in the case eschewed the language of imputation, the fact that each judge, including French CJ, was unwilling to ‘impute’ an intention in the circumstances speaks against any true role for imputation of intention in the law of express trusts.

²² Australian law’s recognition, and application, of the so-called ‘common intention constructive trust’ (see, eg, *Parsons v McBain* (2001) 109 FCR 120) arguably represents a misuse of terminology, deriving from a time preceding the development, in *Muschinski v Dodds* (1985) 160 CLR 583, of the ‘remedial constructive trust’. Although the seminal Australian case on the common intention constructive trust, *Allen v Snyder* [1977] 2 NSWLR 685, saw mention in the reasons of the plurality in *Baumgartner v Baumgartner* (1987) 164 CLR 137, 144–7 (Mason CJ, Wilson and Deane JJ), their Honours gave no unqualified endorsement to the concept. Moreover, whatever the nature of the common intention constructive trust, its tendency to converge with notions of equitable estoppel speaks against its use as a remedy (see IV.B), contrary to the understanding of the nature of the constructive trust espoused by Deane J in *Muschinski v Dodds*.

made by law. Hence the frequent reference to constructive trusts being ‘imposed’ independent of express, inferred or presumed intention. Outside of an inquiry into actual or inferred intention, or into (particular) forms of transaction in which the law presumes an intention to separate legal and beneficial ownership, the law must necessarily take steps to identify those circumstances that justify the *imposition* of a constructive trust and explain what is meant by ‘imposition’ in this context.

While the judgment of Deane J in *Muschinski v Dodds* provides some inkling to this end, as a preliminary aside it is curious to note that, of the other four judges in *Muschinski v Dodds*, only Mason J (in a short concurring judgment) agreed with Deane J’s approach. As the only other judge in the majority, Gibbs CJ adopted an analysis divorced from constructive trusts (and not the subject of argument before the High Court or the lower courts in the case)²³ to grant the appellant relief. Although the Chief Justice ultimately sided with the order propounded by Deane J, it could not be said that Deane J’s observations on the nature of the constructive trust necessarily represented a majority view within the High Court of the day.²⁴

B Targeting the Remedial Characteristic

After noting that the nature and function of the constructive trust had been the subject of considerable discussion throughout the common law world for decades, Deane J took aim at disputing factions who tended to polarise the discussion by referring to the competing rallying points of ‘remedy’ and ‘institution’. The perceived dichotomy between those two catchwords, he opined, was ‘largely ... the consequence of lack of definition’, noting that, ‘[i]n a broad sense, the constructive trust is *both* an institution and a remedy of the law of equity’.²⁵ Within the ensuing three pages of the judgment, his Honour proceeded to explain how the constructive trust straddles the (alleged) institutional–remedial divide, commencing with the following remarks targeting its remedial origin:

As a remedy, [the constructive trust] can only properly be understood in the context of the history and the persisting distinctness of the principles of equity that enlighten and control the common law. The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed,

²³ The Chief Justice reasoned that, as the litigants were made by the contract jointly and severally liable to pay the price for the purchase of the property in dispute, they were under a common obligation to pay the debt, and so ‘the case therefore fell within the general principle applicable both in law and equity which obliged them to bear the burden equally with the consequence that if one discharged more than his or her proper share he or she could call upon the other for contribution’: *Muschinski v Dodds* (1985) 160 CLR 583, 596.

²⁴ The minority, Brennan J (with whom Dawson J agreed), characterised the facts as involving a conditional gift, which potentially gave rise to a claim for compensation. But because the plaintiff asserted a proprietary (as opposed to a personal) right, the facts so characterised undermined the claim: *Muschinski v Dodds* (1985) 160 CLR 583, 607.

²⁵ *Muschinski v Dodds* (1985) 160 CLR 583, 613 (emphasis added).

as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights. This was consistent with the traditional concern of equity with substance rather than form. In time, the relationships in which the trust was recognized and enforced to protect actual or presumed intention became standardized and were accepted into conveyancing practice (particularly in relation to settlements) and property law as the equitable institutions of the express and implied (including resulting) trust. Like express and implied trusts, the constructive trust developed as a remedial relationship superimposed upon common law rights by order of the Chancery Court.²⁶

Justice Deane was evidently seeking to legitimise the ‘remedial’ aspect of the constructive trust by aligning it to the ‘remedial origins’ of express and resulting trusts. It is true that the express trust, as it developed as part of equity’s arsenal, sought to mitigate certain rigours of the common law by giving the ‘beneficiary’ standing to enforce an obligation (and thus relief) that the common law courts did not recognise. In this sense, the express trust (and perhaps to some extent the resulting trust) had a ‘remedial’ genesis. But the reference to the express or resulting trust as a ‘remedy’ is arguably misleading; while the recognition of the trust, and the obligations thereunder, provided an avenue (or trigger) to secure a remedy, the trust itself was historically not the remedy. The ‘remedial’ constructive trust Deane J sought to espouse performs its primary role as a remedy, not as an avenue (or trigger) to secure relief.

The constructive trust, so historically conceived, therefore differs in nature from express and resulting trusts. Justice Deane accepted this to be so, noting that unlike other forms of trust, the constructive trust ‘arises regardless of intention’, its rationale being ‘found essentially in its remedial function’.²⁷ But in an attempt to bring the constructive trust into the broader trusts fold, and to highlight an aspect of the ‘institutional’ descriptor in this context, his Honour then noted that the constructive trust ‘shares ... some of the institutionalized features of express and [resulting] trust’, namely the ‘staple ingredients’ of subject matter, trustee, beneficiary and personal obligation attaching to the property.²⁸ This in turn prompted the observation that

the constructive trust can properly be described as a *remedial institution* which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.²⁹

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid 613–14.

²⁹ Ibid 614 (emphasis added).

C Converging the Institutional within the Remedial

Justice Deane noted another aspect in which ostensibly competing ‘institutional’ and ‘remedial’ notions had populated the constructive trusts literature. The catchword ‘institution’ could be understood, to this end, as ‘connoting a relationship which arises and exists under the law independently of any order of a court’.³⁰ The catchword ‘remedy’, conversely, could refer to the actual establishment of a relationship by such an order. His Honour, though conceding that these ‘catchwords...do serve the function of highlighting a conceptual problem that persists about the true nature of a constructive trust’,³¹ branded any perceived dichotomy as ephemeral upon closer examination, reasoning as follows:

Equity acts consistently and in accordance with principle. The old maxim that equity regards as done that which ought to be done is as applicable to enforce equitable obligations as it is to create them and, notwithstanding that the constructive trust is remedial in both origin and nature, there does not need to have been a curial declaration or order before equity will recognize the prior existence of a constructive trust ... Where an equity court would retrospectively impose a constructive trust by way of equitable remedy, its availability as such a remedy provides the basis for, and governs the content of, its existence inter partes independently of any formal order declaring or enforcing it. In this more limited sense, the constructive trust is also properly seen as both ‘remedy’ and ‘institution’. Indeed, for the student of equity, there can be no true dichotomy between the two notions.³²

In other words, characterising the constructive trust as a remedy does not function to confine its operation to occasions where, like the ordinary concept of a remedy, the court, within its jurisdiction, ‘creates’ and/or ‘imposes’ the remedy. The court can simply *recognise and enforce* the constructive trust that has already arisen. There is no true dichotomy, as Deane J noted, as in each instance the constructive trust remains a remedy,³³ albeit that in one the court *creates* it whereas in another its prior existence is *recognised by court order*.

D Constructive Trust Grounded in Inquiry into Conduct

To the significant extent that equity operates on the conscience of an individual litigant, it stands to reason that the trigger for constructive trust relief is certain *conduct* by the defendant. Justice Deane, as noted earlier, spoke in terms of conduct — namely ‘the retention or assertion of beneficial ownership of property’ — that is ‘contrary to equitable principle’ as the relevant trigger.³⁴ The very breadth of

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Hence the underlying argument in the polemic piece (Dal Pont, above n 18) that all ‘true’ constructive trusts should be viewed as remedies.

³⁴ *Muschinski v Dodds* (1985) 160 CLR 583, 614.

the latter descriptor no doubt served as a means of encompassing both conduct that attracts the constructive trust independent of a court order³⁵ and conduct that in itself motivates the court to create the trust by way of remedy. But that very breadth works against its principled application in each scenario. This in turn explains, as illustrated in High Court case law, why the ‘institutional’ constructive trust has been recognised most frequently against the backdrop of conduct amounting to a breach of fiduciary duty.³⁶ It is important to appreciate, in this regard, that a fiduciary breach may *or may not* involve unconscionable conduct as understood in equity.

Conversely, lacking a fiduciary foundation, the ‘remedial’ constructive trust has, deriving primarily from Deane J in *Muschinski v Dodds*, been imposed to prevent ‘unconscionable’ conduct. In the immediate factual context before the Court in *Muschinski v Dodds* — involving the division of property upon the breakdown of a de facto relationship, since addressed by way of statutorily conferred discretion — Deane J explained the relevant principle underscoring the ‘remedial’ constructive trust as follows:

where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it ... equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do ...³⁷

It therefore proved no surprise that, two years later when another property dispute between former de facto parties came before the Court in *Baumgartner v Baumgartner*,³⁸ Deane J would join in a judgment (with Mason CJ) endorsing the above

³⁵ In the quote extracted in the text, Deane J observed that ‘there does not need to have been a curial declaration or order before equity will recognize the prior existence of a constructive trust’: *Muschinski v Dodds* (1985) 160 CLR 583, 614. It is curious that his Honour spoke of equity recognising the ‘prior’ existence of a constructive trust. On the assumption that its existence is not premised upon a curial declaration or order, presumably equity — as in the principles of equity as opposed to the court recognising and enforcing those principles — would recognise the trust as soon as the circumstances in which it arose transpired. The word ‘prior’, in this regard, would therefore be superfluous, unless Deane J had something else in mind, perhaps a closer temporal alignment between equity recognising the trust and the court enforcing it.

³⁶ Indeed, later in his reasons Deane J noted that ‘[t]he principal operation of the constructive trust in the law of this country has been in the area of breach of fiduciary duty’, but rejected the view that the constructive trust is confined to cases where some pre-existing fiduciary relationship can be identified: *Muschinski v Dodds* (1985) 160 CLR 583, 616.

³⁷ Ibid 620 (citations omitted).

³⁸ (1987) 164 CLR 137.

proposition.³⁹ As unconscionable conduct is not, as noted above, any prerequisite for a fiduciary breach, there clearly remain discrete areas of operation for 'institutional' constructive trusts on the one hand and 'remedial' constructive trusts on the other.

E Role for Curial Discretion

There also remains scope for distinctions as to the temporal application of the constructive trust, depending on whether the trust is 'institutional' or 'remedial'. This may assume practical relevance,⁴⁰ as questions of priority where property interests are involved are often influenced by questions of timing. Timing may, for instance, also prove crucial in the context of insolvency, taxability and standing to lodge a caveat. Prima facie, the court's recognition of the prior existence of a constructive trust dictates that the trust operates from the moment that the relevant conduct triggered its existence. Conversely, the remedial constructive trust, imposed as it is by the court following a finding of unconscionable conduct vis-a-vis an interest in property, like other remedies should in theory take effect from the date of the court's order.

That High Court judges do not always agree as to whether a particular factual scenario is best explained as an institutional constructive trust, or instead a remedial constructive trust,⁴¹ does not render the above distinctions irrelevant in practice. Without

³⁹ Ibid 147–8 (Mason CJ, Wilson and Deane JJ) (speaking in terms of 'the foundation for the imposition of a constructive trust in situations of the kind mentioned is that a refusal to recognize the existence of the equitable interest amounts to unconscionable conduct and that the trust is imposed as a remedy to circumvent that unconscionable conduct': at 147). See also 156–7 (Gaudron J). Cf 152–4 (Toohey J) (favouring an approach grounded in unjust enrichment).

⁴⁰ See Gino E Dal Pont, 'Timing, Insolvency and the Constructive Trust' (2004) 24 *Australian Bar Review* 262.

⁴¹ See, eg, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604. In a case where C, in a contract to purchase land from B, acknowledged A's contractual right to repurchase the property from B, the privity issues with enforcing A's claim against C were addressed by each member of the court via the law of trusts. Mason CJ and Dawson J, in a joint judgment, adopted the express trust, evincing a willingness to infer an intention to create a trust to protect A's interest. The remaining judges, presumably unwilling to make such an inference, grounded their intervention by reference to the constructive trust. Wilson and Toohey JJ ruled that by taking a transfer with the said acknowledgement, C became subject to a constructive trust in favour of A: at 638. This assumes that the constructive trust arose at the time of the transfer, and was thus independent of a court order (that is, it was 'institutional' in nature). Brennan J, conversely, reasoned that should C repudiate A's right to repurchase, 'equity imposes a constructive trust so that [C] holds his title on trust for [A] to the extent of [A's] interest': at 655. This assumes the imposition of the constructive trust by the court premised upon proof of unconscionable conduct (and thus 'remedial'), Brennan J opining earlier in his judgment that 'the fraud which attracts the intervention of equity consists in the unconscionable attempt by the registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title': at 654. Though nothing turned on this distinction on the facts before the court, it may well have been otherwise had another party secured an interest in the land in the intervening period.

the cover of judicial discretion, they could conspire to undermine Deane J's attempt to converge constructive trust jurisprudence under a broader remedial banner. It is regrettable then that his Honour did not elaborate the role of judicial discretion in the recognition, imposition and timing of the relevant constructive trust.

Justice Deane did not, however, entirely overlook questions of judicial discretion. So far as timing was concerned, his Honour accepted that

where competing common law or equitable claims are or may be involved, a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order *or from some other specified date*.⁴²

This presupposes some exercise of judicial discretion. And he described the constructive trust as 'constituting an in personam remedy attaching to property which may be moulded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case'.⁴³ Again, the reference to equity 'moulding' and 'adjusting' the remedy is premised upon some judicial discretion.

But Deane J's chief concern, in implicitly countenancing judicial discretion, was to disclaim any notion of constructive trusts, of whatever variety, being grounded in little short of appeals to fairness.⁴⁴ In remarks frequently cited, his Honour emphasised that

[t]he fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles ...⁴⁵

In particular, his Honour stressed that rights in property, including those impacted upon by constructive trusts, must 'fall to be governed by principles of law and not by some mix of judicial discretion'.⁴⁶ Critically, these remarks do not serve to outright

⁴² *Muschinski v Dodds* (1985) 160 CLR 583, 615 (emphasis added). In his order, Deane J declared that '[l]est the legitimate claims of third parties be adversely affected, the constructive trust should be imposed only from the date of publication of reasons for judgment of this Court': at 623.

⁴³ *Ibid* 615.

⁴⁴ Cf Brennan J, dissenting, remarking that '[t]he flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair', before characterising the argument for a constructive trust on the facts as no more than 'a plea for the return of the interest given on the grounds of fairness': *Muschinski v Dodds* (1985) 160 CLR 583, 608, 609.

⁴⁵ *Ibid* 615 (citations omitted).

⁴⁶ *Ibid* 616.

deny a role for judicial discretion in granting a remedy under the banner of the constructive trust, whether or not property interests are involved, but to circumscribe the exercise of that discretion by legal principle and associated legal reasoning. This description, in any case, reflects what has ordinarily been understood as the exercise of a 'judicial discretion'.⁴⁷ The foregoing is not to deny that identifying *where* unfair conduct translates along the continuum of behaviour to that which is unconscionable remains shrouded in degree. This Deane J conceded, noting that 'general notions of fairness and justice ... remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity'.⁴⁸

III BACKDROP TO DEANE J IN *MUSCHINSKI v DODDS*

Explicit in Deane J's exposition is that the constructive trust, in its main forms, has a distinct remedial flavour. It is a remedy attracted by reason of certain types of conduct upon which equity frowns, chiefly breaches of fiduciary duty and unconscionable conduct. And while careful to refute (in the law of constructive trusts) the exercise of unbridled judicial discretion, his Honour hardly constrained his views by reference to inflexible outcomes. That he perceived a need to dispel discretion grounded in mere fairness itself is testament to the recognition of a judicial discretion, albeit of a principled kind.

Once, therefore, it is accepted that the constructive trust — whether against the backdrop of a breach of fiduciary duty or stemming from a finding of unconscionable conduct in relation to property — is potentially available to be recognised or imposed as a remedy, the question then turns to what, as a matter of principle, may impact upon how and whether that remedy will issue. Inkings into this preceded Deane J's reasons in *Muschinski v Dodds*, in the two 1984 decisions of the Court discussed immediately below, as well as in subsequent High Court decisions on constructive trusts, a discussion of which forms the substance of the remainder of the paper.

A Chan v Zacharia

As noted earlier, though the High Court's decision in *Chan v Zacharia*⁴⁹ marginally falls outside the chosen 30 year time frame, there is reason for 'cheating' a little given its backdrop to Deane J's remarks on the nature of the constructive trust in *Muschinski v Dodds* the ensuing year. Unlike *Muschinski v Dodds*, moreover, *Chan v Zacharia* involved a constructive trust of an 'institutional' variety, stemming from a partner's breach of fiduciary duty to a fellow partner in personally securing the renewal of a lease rather than as an asset of the partnership in the course of its winding up. The primary issue was whether fiduciary duties inherent in partnership

⁴⁷ On the broader concept of 'judicial discretion' see Ronald Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624.

⁴⁸ *Muschinski v Dodds* (1985) 160 CLR 583, 616.

⁴⁹ (1984) 154 CLR 178.

persisted for the purposes of its winding up, and so the Court's remarks on constructive trusteeship were a segue to a finding that those duties indeed did. In delivering the leading judgment, in which Brennan and Dawson JJ concurred,⁵⁰ Deane J made the following remarks pertaining to the relationship between fiduciary breaches and the constructive trust:

Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. *Any such benefit or gain is held by the fiduciary as constructive trustee ...* That constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed.⁵¹

Several observations can be made regarding this extract. First, Deane J locates the relevant trigger for the constructive trusteeship under the banner of a fiduciary breach, whether the benefit or gain stems from a yielding to a conflict between interest and duty, or otherwise from a misuse of position or opportunity derived therefrom. Secondly, that trigger is not, in this context, premised upon proof of unconscionable conduct; there can hardly, it seems, be unconscionable conduct in the presence of good faith. The fiduciary breach is sufficient to this end. Thirdly, having identified a fiduciary breach as the cause of action, constructive trusteeship is evidently the remedy to rectify the breach. Fourthly, his Honour's language aligns with the notion that here constructive trusteeship arises as a matter of law once the illegitimate benefit or gain is made, and thus independently of a court order. This, as mentioned earlier, dictates that the court *recognises* rather than creates the constructive trust, and that accordingly the timing of the relevant obligation thereunder antedates any court order.

What is perhaps most striking about Deane J's observations is the ostensibly unyielding link between fiduciary breach and constructive trusteeship. His Honour declared that any such benefit or gain derived in fiduciary breach 'is' held by the fiduciary as constructive trustee. The causal connection is expressed categorically; the language is imperative ('is') rather than, say, 'may be'.

But this is not entirely how it appears, in two main ways. First, constructive trusteeship in these circumstances is not an invariable outcome. Any 'presumption' that the gain or benefit is held as constructive trustee, as Deane J and Gibbs CJ in *Chan v Zacharia* explained, is rebuttable.⁵² The relevant liability to account will not, for

⁵⁰ Ibid 186 (Brennan J), 206 (Dawson J).

⁵¹ Ibid 199 (emphasis added) (citations omitted).

⁵² Ibid 181 (Gibbs CJ), 204 (Deane J).

instance, arise where what would otherwise have constituted the fiduciary breach was authorised by the principal. It may alternatively be lost by the operation of other equitable doctrines, such as laches or estoppel.

Secondly, it is instructive to note that Deane J spoke of the benefit or gain being held ‘as constructive trustee’, not ‘on constructive trust’. At first glance this appears to be a distinction without a difference; after all, it could be reasoned that a person upon whom a constructive trust is imposed is, by definition, a constructive trustee. Indeed, this is true. Yet by the terminology ‘as constructive trustee’, when placed in the context of ‘the liability to account’, it is probable that Deane J intended to convey the notion that the fiduciary’s liability is one akin to that of a trustee (under an express trust). The primary liability of the latter is a *personal* one to account to the beneficiaries for any gains or benefits secured in breach of trust. It may well be that Deane J thereby sought to counter any view that constructive trusteeship *necessarily* involves liability of a proprietary character. Read in tandem with his Honour’s remarks in *Muschinski v Dodds*, it appears that his concern with avoiding ‘idiosyncratic notions of justice and fairness’ targeted constructive trusteeship with proprietary consequences.

The constructive trust, therefore, is not invariably premised (like the usual express trust and the resulting trust) upon a dichotomy between legal and beneficial ownership in property. Being primarily remedial in character, as Deane J reasoned in *Muschinski v Dodds*, like most other legal and equitable remedies it is directed at securing an outcome triggered by a cause of action. That outcome may involve a re-vesting of property, but it may just as easily (and perhaps more commonly) involve an order against the person to pay a monetary sum. Its remedial flavour should make it unsurprising, to this end, that the constructive trust can be utilised to secure personal accountability.

B *Hospital Products*

This same view inhered in the reasons of Mason and Deane JJ later in 1984 in *Hospital Products*.⁵³ The case involved, inter alia, the issue of whether a distributorship contract attracted fiduciary duties in the distributor to the manufacturer, such as to justify the court granting equitable relief in the form of an account of profits or a constructive trust, rather than being confined to awarding damages for a contractual breach.

As Mason and Deane JJ, in separate judgments, recognised some fiduciary obligations as between the contracting parties (and dissented in so doing), they were compelled to address the scope for constructive trusteeship arising out of fiduciary breaches. In this context, Mason J reiterated the principle Deane J had stated in *Chan v Zacharia*, extracted earlier, albeit without attribution. He similarly concluded that ‘[a]ny profit or benefit obtained by a fiduciary in either of the two situations [so] described is held by him as a constructive trustee’,⁵⁴ and that the

⁵³ (1984) 156 CLR 41.

⁵⁴ Ibid 107.

fiduciary ‘must account for it and in equity the appropriate remedy is by means of a constructive trust’.⁵⁵

Justice Mason added that, in determining the scope of the relevant remedy, ‘the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty’.⁵⁶ Though accepting that occasions ‘to do justice by making available relief in specie through the constructive trust’⁵⁷ may arise out of a fiduciary breach,⁵⁸ on the facts his Honour was unwilling to accept that relief in specie — whereby the manufacturer could claim the competing business illegitimately established by the distributor as the beneficiary of a constructive trust — accurately represented the measure of the profit or benefit obtained by the distributor in breach of fiduciary duty.⁵⁹ Instead his Honour restored the orders of the trial judge, McLelland J, who had issued an account of profits (or, at the election of the manufacturer, equitable compensation).⁶⁰ Justice Deane, in a briefer treatment of the issue, agreed that the manufacturer was entitled to an order that the distributor account, as constructive trustee, for any profits it derived in breach of fiduciary duty.⁶¹

⁵⁵ Ibid 108.

⁵⁶ Ibid 110.

⁵⁷ Ibid 100.

⁵⁸ His Honour cited *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 as an example: *Hospital Products* (1984) 156 CLR 41, 115–16.

⁵⁹ Ibid 114 (noting that the claim for a constructive trust of all the assets of company illegitimately established by the distributor (HPI) ‘ranges far beyond the profits and benefits obtained by HPI in breach of its fiduciary duty’ because it ‘fails to make any allowance for the contribution in time, effort and finance made by HPI to the acquisition and creation of [its] assets’ and it ‘would be to debar HPI from competing with [the manufacturer] in the United States market, notwithstanding that the contract between the parties contained no such embargo during the currency of the contract or after its termination’).

⁶⁰ *United States Surgical Corporation v Hospital Products International Ltd* [1982] 2 NSWLR 766.

⁶¹ *Hospital Products* (1984) 156 CLR 41, 124. Justice Deane, however, envisaged that the plaintiff was entitled to a declaration that the defendant:

was liable to account as a constructive trustee for the profits of that Australian business in accordance with the principles under which a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit, or the proceeds of a benefit, which he has appropriated to himself in breach of his contractual or other legal or equitable obligations to another (125).

As this particular aspect of the matter was not explored in argument and a majority of the Court found no basis for a constructive trust, his Honour deferred ‘until some subsequent occasion a more precise identification of the principles governing the imposition of a constructive trust in such circumstances’: at 125. That occasion never transpired, and the notion that mere contractual breaches could form a foundation for constructive trusteeship has not seen subsequent endorsement.

That Mason J, as well as Deane J, was willing to countenance a personal remedy, while concurrently endorsing the proposition that profits gained in fiduciary breach are held as constructive trustee, discloses an alignment between constructive trusteeship and relief of a non-proprietary nature. In so doing it reveals an underlying discretion within the court, including under the banner of constructive trusteeship, as to *form and extent* of relief. It thus speaks against fixed rules in equating and quantifying relief in this context.

IV UPSHOT OF THE CONSTRUCTIVE TRUST AS A REMEDY

It stands to reason that the critical aspect emanating from Deane J's jurisprudence, with support from Mason J, is that the constructive trust is a remedy, which like other equitable remedies is punctuated by judicial discretion. The latter is essential because, consistent with equitable relief more generally, its availability is premised upon inquiry into the conduct of the defendant and, as elaborated below, may need to yield to alternative forms of relief, in particular where the interests of innocent third parties may be prejudiced. The remedial focus, grounded in judicial discretion informed by the defendant's conduct, is likewise reflected below by reference to the relationship between the constructive trust and equitable estoppel, and the constructive trust's application in accessory and recipient liability scenarios.

A Constructive Trust Relief Not 'Automatic'

The need for flexibility and discretion — which inheres in the broader ideal of (equitable) relief 'doing justice' in the circumstances — dictates that a constructive trust is not an 'automatic' remedy when a fiduciary breach or unconscionable conduct is shown. Other remedies may suffice. Nor does the curial inquiry to this end need to be constrained by the interests of the litigants before the court. In 1986 Gibbs CJ in *Daly v Sydney Stock Exchange Ltd*,⁶² where the Court ruled that a stock-broking firm breached its fiduciary duty by accepting a deposit of client moneys without disclosing its parlous financial position, uttered the following remarks as to the constructive trust as a remedy for this breach:

the demands of justice and good conscience could have been satisfied without the creation of a constructive trust. In deciding whether or not the money should be held to have been subject to a constructive trust it is not unimportant that the ordinary legal remedy of a creditor would have been adequate to prevent the firm from being benefitted at the expense of the appellant ... Further, the consequences of holding the money to be subject to a constructive trust and thereby transforming the creditor into a beneficiary suggest that it would be contrary to principle to recognize the existence of a constructive trust in a case such as the present. One consequence would be that the money, and any property acquired with it, would, on the firm's bankruptcy, be withdrawn from the general body of

⁶² (1986) 160 CLR 371.

creditors; another would be that the appellant could require the firm to account for any profits made with the use of the money.⁶³

Chief Justice Gibbs noted that considerations of this kind led Lindley LJ in *Lister v Stubbs*⁶⁴ to say that to brand the relationship between the parties — there a company and its agent who had corruptly received a commission — as trustee and beneficiary would confound ownership with obligation. The Chief Justice branded Lindley LJ's reasons as 'impeccable when applied to the case in which the person claiming the money has simply made an outright loan to the defendant'.⁶⁵

Though the correctness of *Lister v Stubbs* — which declares that an agent who receives a profit in breach of fiduciary duty other than by use of the principal's property holds that profit as a debtor, not as a constructive trustee for the principal — in Australian law is unlikely to survive, given the Full Federal Court's 2012 decision in *Grimaldi v Chameleon Mining NL (No 2)*⁶⁶ (and it was indeed overruled in 2014 in England),⁶⁷ the concerns raised by Gibbs CJ as to the automatic application of the constructive trust remain extant. Indeed, the court in *Grimaldi* noted that 'to accept that money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances',⁶⁸ as 'a constructive trust ought not to be imposed if there are other orders capable of doing full justice'.⁶⁹ One scenario it envisaged as capable of challenging the appropriateness of the constructive trust was where a 'third party issue arises',⁷⁰ namely where the trust could adversely affect the legitimate interests of an innocent third party.

Critically, in rejecting the constructive trust as the relevant remedy, the High Court in *Daly v Sydney Stock Exchange Ltd* proceeded on the basis that the constructive trust sought was to have proprietary consequences. Given that the alleged trust would have arisen at the time of the fiduciary breach, there necessarily arose the prospect that, should the trust create a proprietary interest in the moneys in question, any 'innocent' third parties who secured some claim to or interest in those moneys could be unduly prejudiced. Hence the need for curial discretion, as explicitly envisaged in *Grimaldi*, in determining what relief, short of constructive trusteeship *with a proprietary consequence*, would do justice as between the competing claimants.

⁶³ Ibid 379. His Honour ultimately concluded that no constructive trust came into existence when the client paid the moneys to the stockbroking firm because it was 'unnecessary to protect the legitimate rights of the lender and ... could lead to consequences unjust both to the creditors of the borrower and the borrower itself': at 380 (citations omitted).

⁶⁴ (1890) 45 Ch D 1, 15.

⁶⁵ *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 379.

⁶⁶ (2012) 200 FCR 296 ('*Grimaldi*').

⁶⁷ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250.

⁶⁸ *Grimaldi* (2012) 200 FCR 296, 422–3 [583].

⁶⁹ Ibid, citing *John Alexander's Clubs* (2010) 241 CLR 1, 45 [128].

⁷⁰ Ibid 423 [583].

The High Court's most recent mention of constructive trusts, *John Alexander's Clubs*,⁷¹ saw a return to this theme. In a unanimous judgment their Honours referred to a line of authority supportive of the following propositions:

A constructive trust ought not to be imposed if there are other orders capable of doing full justice. ... One point ... is that care must be taken to avoid granting equitable relief which goes beyond the necessities of the case. Another point ... is that third party interests must be borne in mind in deciding whether a constructive trust should be granted. [The law] does not permit a constructive trust to be declared in a manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant.⁷²

And the year before, citing the same line of authority that informed the above propositions, the Full Court of the High Court in *Bofinger v Kingsway Group Ltd* noted that 'the term "constructive trust" may be used not with respect to the creation or recognition of a proprietary interest but to identify the imposition of a personal liability to account upon a defaulting fiduciary'.⁷³ Later in its reasons, the Court emphasised the 'importance attached by equity to the fashioning of the particular remedy to meet the nature of the case' by reference to, *inter alia*, 'the remedial constructive trust'.⁷⁴

B Constructive Trust as a Remedy Contrasted with Estoppel

The line of authority mentioned in the two preceding paragraphs emanated from the High Court's 1999 decision in *Giumelli*.⁷⁵ The case involved no fiduciary issue — it arose out of unfulfilled promises by parents to their son as to ownership of part of the family farming property — and so any finding of a constructive trust rested upon a finding of an unconscionable denial of a beneficial interest in property. In the Full Court of the Western Australian Supreme Court, from which the appeal to the High Court came, Ipp J (with whom Franklyn J concurred) imposed a constructive trust over the property the subject of the promises, reasoning that the parents' denial to their son of a beneficial interest therein amounted to unconscionable conduct in view of the son's contributions to the property and associated farming business.⁷⁶ While the third judge, Rowland J, instead approached the case from the perspective of estoppel — finding that the parents' backflip from their promises was unconscionable — he agreed with the order proposed by Ipp J, 'whether based on a constructive trust or on equitable estoppel'.⁷⁷

⁷¹ (2010) 241 CLR 1.

⁷² Ibid 45–6 [128]–[129].

⁷³ (2009) 239 CLR 269, 290 [47].

⁷⁴ Ibid 300 [91].

⁷⁵ (1999) 196 CLR 101.

⁷⁶ *Giumelli v Giumelli* (1996) 17 WAR 159, 172–5.

⁷⁷ Ibid 167.

Although the High Court approached its decision ultimately by reasoning grounded in estoppel, as a prelude thereto it made several remarks pertaining to constructive trusts. As to the constructive trust alleged on the facts in question, their Honours noted that it was 'proprietary in nature'.⁷⁸ Such a trust, they observed, 'is a remedial response to the claim to equitable intervention made out by the plaintiff', which 'obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties'.⁷⁹ It followed that it 'does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests'.⁸⁰

Rather, the constructive trust in this context, should it be apt, is utilised essentially to secure the effective conveyance of a property interest. As foreshadowed in the remarks of Gibbs CJ in *Daly v Sydney Stock Exchange Ltd*, albeit against the backdrop of a fiduciary breach (and thus an 'institutional'-type constructive trust), though, the High Court in *Giumelli* was not constrained to accept that an unconscionable denial of a beneficial interest in property should necessarily sound in the conveyance of specific property via the constructive trust as the remedy. In the face of, inter alia, improvements to the property the subject of the promise by other family members, and the continued residence therein by the plaintiff's younger brother, any order to convey the property to the plaintiff would have adversely affected third parties. Accordingly, their Honours saw *Giumelli* as a case for the fixing of a money sum to represent the value of the plaintiff's equitable claim to the promised property.⁸¹

Nonetheless, what the court omitted to investigate, other than cursorily, is the relationship between equitable (proprietary) estoppel and the (remedial) constructive trust. Equitable estoppel is not a remedy, but either a cause of action or defence, premised upon proof of an unconscionable resiling from a promise that reasonably induced the promisee to act to his or her detriment. The remedy stemming from a successful claim of estoppel, when pleaded as a cause of action, may vary according to the circumstances, but has in recent times been identified by the High Court as starting from an assumption that the promise ought to be enforced.⁸² When the promise relates to property, it may be enforced by an order that the property be conveyed in accordance with the promise. In effect, the conveyance can be effected in this scenario via a (remedial) constructive trust of the variety discussed by the High Court in *Giumelli*.

If, though, the property no longer exists in the relevant form, or some innocent third party has secured an interest therein, an order for the payment of a monetary sum, equivalent in value to the subject matter of the promise, may be more appropriate.

⁷⁸ *Giumelli* (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

⁷⁹ *Ibid* 112 [3].

⁸⁰ *Ibid* 112 [5].

⁸¹ *Ibid* 125 [49]–[51].

⁸² See *Sidhu v Van Dyke* (2014) 251 CLR 505.

Even in a purely promissory estoppel case, the latter may be apt where necessary to avoid the litigants having to continue some business association.⁸³ None of these scenarios is consistent with a constructive trust, in a proprietary sense, as the remedial response.

It stands to reason that while a constructive trust may, in some circumstances, represent an appropriate remedial response to a cause of action in equitable estoppel, it need not necessarily do so. More to the point, to accept, as Deane J did in *Muschinski v Dodds*, that the constructive trust is essentially remedial in character, is to differentiate it by juridical nature from equitable estoppel.⁸⁴ That some constructive trusts require unconscionable conduct as a trigger, and that equitable estoppel is likewise premised upon unconscionable conduct, does not serve to equate the relevant legal inquiries in each event, let alone the substantive nature of the concepts in issue.

C Distinguishing the Source of the Claim from the Remedy

The need to be clear as between the source of a legal claim and the remedy, in an environment involving an attempt to trigger a constructive trust, also presented itself to the High Court in 1998 (the year before *Giumelli* was decided). Indeed, in *Giumelli* their Honours cited the case, *Bathurst City Council*,⁸⁵ as authority for the proposition that '[b]efore a constructive trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust'.⁸⁶ In *Bathurst City Council* the Full Court, on this point, remarked as follows:

An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant.⁸⁷

These observations sit well with the flow of High Court authority, and the discretion that goes to a judicial determination of the most appropriate equitable remedy in the circumstances. In *Bathurst City Council* the Court was pressed to recognise a 'charitable' remedial constructive trust. This it refused, reasoning that '[a] charitable trust ... imposed by a court as a remedy for unconscientious conduct by a defendant would lack certain distinctive, if not vital, attributes of trusts for a charitable purpose',⁸⁸ including a general charitable intention, and indefiniteness of duration.

⁸³ See, eg, the order in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

⁸⁴ In this regard, English courts' reticence to accept the remedial constructive trust may well explain why they continue to struggle with the distinction between equitable estoppel and the constructive trust: see, eg, Sir Terence Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] *Conv* 104.

⁸⁵ (1998) 195 CLR 566.

⁸⁶ *Giumelli* (1999) 196 CLR 101, 113 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

⁸⁷ *Bathurst City Council* (1998) 195 CLR 566, 585 [42].

⁸⁸ *Ibid* 584 [41].

Albeit not addressed explicitly by the Court, there is another reason why the charitable trust cannot operate as a remedy in the fashion proposed. Charitable trusts are express trusts, as highlighted in part by the above reference to a charitable intention. There is no need to introduce a constructive trust as a vehicle to enforce an express trust or to remedy its breach.⁸⁹ After all, the entire notion of a 'constructive' trust derives from the absence of equitable obligations imposed under an express (or resulting) trust. And, as is evident from the tide of High Court authority, a remedial response via a constructive trust will not ensue where it is not needed.

D Translation to Remedy in Third Party Scenarios

As foreshadowed earlier, the principal aim of Deane J's foray in *Muschinski v Dodds* into the juridical nature of the constructive trust was to highlight its remedial nature and function, as distinct from express trusts and resulting trusts. Correlative to this objective, his Honour firmly sourced the trigger for constructive trusteeship by reference to conduct 'contrary to equitable principle'.⁹⁰ Justice Deane envisaged that conduct amounting to a breach of fiduciary duty, or an unconscionable denial of (or assertion to) a beneficial interest in property, met this description.

Against this backdrop, it is instructive to consider the 2007 remarks of the Full Court of the High Court in *Farah Constructions*,⁹¹ where the main remedial issues before the Court targeted constructive trusteeship in the context of accessory and recipient liability. It should be recalled, for this purpose, that the High Court, in its 1975 decision in *Consul Development*,⁹² endorsed the availability of equitable relief — via the constructive trust — against persons ('strangers') who, though not fiduciaries or trustees themselves, either knowingly receive trust property ('recipient liability') or knowingly assist a trustee or fiduciary in a dishonest or fraudulent design ('accessory liability').⁹³

Vis-a-vis the law of constructive trusts, the principal focus of the judgment in *Farah Constructions* was on the *conduct* of an alleged accessory or recipient that justifies constructive trusteeship. The Court endorsed the view that, as the alleged accessory or recipient does not owe fiduciary or trust duties to the principal, proof of *fault* in an involvement in the fiduciary breach is core to rendering him or her a constructive

⁸⁹ In *Brown v Pourau* [1995] 1 NZLR 352, 368 Hammond J viewed a secret trust as an express trust, but added that the trustee's obligation is supported by a remedial constructive trust. But as the court enforces express trusts according to ordinary trusts principles, any constructive trust is superfluous for this purpose. Cf *Bathurst City Council* (1998) 195 CLR 566, 583 [39], where by way of obiter the court classed a secret trust as '[o]ne species of constructive trust', but did not explain how one of its core elements — proof of intention — sits with constructive trusts jurisprudence.

⁹⁰ *Muschinski v Dodds* (1985) 160 CLR 583, 614.

⁹¹ (2007) 230 CLR 89.

⁹² (1975) 132 CLR 373.

⁹³ Thus applying the venerable remarks of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2.

trustee. So, in the case of accessory liability, the Court favoured the view, open on one reading of *Consul Development*, that an accessory's liability as constructive trustee could be triggered by the accessory's *constructive knowledge* of the dishonest and fraudulent design.⁹⁴

That their Honours expressly disclaimed any analogy between the constructive trust involved in *Muschinski v Dodds* and that capable of arising for the purposes of recipient liability⁹⁵ did not preclude their focus (as did Deane J in *Muschinski*) on the recipient's *conduct* as a determinant of relief. In particular, the Court adamantly rejected the alternative approach espoused by the New South Wales Court of Appeal — which located constructive trusteeship for the purposes of recipient liability under the rubric of unjust enrichment⁹⁶ — in favour of the traditional approach, espoused in *Consul Development*, resting in knowledge in the recipient. In so doing, it rebuffed the view that constructive trusteeship could be triggered by a consequentialist inquiry into the injustice surrounding an outcome, at the expense of an inquiry into the conduct of the recipient, by reference to his or her state of mind.

In so doing, their Honours were pursuing no new course of reasoning. In *Baumgartner v Baumgartner*,⁹⁷ for instance, Toohey J's analysis grounded in unjust enrichment saw no encouragement from the other four judges, who squarely identified unconscionable conduct as the threshold for constructive trust relief. It has witnessed no encouragement thereafter either. In 2009, in a unanimous judgment, the Court rejected 'all-embracing theories of unjust enrichment'⁹⁸ as a foundation for, *inter alia*, constructive trusteeship, declaring that these 'may conflict in a fundamental way with well-settled equitable doctrines and remedies'.⁹⁹

V CONCLUSION

In *Muschinski v Dodds*¹⁰⁰ Gibbs CJ spoke of 'the ill-defined limits of the rules relating to constructive trusts'. This view no doubt influenced his Honour to pursue a different path to relief in that case. The constructive trust has, after all, been described as 'a vague dust-heap for the reception of relationships which are difficult to classify or which are unwanted in other branches of the law'.¹⁰¹ It has also been bedevilled

⁹⁴ *Farah Constructions* (2007) 230 CLR 89, 160 [163].

⁹⁵ *Ibid* 162–4 [171]–[179].

⁹⁶ See *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 (15 September 2005) [207]–[237] (Tobias JA). See also Mason P at [1], Giles JA at [2].

⁹⁷ (1987) 164 CLR 137, 152–4 (although Toohey J conceded that the outcome of the case would have been the same on an unconscionable conduct analysis: at 154).

⁹⁸ *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300 [90].

⁹⁹ *Ibid* 300 [91].

¹⁰⁰ (1985) 160 CLR 583, 595.

¹⁰¹ Edward I Sykes, 'The Doctrine of Constructive Trusts' (1941) 15 *Australian Law Journal* 171, 175.

with terminological difficulties. Only last year Lord Sumption remarked that ‘there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees’.¹⁰²

While the only dedicated analysis of the juridical nature of the constructive trust at High Court level within the last 30 years (and indeed within the history of the Court), it is noteworthy that Deane J’s reasons in *Muschinski v Dodds* do little to add precision to the occasions when constructive trusts arise. And while those reasons do address at least one question of terminology — namely the descriptors ‘institutional’ and ‘remedial’ — they appear directed more at breaking down divisions than sustaining them. At least in this sense, Deane J could be accused of contributing little that is genuinely concrete to constructive trusts jurisprudence.

Yet this conclusion overlooks some basal elements of his Honour’s analysis, which as explained in this paper have influenced subsequent High Court thinking. Justice Deane’s attempt to cast the constructive trust as primarily remedial has produced a lasting impact on Australian law. It has served to accentuate the distinctions between the constructive trust and other forms of trusts. And as an equitable remedy, its application is not constrained by fixed rules — whether as to availability, effect or timing — but rather grounded in equitable principle, namely by reference to discretion informed not only by the conduct of the defendant but by justice to others. As each of these points has seen subsequent High Court endorsement and application, Deane J’s legacy vis-a-vis constructive trusts is hardly insubstantial. And the elapsing of the last 30 years has sustained not only the flexibility of the concept but a step in the convergence of that jurisprudence at a conceptual level.

¹⁰² *Williams v Central Bank of Nigeria* [2014] AC 1189, 1197 [7].

SMALL-SCALE PROPERTY DEVELOPMENT: GST IMPLICATIONS

ABSTRACT

The purpose of this article is to explore the GST implications of small-scale property development in Australia and to provide guidance as to whether such activities give rise to a GST liability. The legislation governing the operation of the GST affecting these projects uses the familiar terminology of ‘business’, but it also uses terminology such as ‘adventure or concern in the nature of trade’, which has not received extensive consideration by the Australian courts. The authors review relevant case law to identify key principles, which will guide the courts in applying this terminology to small-scale property development, and provide guidance as to when a taxpayer undertaking such projects will be required to register for GST. The authors also discuss the factors relevant to determining the impact of the timing of registration. The article concludes that small-scale property developers need to be aware of the complexities and uncertainty in relation to the application of the GST to such projects.

I INTRODUCTION

The GST has now been with us for over a decade. Although its day-to-day applicability is mostly well-known, its application is less clear in the case of small-scale property developments, which are not uncommon amongst taxpayers whose primary income is from salary and wages. There are many variants of what encompasses a small-scale development but a typical scenario involves buying a run-down house, demolishing it, subdividing and building multiple dwellings on the site. The case law concerning this issue is not clearly resolved which means that neither the advisors nor the taxpayer can be certain as to whether or not the sale of the developed property will give rise to a GST liability. Given that the sale price of the property is determined by market forces and that the GST cannot be arbitrarily added to the sale price, it is important that the taxpayer has a greater degree of certainty regarding the liability to GST for compliance purposes and for assessing the viability of the project.

This article reviews the relevant legislation and case law applicable to the potential GST liability of small-scale property development. Part II examines the meaning

* Lecturer, Deakin Law School, Deakin University, Geelong, Australia.

** Senior Lecturer, Deakin Law School, Deakin University, Geelong, Australia.

of ‘carrying on an enterprise’ and the requirements to register for the GST. Registration for the GST is a necessary though not sufficient condition for there to be a GST liability on the sale proceeds from the development. If registration is not required and not voluntarily undertaken, there will be no GST liability on such sales. Part III of this article considers the consequences of registration and what effect the timing of registration has on the liability to pay GST.

II WHEN WILL THERE BE A POTENTIAL LIABILITY TO PAY GST?

A Legislative Background

Under s 7-1 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (*‘GSTA’*) there will be a GST liability where a taxpayer makes a ‘taxable supply’. Section 9-5 of the *GSTA* states:

You make a **taxable supply** if:

- (a) you make the supply for *consideration; and
- (b) the supply is made in the course or furtherance of an *enterprise that you *carry on; and
- (c) the supply is *connected with the indirect tax zone; and
- (d) you are *registered, or *required to be registered.

However, the supply is not a *taxable supply to the extent that it is *GST-free or *input taxed.

The requirements in sub-ss (a), (c) will generally be fulfilled for small-scale developers,¹ which leaves the more contentious issue of whether GST registration is required. If GST registration is required, sub-s (d) will be fulfilled as will sub-s (b) because carrying on an enterprise is a prerequisite for GST registration.²

In general, GST registration is required when a taxpayer carries on an enterprise and has a GST turnover which exceeds the turnover threshold.³ Consequently, the two main issues relevant in deciding whether small-scale property developers need to be registered for GST are whether they are carrying on an enterprise and the amount of their GST turnover.

¹ The requirements in *GSTA* s 9-5(a) will be fulfilled because supplying real estate constitutes a supply under *GSTA* s 9-10. Furthermore, the receipt of money will constitute consideration under *GSTA* s 9-15. The requirement of s 9-5(c) will also be fulfilled as real estate located in Australia will be regarded as being connected with the indirect tax zone under *GSTA* s 9-25(4).

² *Ibid* s 23-5.

³ *Ibid* ss 23-5, 23-15.

B *Carrying on an Enterprise*

Section 9-20(1) of the *GSTA* defines an ‘enterprise’ as follows:

- (1) An **enterprise** is an activity, or series of activities, done:
 - (a) in the form of a *business; or
 - (b) in the form of an adventure or concern in the nature of trade; or
 - (c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property; or
 - (d) by the trustee of a fund that is covered by, or by an authority or institution that is covered by, Subdivision 30-B of the *ITAA 1997* and to which deductible gifts can be made; or
 - (da) by a trustee of a *complying superannuation fund or, if there is no trustee of the fund, by a person who manages the fund; or
 - (e) by a charity; or
 - (g) by the Commonwealth, a State or a Territory, or by a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or
 - (h) by a trustee of a fund covered by item 2 of the table in section 30-15 of the *ITAA 1997* or of a fund that would be covered by that item if it had an ABN.

Of relevance to this article is the inclusion of activities ‘in the form of a business’ or ‘in the form of an adventure or concern in the nature of trade’.⁴ As the definition of enterprise is an exhaustive definition it does not require the courts to consider the ordinary meaning of the term ‘enterprise’, but it does leave to interpretation the meanings of the phrases ‘in the form of a business’ and ‘in the form of an adventure or concern in the nature of trade’. In addition, s 9-20(2)(a) excludes from the meaning of enterprise a person as an employee, s 9-20(2)(b) excludes any private recreational pursuit or hobby and s 9-20(2)(c) makes it clear that individuals and partnerships of individuals will only meet the definition of enterprise if there is a reasonable expectation of profit or gain. Given the unfamiliarity of some of these terms in Australian tax law it is necessary to examine other jurisdictions to consider their meaning in relation to the *GSTA*. This needs to be done with some caution, however, given that there are significant differences in the equivalent legislation in other jurisdictions.⁵

Application of s 9-20 to small-scale developments raises a number of important issues including: the extent to which this section could apply to one-off undertakings; whether the phrase ‘in the form of’ adds to the scope of the terms ‘business’ and ‘an adventure or concern in the nature of trade’; and whether ‘an adventure or

⁴ Ibid ss 9-20(1)(a)–(b).

⁵ Richard Krever, *GST Legislation Plus 2014* (Thomson Reuters, 2014) 75–6.

concern in the nature of trade' is significantly different from the notion of 'business' as used in the *Income Tax Assessment Act 1997* (Cth) ('ITAA97'). Although the Australian Taxation Office has a number of private rulings concerning whether land developers are carrying on an enterprise, these rulings are often inconsistent, further adding to the confusion faced by taxpayers.⁶ Furthermore, it has been argued that some case law suggests that a court's decision as to whether the taxpayer is 'carrying on an enterprise' is primarily based on the court's overall impression of the taxpayer's activities.⁷

1 *Whether Single Transactions are Potentially Covered by the GSTA*

Both the *GSTA* and *A New Tax System (Australian Business Number) Act 1999* (Cth) ('ABNA') use the phrase 'activity, or series of activities' in relation to the definition of an enterprise but neither Act defines this phrase. This raises the question of whether the scope of this phrase includes a single transaction. The New Zealand GST legislation also uses the term 'activity' and defines a 'taxable activity' as 'any activity which is carried on continuously or regularly'.⁸ This definition arguably removes the application of GST in New Zealand from a one-off purchase and sale of property.

The meaning of 'activity' under s 6(1) of the *Goods and Services Tax Act 1985* (NZ) was considered in the New Zealand decision in *Newman v Commissioner of Inland Revenue*.⁹ In *Newman v CIR* the taxpayer, who was registered for GST as a builder, purchased a 2.7 hectare block of land and commenced building a house to be used as the family home. The house was only partly completed when the family moved in. At that time the taxpayer was experiencing financial difficulty and, as a result, he subdivided and sold part of the 2.7 hectare block. The Commissioner argued that the sequence of steps required for planning, seeking approval, carrying out works and selling the land constituted an activity which was carried on continuously and regularly.¹⁰ The New Zealand Court of Appeal unanimously disagreed with the Commissioner's argument and thereby found that the subdivision was not an activity that was carried on continuously or regularly and therefore was not a taxable activity. Justice Richardson concluded:

The activity engaged in by the appellant in relation to this land to provide the front lot for sale was, on the evidence, a straightforward subdivision. There was no development work on the property. The activity was not repeated over time

⁶ Chris Sievers, *GST and 'Enterprise' in the Context of the Sub-division and Sale of Real Property* (30 March 2012) All About GST in Australia <<http://chrissievers.com/gst-and-enterprise-in-the-context-of-the-sub-division-and-sale-of-real-property/>>.

⁷ Melanie Baker, 'Tutors, Motor Vehicle Enthusiasts and Litigation Funders: A Case Update on What it Means to "Carry on an Enterprise"' (2014) 14(2) *Australian GST Journal* 30, 38.

⁸ *Goods and Services Tax Act 1985* (NZ) s 6(1)(a).

⁹ (1995) 17 NZTC 12 097 ('*Newman v CIR*').

¹⁰ *Goods and Services Tax Act 1985* (NZ) s 6(1)(a) defines 'taxable activity' as meaning 'any activity which is carried on continuously or regularly'.

either continuously or regularly. It did not involve repeated acts. Dissection of what was done into a series of sequential steps does not answer the statutory test of whether the activity was carried on continuously.¹¹

Importantly, the Court of Appeal considered the project as one activity and rejected the Commissioner's argument that the subdivision consisted of a series of activities.

However, it appears unlikely that the Australian courts would follow the New Zealand approach, given the differences that exist between the legislation. First, the use of the phrase 'activity, or series of activities' in s 9-20 suggests that a singular activity is distinct from an ongoing series of activities and that both can constitute an enterprise. Furthermore, in contrast to the New Zealand legislation, the Australian legislation does not limit the general definition of enterprise with the phrase 'continuously or regularly', although the Australian legislation uses this phrase in relation to the specific activities involving 'a lease, licence or other grant of an interest in property'.¹² As this phrase is excluded from the other elements of the definition of enterprise, this could be taken as an indication that its omission was deliberate and that it was intended that all the other elements of s 9-20(1) apply to one-off transactions. This is supported by *Miscellaneous Taxation Ruling MT 2006/1* which sets out the Commissioner's view on the meaning of this phrase and states that 'the term "activity, or series of activities" for an entity can range from a single undertaking including a single act to groups of related activities or to the entire operations of the entity.'¹³

A related issue is raised where the legislation not only requires the presence of an enterprise, but also requires, in *GSTA* s 9-5(b), that 'the supply is made in the course or furtherance of an enterprise that you carry on'. When the GST was first introduced, it was argued that in the event that the present day courts adopt the notion that 'carrying on' requires an element of repetition, (and even if a one-off transaction constitutes an enterprise as defined by s 9-20) there is a case to argue that it may not meet the requirement of being carried on as it does not exhibit characteristics of repetition.¹⁴ This view has support given that the definition of 'carrying on' was considered in *Smith v Anderson*¹⁵ as 'a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated'.¹⁶

¹¹ *Newman v CIR* (1995) 17 NZTC 12 097, 12 101.

¹² *GSTA* s 9-20(1)(c).

¹³ Australian Taxation Office, *The New Tax System: The Meaning of Entity Carrying on an Enterprise for the Purposes of Entitlement to an Australian Business Number*, MT 2006/1, 13 December 2006, [153] (*Miscellaneous Taxation Ruling MT 2006/1*). See for relevance to the GST: Australian Taxation Office, *Goods and Services Tax: Does MT 2006/1 Have Equal Application to the Meaning of 'Entity' and 'Enterprise' for the Purposes of the A New Tax System (Goods and Services Tax) Act 1999?*, GSTD 2006/6, 13 December 2006.

¹⁴ Justice D Graham Hill, 'Goods and Services Tax: Flagging for the Courts the Problems of the GST' (2000) 3(6) *Tax Specialist* 304.

¹⁵ (1880) 15 Ch D 247.

¹⁶ *Ibid* 277–8.

Subsequently, in the Australian Federal Court case of *Toyama Pty Ltd v Landmark Building Developments Pty Ltd*,¹⁷ White J held that while the phrase ‘in the form of a business’ in *GSTA* s 9-20(1)(a) can include a one-off activity, the reference to ‘an enterprise that you carry on’ in *GSTA* s 9-5 does introduce a requirement of a series of acts.¹⁸ However, his Honour gave a very lenient interpretation of the requirement of a series of acts and, on the facts, held that a trustee’s actions concerning a single property, which included the use of consultants, marketing of the property, obtaining of advice and arranging the property’s sale, were activities that fulfilled this requirement.¹⁹

In summary, it appears that a one-off development potentially falls into the GST net. However, the following discussion does indicate that in some circumstances a one-off transaction (all things equal) is less likely to fulfil the requirement of an ‘enterprise’ under *GSTA* s 9-20(1)(a).

2 In the Form of a Business

An activity or a series of activities constitutes an enterprise if they are in the form of a business.²⁰ The term ‘business’ is further defined in the *GSTA* as including ‘any profession, trade, employment, vocation or calling, but does not include occupation as an employee.’²¹ This definition is identical to that used in s 995-1 of the *ITAA97* and therefore it is reasonable to presume that the extensive body of income tax case law relating to this definition will be applied in relation to GST.²² Unlike the *ITAA97*, however, the definition of an ‘enterprise’ used in *GSTA* s 9-20(1) prefaces the term ‘business’ with the words ‘in the form of’. This raises the issue of whether the inclusion of this phrase extends the meaning of ‘business’ beyond the case law established from income tax decisions. This issue is discussed later in this part of the article. First, however, it is necessary to examine how the current income tax decisions may influence the courts in relation to defining ‘business’ for GST purposes and how they impact the GST liability of small-scale property development.

As an inclusive definition, the courts are open to consider the ordinary meaning of the term ‘business’ as well as its statutory meaning. As a result, the case law has given rise to a range of indicia that are commonly considered when distinguishing between a business activity and a recreational pursuit. According to case law arising from income tax decisions, an operation will constitute a business when it has certain indicia, including: being organised in a business-like manner, the taxpayer has a

¹⁷ (2006) 197 FLR 74.

¹⁸ Ibid 87–8.

¹⁹ Ibid.

²⁰ *GSTA* s 9-20(a).

²¹ Ibid s 195-1 (definition of ‘business’).

²² *Rendyl Properties Pty Ltd v Federal Commissioner of Taxation* (2009) ATC 2870, 2873–4.

profit intention, the activity involves repetition and the size of the activity is beyond that needed for personal needs.²³ It is not necessary for an operation to have all these indicia to constitute a business as the courts have still held that a business is being conducted even though some indicia are not present.²⁴

In the case of a taxpayer repeatedly developing and selling property, there is a strong case that the taxpayer is carrying on a business. This is because, in such circumstances, there is both an intention to resell the property at the time of purchase and a repetition of similar transactions, both of which are important though non-determinative indicators that the taxpayer is carrying on a business.²⁵ In the case of *Crow v Federal Commissioner of Taxation*²⁶ a taxpayer who had repeatedly purchased and subdivided land was held by Lockhart J to be carrying on a business of property development. Although the Court in *Crow* found that the taxpayer had an intention to resell at the time of purchasing the property, the Court also placed importance on the fact that the taxpayer had undertaken many developments, as well as the systematic nature of the developments undertaken.²⁷ Whilst this case involved developments that were typically several hundred acres each, there is reason to believe that its findings could be applicable to small-scale developers where the land developed would be substantially smaller in size. Importantly, courts have made it clear that the volume of operations and capital alone are generally far from decisive in determining whether an operation is a business.²⁸ Consequently, a taxpayer who has a history of small-scale property development through buying, developing and selling a property carries most of the salient features that were present in *Crow* and would likely be seen as carrying on a business.

In contrast, there is much less certainty about whether a business is carried on where a developer who bought property without an intention to resell it subsequently undertakes an isolated development which they then sell. This uncertainty is due

²³ *Ferguson v Federal Commissioner of Taxation* (1979) 37 FLR 310.

²⁴ For instance, in the case of *Federal Commissioner of Taxation v Walker* (1985) 79 FLR 161, a relatively small operation that originally involved one Angora goat was held to be a business. In the case of *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289, the High Court held that a sportsperson was carrying on a business despite the lack of a profit intention.

²⁵ See *Federal Commissioner of Taxation v Swansea Services Pty Ltd* (2009) 72 ATR 120 ('*Swansea*') regarding how an intention to profit upon purchasing an asset can weigh in the finding that the taxpayer is carrying on a business. See also *Federal Commissioner of Taxation v St Hubert's Island Pty Ltd* (1978) 138 CLR 210, 246 [21] regarding the importance of repetition in finding that the taxpayer was carrying on a business.

²⁶ (1988) 19 ATR 1565 ('*Crow*').

²⁷ *Ibid* 1573.

²⁸ See, eg, the following cases which found the presence of a business despite relatively small amounts of money involved: *Federal Commissioner of Taxation v Walker* (1985) 79 FLR 161; *Ferguson v Federal Commissioner of Taxation* (1979) 37 FLR 310; *Thomas v Federal Commissioner of Taxation* (1972) 46 ALJR 397.

to limited relevant case law, and although *Taxation Ruling TR 92/3* attempts to give some guidance on this issue, it is of limited assistance and has been subject to some criticism.²⁹

One of the earlier Australian cases that held that an isolated transaction can be regarded as a business is *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd*.³⁰ Although this case involved a large-scale professional development, its findings are relevant in deciding whether a small-scale developer is conducting a business. The taxpayer in this case was a company initially incorporated to purchase 1584 acres of beachfront land for recreational purposes. Thirteen years later the shares in Whitfords Beach Pty Ltd were purchased by three companies which had a history of property development and clearly intended to subdivide and develop the land. The new owners amended the Articles of Association of the taxpayer and proceeded to develop the property. This development involved rezoning and subdividing the land, as well as an extensive physical development, including building roads and the installation of drainage, electricity, water and sewerage. The High Court, by majority, held that the gain was ordinary income due to the taxpayer now being in the business of developing the land. This was despite the taxpayer having undertaken one development rather than a continuing series of developments. The conclusion of two of the three majority judges appeared to be highly influenced by the extensiveness of the development.³¹ Their Honours indicated that a previous High Court case that had found on similar facts that there was no business might not be considered good law.³² Although the judges did not state how extensive a development would have to be to constitute a business, they did state that merely subdividing the land would of itself be insufficient.³³

Unfortunately, since the decision in *Whitfords Beach*, only a small number of cases have considered whether an isolated property development venture would constitute a business or a mere realisation of a capital asset. In the Full Federal Court decision of *Statham v Federal Commissioner of Taxation*,³⁴ the taxpayer was the trustee of a deceased estate. The deceased in question had originally operated a farming business on a property of approximately 270 acres. As the farming activities had not been financially viable, the deceased had subdivided the land, carried out earthworks, constructed roads and connected the lots to the electricity grid. The trustee did

²⁹ Australian Taxation Office, *Income Tax: Whether Profits on Isolated Transactions are Income*, TR 92/3, 30 July 1992 ('*Taxation Ruling TR 92/3*'). For criticism of *Taxation Ruling TR 92/3*, see R C Allerdice, 'Ruling TR 92/3: The Voice of the Profit' (1993) 27 *Taxation in Australia* 408; Julie Cassidy, 'The Taxation of Isolated Sales under Section 25(1) ITAA: TR 92/3 v Joint Submission' (1994) 4 *Revenue Law Journal* 1, 17–18; Rami Hanegbi, 'Isolated Transactions: Current Income Tax Implications' (2006) 35 *Australian Tax Review* 248, 256–7.

³⁰ (1982) 150 CLR 355 ('*Whitfords Beach*').

³¹ Ibid 384–5 (Mason J), 399–400 (Wilson J).

³² Ibid 385 (Mason J), 398 (Wilson J).

³³ Ibid 385 (Mason J), 400 (Wilson J).

³⁴ (1988) 20 ATR 228 ('*Statham*').

not directly contract with any party that developed the land and was not directly involved in selling the land, but rather assigned this task to a real estate agent. Over a number of years, 105 lots were sold for a total of over \$1.1 million. The Full Federal Court held that the taxpayer was not running a business of land development but merely realised a capital asset, albeit at its best value. In its decision, the Court was particularly influenced by the ‘hands-off’ approach of the taxpayer; the process of development and sale was left to other parties.³⁵ The Court was also influenced by the limited nature of the physical development.³⁶ As a consequence, it has been suggested that *Statham* supports the view that a one-off project can avoid being labelled a business for tax purposes if the taxpayer does not actively participate in the process of developing and selling the property.³⁷

The decision in *Statham* has more recently been supported by the decision of a single judge of the Federal Court in *Casimaty v Federal Commissioner of Taxation*.³⁸ In this case, the taxpayer had farmed land of approximately 1000 acres. The land had originally been gifted to him by his father, but the taxpayer was unable to make sufficient money from farming to support his debts, so over a number of years the taxpayer developed and sold approximately two-thirds of the land. The taxpayer not only subdivided the land but also constructed roads, provided water and sewerage facilities to the blocks, and built external fencing. While the development was extensive, the taxpayer only developed the land to the extent that the taxpayer needed to obtain council approval for subdivision. Justice Ryan held that the development activities did not constitute a business. His Honour, however, did indicate that had the development process been more extensive it would have been easier to find that the taxpayer was running a business.³⁹ His Honour specifically indicated that this might have been the case had the taxpayer built fences or units on the blocks and been more directly involved in the sales process.⁴⁰

Conversely, in *Stevenson v Federal Commissioner of Taxation*⁴¹ a single judge of the Federal Court found that an isolated development did constitute a business. This case also involved a taxpayer who had farmed land for many years but subsequently ceased farming, subdivided the area into smaller lots and sold them over several years. The project was undertaken in stages, and involved a total of 360 acres and receipts of over \$3 million. As well as subdividing the land, the taxpayer arranged works for the supply of water, sewerage reticulation and power to each of the blocks. One stage included developing a park with a public toilet, as well as construction of a seawall where the blocks fronted a lake. Two of the stages also involved road

³⁵ Ibid 235–6.

³⁶ Ibid 235.

³⁷ Geoffrey Hart, ‘The Limited Impact of *Whitfords Beach* in Urban Land Development’ (2007) 17 *Revenue Law Journal* 85, 94–8.

³⁸ (1997) 151 ALR 242 (‘*Casimaty*’).

³⁹ Ibid 261–2.

⁴⁰ Ibid.

⁴¹ (1991) 29 FCR 282.

works and one also involved earth works. Unlike the cases of *Statham* and *Casimaty*, the taxpayer was directly involved in the development and sales process. He was also the sole decision-maker, controlled the marketing of the blocks and, on many occasions, dealt directly with purchasers. The taxpayer also dealt directly with the council and other authorities, and, occasionally, even did some work on the land himself to avoid paying for labour. In finding that the taxpayer was conducting a business, Jenkinson J placed particular importance on the fact that the taxpayer personally undertook much of the planning and management of the development.⁴² His Honour also approved the principle stated by Mason J in *Whitfords Beach*: the extent of the development activities is an important consideration in determining whether the taxpayer is in business or not.⁴³

An isolated development project was also held to be a business by the single judge Federal Court case of *Abeles v Federal Commissioner of Taxation*.⁴⁴ In this case, two brothers purchased 10 acres of land. Upon the land being rezoned, they entered into a development that involved not only their land but also the neighbouring land. In total, the development involved six different pieces of land and four groups of land owners. The costs of the development were shared on a pro-rata basis, and the development involved not only subdividing the land, but also road, sewerage and other works. The brothers eventually sold 38 blocks of land, most of them in one year. Justice O'Loughlin held that the taxpayers were carrying on a business of development. His Honour's decision was based on the extensiveness of the development and that the brothers had participated in the development together with the owners of the neighbouring properties, which gave it a business-like character.⁴⁵ Although his Honour's decision was also influenced by his determination that the property was not initially purchased for domestic purposes, this decision was ultimately made without being able to identify the dominant purpose of the purchase.⁴⁶

These abovementioned cases are of importance in relation to whether a taxpayer, who has purchased property without an intention to develop it but then subsequently undertakes an isolated development on that property, will be found to meet the definition of 'enterprise' and potentially require registration for GST. In particular, the key factors that will be considered are the taxpayer's level of involvement in the development and sale process, and the extent of the work done to carry out the development.⁴⁷ Nevertheless, under the current case law, it remains uncertain in many specific situations whether an isolated development project will constitute a business.

⁴² Ibid 290.

⁴³ Ibid 291–2.

⁴⁴ (1991) 22 ATR 504.

⁴⁵ Ibid 512.

⁴⁶ Ibid. Although the taxpayers claimed that they had purchased the property for domestic purposes (as a residence for themselves) this claim was met by the judge with scepticism.

⁴⁷ For a contrary view that argues that isolated transactions are highly unlikely to constitute a business, see Hart, above n 37.

Another important ‘intermediate’ scenario to consider is that of a one-off small-scale developer who acquires a property with an intention to develop and sell, and then subsequently acts out their intention. While there is very little case law that considers whether such a taxpayer’s activities constitute a business, to a large degree this issue is redundant because, as discussed in this paper, such activities will typically fall into the GST net as constituting an ‘adventure in the nature of trade’.⁴⁸ The limited case law suggests that the presence of a profit intention upon purchase will clearly strengthen the argument that such a taxpayer is also carrying on a business. The recent case of *Swansea*⁴⁹ illustrates how important the presence of a profit intention by resale upon purchase can be in determining whether a taxpayer is carrying on a business. *Swansea* concerned whether a long-term investment in paintings, artwork and antiques by a corporation was an enterprise for GST purposes. Justice McKerracher found that the investment activity was in the ‘form of a business’ even though long-term capital investments generally are not treated as a business for income tax purposes.⁵⁰ An important factor in this decision was that the facts supported the view that the painting, artwork and antiques were purchased with an intention to later sell at a profit.⁵¹

Much of the previous analysis (other than the discussion on *Swansea*) has relied on cases concerning income tax law to explore the meaning of the term ‘business’. But, the income legislation does not use the phrase ‘in the form of a business’ as is the case with *GSTA* s 9-20(1)(a). It is, therefore, necessary to consider whether the addition of ‘in the form of’ has any significant impact on the way in which the term ‘enterprise’ is interpreted by the courts. In *Miscellaneous Taxation Ruling MT 2006/1*, the Commissioner suggests that the inclusion of this phrase gives a wider meaning to the word ‘business’ and, in particular, would include non-profit entities and smaller superannuation funds.⁵² Justice McKerracher in *Swansea* also expressed the view that the phrase ‘in the form of’ extends the meaning of ‘enterprise’ beyond the ordinary meaning of ‘business’ and stated, in agreement with the comment in *Miscellaneous Taxation Ruling MT 2006/1*, that it includes activities that have the appearance or characteristics of business activities, but do not fall into the ordinary legal meaning of the term ‘business’.⁵³ His Honour also noted that for an individual, the activity must still be intended to be profit-making and not a private recreational pursuit or hobby.⁵⁴

In summary, in relation to a small-scale developer, it appears that those who repeatedly undertake developments would, in most instances, be carrying on a business and so

⁴⁸ Although the legislation such as the *GSTA* s 9-20(1) uses the term ‘adventure or concern in the nature of trade’ case law uses this term interchangeably with ‘adventure in the nature of trade’. See *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 25 (‘*Edwards*’).

⁴⁹ (2009) 72 ATR 120.

⁵⁰ Ibid 147.

⁵¹ Ibid.

⁵² *Miscellaneous Taxation Ruling MT 2006/1* [170B].

⁵³ (2009) 72 ATR 120, 146–7.

⁵⁴ Ibid.

would be regarded as carrying on an enterprise. Depending on the facts, however, taxpayers who undertake a development on a one-off or sporadic basis, who did not acquire their property with the intention of development, are in some situations either undertaking a business or at least undertaking activities that are 'in the form of a business'. In particular, the extent of the development and whether the taxpayer is directly involved in the project will be important in determining the outcome of a given case.⁵⁵ The Australian Taxation Office is of the view that the extensiveness of the development is very important in determining whether there is an enterprise being carried on. Specifically, the Australian Taxation Office believes that even where property has not been purchased with an intention to profit from resale, an extensive development to a large piece of land will constitute an enterprise, as will demolishing a house, subdividing the land and building two houses on the block.⁵⁶ On the other hand, where a property has not been purchased with an intention to resell it at a profit, the Australian Taxation Office is of the view that a subdivision that is accompanied with either minimal activity, or minimal work necessary to get the subdivision approved without building on the subdivided land will generally not constitute an enterprise.⁵⁷ The other possibility that needs to be considered is the 'intermediate' case of a one-off or sporadic development where the property was acquired with the intention of development. Although there is very limited case law that determines whether such taxpayers are carrying on a business or are undertaking activities 'in the form of a business', there will be a stronger case for this in comparison to when there is no such intention upon purchase. However, this issue appears to be largely redundant because, as discussed in Part II(B)(3), such transactions will typically be considered to be an enterprise for GST purposes because they constitute 'an adventure or concern in the nature of trade'.

3 *'In the Form of an Adventure or Concern in the Nature of Trade'*

If the activity or series of activities is not in the form of a business, as required by s 9-20(1)(a), there may still be an enterprise under s 9-20 if the activity is 'in the form of an adventure or concern in the nature of trade'.⁵⁸

Whereas the notion of a 'business' (as previously discussed) is very familiar in Australian taxation law, the addition of the phrase 'an adventure or concern in the nature of trade' is not widely used nor is it defined in the *GSTA*.⁵⁹ It is also of interest to note that the Explanatory Memorandum to the Bill does not add any guidance on why this phrase was included in the definition of 'enterprise'.⁶⁰ Importantly, the

⁵⁵ *Casimaty* (1997) 151 ALR 242, 261–2.

⁵⁶ *Miscellaneous Taxation Ruling MT 2006/1* [277]–[283].

⁵⁷ *Ibid* [291]–[307].

⁵⁸ *ABNA* s 9-20(1)(b).

⁵⁹ Hill, above n 14.

⁶⁰ Explanatory Memorandum, A New Tax System (Goods and Services Tax) Bill 1998 (Cth) 7–8 [2.2]–[2.5].

Australian Taxation Office is of the view that the words ‘in the form of’ do not broaden which activities fall under this limb of the definition of an ‘enterprise’.⁶¹

Given the lack of direct Australian statutory and judicial guidance on the precise meaning of ‘adventure or concern in the nature of trade’, it is desirable to examine other sources to assist in deriving the meaning of the term. The discussion below of these sources indicates that this phrase tends to capture one-off developments that fall short of constituting a business but involve property which was purchased with an intention to profit from reselling the developed properties. The importance of an intention to profit in this definition is reinforced by the specific requirement in s 9-20(2)(c) of a reasonable expectation of a profit or gain being needed to satisfy the definition of ‘enterprise’ if the taxpayer is an individual or a partnership.⁶²

The words ‘adventure or concern in the nature of trade’ are used in the UK legislation,⁶³ and the Great Britain *Royal Commission on the Taxation of Profits and Income: Final Report*⁶⁴ provides a useful starting point in ascertaining the meaning of this term. This report established six badges of trade which comprise: the subject-matter of the realisation, the length of the period of ownership, the frequency or number of similar transactions by the same person, supplementary work on or in connection with the property realised, the circumstances that were responsible for the realisation and motive.⁶⁵ Notably, there is considerable accord between these six badges of trade and the indicia of a business used by the Australian courts, which suggests there could be considerable overlap between ss 9-20(1)(b) and 9-20(1)(a). Although these UK badges of trade have not been formally incorporated into the Australian tax legislation, they have been referred to in *Puzey v Federal Commissioner of Taxation* as factors that can be used to determine whether a taxpayer is carrying on a business.⁶⁶ Also in *Federal Commissioner of Taxation v Williams*⁶⁷ and *Swansea*,⁶⁸ ‘business’ and ‘an adventure or concern in the nature of trade’ are regularly used synonymously, and in neither case was any distinction made between the two concepts. Nevertheless, statutory interpretation rules require that the words and phrases used in legislation are taken as necessary and that a particular word or phrase does not render another meaningless or redundant.⁶⁹ The Australian Taxation Office is also of the opinion that the inclusion of this phrase

⁶¹ *Miscellaneous Taxation Ruling MT 2006/1* [242].

⁶² *GSTA* s 9-20(2)(c).

⁶³ *Income and Corporation Taxes Act 1988* (UK) c 1, s 832(1), sch D.

⁶⁴ Great Britain, *Royal Commission on the Taxation of Profits and Income, Royal Commission on the Taxation of Profits and Income: Final Report* (1955).

⁶⁵ *Ibid* 39–40 [116].

⁶⁶ (2003) 131 FCR 244, 257 [48].

⁶⁷ (1972) 127 CLR 226 (‘*Williams*’).

⁶⁸ (2009) 72 ATR 120.

⁶⁹ See, eg, *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith, CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (McHugh, Gummow, Kirby and Hayne JJ).

indicates that the legislature intended to extend the meaning of an enterprise, and that it includes activities that do not meet the definition of a business because they lack continuity and repetition.⁷⁰

The dictionary definition of ‘trade’ can also be used to assist in determining the meaning of ‘adventure or concern in the nature of trade’. This is because interpretation principles require that an undefined term is applied using its common meaning and, to this end, courts have referred to dictionary definitions to assist.⁷¹ The term ‘trade’ is defined in the *Macquarie Dictionary* as ‘the buying and selling, or exchanging, of commodities, either by wholesale or by retail ... a form of occupation pursued as a business or calling, as for a livelihood or profit.’⁷² In addition, the *Oxford English Dictionary* defines it as a ‘[p]assage or resort for the purpose of commerce; hence, the buying and selling or exchange of commodities for profit’.⁷³ Both of these definitions emphasise the dealing of a commodity in the purchase and the sale aspects of the transaction, and also the expectation of profit. If it were undertaken on a regular and continuous basis the previous discussion would support the view that it would also be in the form of a business, therefore making it unnecessary to consider whether it is an adventure or concern in the nature of trade. On the other hand, as discussed previously, it is less likely that an isolated business deal or trade will be found to be a business.⁷⁴ While isolated developments are less likely to constitute a business, the dictionary definitions referred to support the conclusion that isolated developments that involve the purchase of property with an intention to profit through development and sale, constitute ‘an adventure or concern in the nature of trade’.

Miscellaneous Taxation Ruling MT 2006/1 implies the Australian Taxation Office’s view is that ‘an adventure or concern in the nature of trade’ has strong similarity to the term ‘profit-making undertaking or scheme’.⁷⁵ The term ‘profit-making undertaking or scheme’ is used in a substantial amount of Australian case law.⁷⁶ However, while these notions are both aimed at one-off transactions,⁷⁷ there is no case law that

⁷⁰ *Miscellaneous Taxation Ruling MT 2006/1* [244].

⁷¹ See, eg, *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 348 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Manly Council v Malouf* (2004) 61 NSWLR 394, 396–7 (Handley JA).

⁷² C Yallop et al (eds), *Macquarie Dictionary* (Macquarie Library, 4th ed, 2005) 1491.

⁷³ Oxford University Press, *Oxford English Dictionary* (2015) <<http://www.oed.com/>>.

⁷⁴ *Casimaty* (1997) 151 ALR 242; *Westfield Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 333.

⁷⁵ *Miscellaneous Taxation Ruling MT 2006/1* [233]–[238], [263]–[270].

⁷⁶ The previous *Income Tax Assessment Act 1936* (Cth) s 26(a) made gains from a ‘profit-making undertaking or scheme’ assessable. This was subsequently re-enacted in *Income Tax Assessment Act 1936* (Cth) s 25A and later as *ITAA97* s 15-15 where the legislation refers to a ‘profit-making undertaking or plan’.

⁷⁷ In *AB v Federal Commissioner of Taxation* (1997) 37 ATR 225, 242, Foster J agreed with the comment that an adventure in the nature of trade is an isolated business venture as opposed to a continuing business.

directly suggests or implies that there is any overlap between them.⁷⁸ If in the future it is found that these concepts are strongly connected, then the substantial amount of Australian case law on profit-making undertaking or schemes would provide further guidance as to when a gain is an adventure or concern in the nature of trade. However, even this guidance would be limited, given that the courts have never decided that a gain is a profit-making undertaking or scheme while, at the same time, stating that the taxpayer is not running a business. Rather, in previous cases where it has been held that a gain is a profit-making undertaking or scheme, the courts either did not address the issue of whether there was a business or found that the gain was a result of both a profit-making undertaking or scheme and a business.⁷⁹

The best indication of how Australian courts would interpret an adventure in the nature of trade is likely to be in accordance with the meaning of the term given by English cases relating to the buying and selling of assets, and how those cases have been interpreted by Australian courts. The collective English and Australian case law indicates that the phrase covers one-off developments that involve making a profit from property, which was purchased with an intention to profit from reselling the developed properties. At first, an English House of Lords decision held that an isolated commercial transaction that realised a profit from reselling an asset that had been purchased with an intention to resell did not constitute an adventure in the nature of trade.⁸⁰ A few decades later, however, another English House of Lords case found that it did.⁸¹ In Australia, the High Court is of the view that the latter case effectively over-rode the first:

Some twenty-five years after *Jones v Leeming* the Treasurer was vindicated, substantially if not entirely, by the House of Lords' decision in *Edwards (Inspector of Taxes) v Bairstow* ... The irony of this is that the facts of *Jones v Leeming* are not readily distinguishable from *Edwards v Bairstow*...⁸²

The importance of an intention to profit by resale when purchasing an asset, in deciding if the taxpayer is undertaking an adventure in the nature of trade, was illustrated in the UK case of *Marson (Inspector of Taxes) v Morton*.⁸³ In that case, the taxpayers had purchased property with an intention to hold the property long-term, but shortly after sold the property in its original state. Sir Nicolas Browne-Wilkinson VC of the Chancery Division held that the tribunal had not erred in its finding that the taxpayers had not undertaken an adventure in the nature of trade. Importantly, Sir Nicolas Browne-Wilkinson VC stated that the taxpayers' intention when purchasing the

⁷⁸ In *McClelland v Federal Commissioner of Taxation* (1970) 120 CLR 487, 491, when referring to an 'adventure or concern in the nature of trade', the Privy Council stated that 'there is no similar provision in the Australian Act'.

⁷⁹ Hanegbi, above n 29, 259.

⁸⁰ *Jones v Leeming* [1930] AC 415 ('Jones').

⁸¹ *Edwards* [1956] AC 14.

⁸² *Whitfords Beach* (1982) 150 CLR 355, 376 (citations omitted).

⁸³ [1986] 1 WLR 1343.

property was important to his finding.⁸⁴ Although case law indicates that in some circumstances it is possible for a taxpayer who sells an asset they originally acquired with an intention to profit through sale to not be regarded as carrying on an adventure in the nature of trade,⁸⁵ but rather as an investment activity,⁸⁶ this is unlikely to be the case for a property developer given that the development is an active endeavour rather than a passive investment.⁸⁷

Subsequent High Court authority reinforces the view that the term ‘an adventure in the nature of trade’ typically covers small-scale developments by taxpayers who have an intention to resell upon purchase. Such authority appears to indicate that ‘an adventure in the nature of trade’ is very similar to the Australian tax concept of what is known as the ‘first strand of *Myer*’. The first strand of *Myer* makes certain commercial transactions entered into with a profit intention fall into the income tax net.⁸⁸ The similarity of the two concepts is apparent in the judgment of *Myer*, where the High Court said, after discussing the abovementioned House of Lord cases of *Jones* and *Edwards* (which dealt with the issue of whether selling an asset that had been acquired for resale purposes constitutes an adventure in the nature of trade):

The judgments in some of the English decisions naturally reflect the language of the United Kingdom statutory provisions, which have no precise counterpart in this country. However, over the years this Court, as well as the Privy Council, has accepted that profits derived in a business operation or commercial transaction carrying out any profit-making scheme are income, whereas the proceeds of a mere realization or change of investment or from an enhancement of capital are not income ...

It is one thing if the decision to sell an asset is taken after its acquisition, there having been no intention or purpose at the time of acquisition of acquiring for the purpose of profit-making by sale. Then, if the asset be not a revenue asset on other grounds, the profit made is capital because it proceeds from a mere realization. But it is quite another thing if the decision to sell is taken by way of implementation of an intention or purpose, existing at the time of acquisition, of profit-making by sale, at least in the context of carrying on a business or carrying out a business operation or commercial transaction.⁸⁹

⁸⁴ Ibid 1348–9.

⁸⁵ Ibid.

⁸⁶ See, eg, *Manzur v Revenue and Customs Commissioners* [2010] UKFTT 580 (17 November 2010) where a retired surgeon who regularly bought and sold shares with an intention to profit from them was found by the First-tier Tribunal to be undertaking an investment activity rather than an adventure in the nature of trade.

⁸⁷ *Marson (Inspector of Taxes) v Morton* [1986] 1 WLR 1343 emphasised that a transaction that involves some type of development or work on the subject matter is more likely to constitute an adventure in the nature of trade than one that does not: at 1348.

⁸⁸ *Federal Commissioner of Taxation v The Myer Emporium Ltd* (1987) 163 CLR 199 (*‘Myer’*).

⁸⁹ Ibid 212–13.

Specifically, the first strand of *Myer* applies where a taxpayer has undertaken a commercial or business transaction with the intention to profit from the transaction,⁹⁰ and subsequently realises the profit as intended.⁹¹ In the case of a transaction that involves a resale, this means that the profit-making intention must be present at the time the asset is acquired.⁹² Judicial decisions suggest that this principle is applicable even where the initial intention was not the sole or dominant one.⁹³ Furthermore, it will also apply where the taxpayer intended to profit in one of a few possible ways,⁹⁴ or where there was an intervening event that led to the property being unexpectedly used for private purposes and an accompanying delay in the sale.⁹⁵ Where the taxpayer is a company, the purpose of those who control it — typically its shareholders and directors — is relevant to establishing whether there was an intention to profit through sale at the time of purchase.⁹⁶ Although case law has not given a clear meaning as to what is meant by the requirement of a ‘commercial transaction’, judicial authority suggests that it is something that can fall short of constituting a business.⁹⁷

Given the apparent similarities between the concepts of an adventure in the nature of trade and the first strand of *Myer*, it is worthwhile examining how Australian courts have applied the first strand of *Myer* to small-scale developers. The single judge Federal Court decision of *McCurry*⁹⁸ applied the first strand of *Myer* to hold that a one-off property development was not a business but was a commercial deal and, therefore, was ordinary income for income tax purposes. In *McCurry* the taxpayers purchased land that had an existing house on it which was of no value. They then proceeded to demolish the old house and constructed three townhouses on the land. The first attempt to sell the properties failed, but they were later sold at a profit after

⁹⁰ Ibid 209–10. However, it should be noted that the *Myer* decision is open to interpretation: see P Burgess et al, *Cooper, Krever & Vann's Income Taxation: Commentary and Materials* (Thomson Reuters, 7th ed, 2012) 305 [5.380]: ‘[m]any learned minds have attempted to plumb the depths of the *Myer* judgment. You also may care to try to comprehend exactly what was being said.’

⁹¹ *Myer* (1987) 163 CLR 199, 213.

⁹² Ibid.

⁹³ *Federal Commissioner of Taxation v Cooling* (1990) 22 FCR 42. Although this case did not involve property development, the Court discussed it in the context of the overriding principle regarding a transaction entered into with a profit-making motive.

⁹⁴ *Westfield Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 333, 344.

⁹⁵ *McCurry v Federal Commissioner of Taxation* (1998) 39 ATR 121 (‘*McCurry*’).

⁹⁶ *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* (1928) 41 CLR 148 in deciding whether a gain was assessable under a specific provision that assessed profit-making schemes. The case was cited with approval and applied in *Whitfords Beach* (1982) 150 CLR 355, 370 (Mason J) in deciding whether a business was present. The principle was also applied in *Antlers Pty Ltd v Federal Commissioner of Taxation* (1997) 35 ATR 64 in deciding whether the gain was assessable under a specific provision that assessed profit-making schemes.

⁹⁷ *McCurry* (1998) 39 ATR 121, 124–5.

⁹⁸ Ibid 124–8.

a short period when the properties were used by the taxpayers and their family as their private residence. Central to Davies J's decision was the application of the *Myer* principle to the facts in this case, which indicated that the taxpayers, although not conducting a business, undertook a commercial dealing and had acquired property with the intention of developing it and then selling it at a profit.⁹⁹

In addition to the case law that indicates the connection between an adventure in the nature of trade and the first strand of *Myer*, there is some limited Australian case law that directly discusses what an adventure in the nature of trade is, in the context of deciding whether gains are ordinary income for income tax purposes. The comments in these cases are consistent with an adventure in the nature of trade generally being fulfilled where the taxpayer has resold property that was purchased with an intention to resell. Conversely, they indicate that a lack of intention to profit by resale upon purchase will generally mean that there is no adventure in the nature of trade. The Australian Taxation Office is of the view that a simple subdivision of land will constitute an adventure in the nature of trade if the land was purchased with the intention of profiting by subdividing and sale.¹⁰⁰

In the first of these cases, the High Court in *Williams*¹⁰¹ considered, in part, whether the sale of land was an 'adventure in the nature of trade' in relation to deciding if the sale of property was assessable as ordinary income. In *Williams*, the High Court was concerned with the sale of land that had originally been purchased with an intention to later sell at a profit, but had instead been gifted to Mrs Williams (the spouse of the person who purchased the property) and later sold by Mrs Williams. In holding that the sale was not an adventure in the nature of trade, the Court placed emphasis on whether Mrs Williams had a profit intention at the time of acquiring the property.¹⁰² This was seen as a critical factor in determining whether there was an adventure in the nature of trade.

In *McClelland v Federal Commissioner of Taxation*¹⁰³ the taxpayer, together with her brother, had inherited a large tract of land as co-owners. The brother wished to sell his interest. However, as the taxpayer did not want to co-own the land with a stranger, she offered to buy her brother's interest. To pay for the purchase from the brother, the taxpayer sold a portion of the land just after acquiring the brother's interest. One of the issues was whether the profit on the sale of land pertaining to the interest acquired from her brother was ordinary income due to the taxpayer undertaking an adventure in the nature of trade. The Privy Council reversed the High Court's decision and, by majority, found that there was no adventure in the nature of trade. Specifically, the majority appeared to base its decision on the fact that the taxpayer's intention was to keep the land, but practical circumstances made her embark upon

⁹⁹ Ibid 124–6.

¹⁰⁰ *Miscellaneous Taxation Ruling MT 2006/1* [242].

¹⁰¹ (1972) 127 CLR 226.

¹⁰² Ibid 231–3 (Stephen J), 248–50 (Gibbs J).

¹⁰³ (1970) 120 CLR 487.

the sale.¹⁰⁴ The majority distinguished the English case of *Iswera v Inland Revenue Commissioners*¹⁰⁵ that had held there was an adventure in the nature of trade as the taxpayer there had purchased land with an intention to subdivide and sell, and then carried out that intention.¹⁰⁶

In the single judge High Court decision of *Eisner v Federal Commissioner of Taxation*¹⁰⁷ the taxpayer purchased two properties. The Court accepted that they had been purchased by the taxpayer with the intention of building apartments on them and subsequently renting them out. The taxpayer had borrowed money for this purchase from one of the companies that he controlled. However, as the taxpayer was unable to obtain the requisite finance for development, he chose to incorporate a new company and sold the properties to this company at a substantial profit. Another company controlled by the shareholder then built units for sale on the land. One of the issues that the Court had to consider was whether the gain was ordinary income. In deciding that the gain was not an adventure in the nature of trade, Walsh J was swayed by the fact that the properties had been purchased for the purpose of developing and renting them out.¹⁰⁸ His Honour mentioned that although the taxpayer had sold the property by incorporating a company that bought the property at a high price, this did not mean that the gain was ordinary income due to it being an adventure in the nature of trade.¹⁰⁹

From the decisions in *Williams*, *McLelland* and *Eisner* there is support for the view that an adventure in the nature of trade requires at the point of purchase an intention to profit through sale. In these cases it was held that the taxpayers were not engaged in an adventure in the nature of trade because their original intention was to profit from the use of the property rather than from its sale.

It, therefore, is reasonable to conclude that if a small-scale developer can be shown to acquire the property with an intention to develop and sell at a profit, and acts out this intention, then the activity is highly likely to be an adventure in the nature of trade, even though it is not necessarily an activity in the form of a business. This is consistent with the view of the Australian Taxation Office that property purchased with an intention to resell at a profit will mean that the activities constitute an ‘enterprise’.¹¹⁰ However, where property was originally purchased without an intention to resell it for profit, but is then subsequently developed and sold in a manner that falls

¹⁰⁴ Ibid 495–7.

¹⁰⁵ [1965] 1 WLR 663.

¹⁰⁶ *Williams* (1972) 127 CLR 226, 397.

¹⁰⁷ (1971) 45 ALJR 110.

¹⁰⁸ Ibid 113–14.

¹⁰⁹ Ibid 114–15.

¹¹⁰ *Miscellaneous Taxation Ruling MT 2006/1* [270]–[276]. Examples 28 and 29 indicate that the Australian Taxation Office also believes that the sale of property that was purchased with an intention to develop and sell constitutes an adventure in the nature of trade.

short of constituting a business, the judicial evidence appears to indicate that it would not constitute an adventure in the nature of trade. However, in this second situation, if the taxpayer proceeds to develop the property extensively it would seem, depending on the individual circumstances, that they are potentially undertaking a business.

C Registration Threshold

Although anyone who is carrying on an enterprise is allowed to register for GST,¹¹¹ registration is compulsory where the taxpayer is carrying on an enterprise and (unless it is a non-profit body) their turnover for GST purposes exceeds the turnover threshold of \$75 000.¹¹²

The effect of the legislation is that the relevant information for determining whether registration is required is the taxpayer's projected GST turnover.¹¹³ Projected GST turnover at any given point is the sum of the 'values'¹¹⁴ of supplies made or likely to be made in the current month and the next 11 months.¹¹⁵ However, it is very important to note that sales of capital assets are not counted in determining the projected GST turnover of an enterprise.¹¹⁶ Consequently, for small-scale property developers, the value of supplies included in their projected GST turnover will be the sum of the 'values' of non-capital property sales in the current month and the projected sales in the next 11 months.

As nearly all properties sold by a small-scale developer would be materially over \$75 000, the developers carrying on an enterprise would need to register, at the latest, just after the first sale of a developed property.¹¹⁷ However, if the properties are regarded as capital the threshold would not be breached and registration would not be required.

¹¹¹ *GSTA* s 23-10.

¹¹² *Ibid* ss 23-5, 23-15; *A New Tax System (Goods and Services Tax) Regulations 1999* (Cth) reg 23-15.01. The turnover threshold for a non-profit body is \$150 000; however, this article does not deal with non-profit bodies.

¹¹³ *GSTA* s 188-10(1) states that the turnover requirement will be met when the current GST turnover is at least \$75 000 and the Commissioner is not satisfied that the projected GST turnover is below \$75 000, or the projected GST turnover is at or above the turnover threshold. The net effect of this provision is that the projected GST turnover will ultimately decide whether the registration threshold has been met.

¹¹⁴ *Ibid* s 9-75. 'Value' is defined in the *GSTA* as the pre-GST amount, which is calculated as 10/11 of the GST inclusive sale 'price': at s 9-75(1).

¹¹⁵ *Ibid* s 188-20. Excluded are input taxed supplies, supplies that are not for consideration and not covered by s 72-5 and supplies that are not connected with the enterprise carried on.

¹¹⁶ *Ibid* s 188-25.

¹¹⁷ Part III of this article will examine the optimal time that a taxpayer should register.

Example

Alex is a small-scale developer who bought a large house, demolished it and built three townhouses on the property. He sold each of the townhouses for \$400 000. The first is sold on 5 February 2014, the second on 20 December 2014 and the third on 5 March 2015. On the assumption that Alex is carrying on an enterprise, registration for GST would be required during February 2014 because, at that point, the projected GST turnover would be over \$75 000, given that the turnover would include sales made in February 2014 through to January 2015.

1 Registration is Not Required When Properties are Regarded as Capital

As previously stated, the relevant registration threshold does not include payments that the *GSTA* regards as capital.¹¹⁸ Thus, if a small-scale developer's properties are regarded as part of capital, it is unlikely there will be a turnover of at least \$75 000, meaning that there is no need to register for GST and so any GST liability will be avoided. This will generally only be an issue if the taxpayer has developed the properties for rental purposes and then subsequently sold them.

A preliminary issue is whether the sale of properties by landlords will typically be considered as being in the course or furtherance of an enterprise, which, as discussed, is one of the requirements for GST registration.¹¹⁹ Although this paper has earlier discussed when a small-scale developer's activities are in the course of furtherance of an enterprise, unique issues arise when the taxpayer sells the properties that were developed for rental purposes.

A landlord will be carrying on an enterprise because the definition of enterprise includes activities undertaken 'on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property'.¹²⁰ However, it is arguable that if this is the only means by which they are carrying on an enterprise, the sale of those properties could not be considered to be undertaken in the course or furtherance of that leasing enterprise. Consequently, an issue arises as to whether developing properties for rental, renting them out and then selling them could be carrying on an enterprise under one of the other limbs of the definition of 'enterprise'. If it is, there is a much stronger argument that the sale of the properties could be considered to be in the course of that enterprise.

It would be very unlikely for a taxpayer who develops property for rental or private purposes to be regarded as carrying on an enterprise by carrying on an adventure in the nature of trade. This is because the 'badges of trade', described earlier in this paper, are unlikely to be fulfilled when a development involves building properties for the sole purpose of earning rental income. Specifically, the subject matter of realisation, the length of period of ownership, the motive and that rental properties

¹¹⁸ *GSTA* s 188-25.

¹¹⁹ *Ibid* s 9-5(b).

¹²⁰ *Ibid* s 9-20(1)(c).

are investment assets¹²¹ are badges which, in the case of a rental development, would make it very unlikely that an adventure in the nature of trade has been undertaken.¹²² Although this issue has not been directly addressed in Australia, there is English authority supporting the proposition that developing a property for the purpose of rental is not an adventure in the nature of trade.¹²³

However, a taxpayer's activities that involve building properties for rental could, in some circumstances, be regarded as a business and, consequently, be regarded as an enterprise for GST purposes.¹²⁴ If this is the case, then the final act of selling these properties could be considered part of this enterprise. As discussed earlier in this paper, some isolated land developments undertaken by small-scale developers to sell the developed land could also constitute the carrying on of a business, even where the land was not purchased with the intention to sell. This depends, however, on a number of factors including the size and extensiveness of development. It therefore follows that in some situations developments that are undertaken with the intention to rent out the properties upon completion could also constitute a business. Whether such a taxpayer would be considered as carrying on a business depends on the extent to which they fulfil the indicia of a business mentioned earlier in this article. Alternatively, it is possible, though unlikely, that the act of renting out properties, regardless of the preceding development, is of itself regarded as a business. Where the rental activities are a business, and so an enterprise for GST purposes, there is a strong argument that the final act of selling the properties would be included as part of that enterprise. Though a normal small-scale landlord who purchased and rented out a pre-existing investment property

¹²¹ Australian Taxation Office, *Goods and Services Tax: New Residential Premises and Adjustments for Changes in Extent of Creditable Purpose*, GSTR 2009/4, 24 June 2009, [41]–[43] ('GSTR 2009/4') considers operations that develop properties for rental, and indicates that such properties are capital and that they are 'investment assets'.

¹²² The alternate view is that although developing a property for rental would be an activity that lacks some of the badges of trade, it could still be an adventure in the nature of trade because the word 'trade' is broadly defined as including the provision of goods or services: *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134, 139.

¹²³ In *Simmons (Liquidator of Lionel Simmons Properties) v Inland Revenue Commissioners* [1980] 2 All ER 798 the House of Lords found that a company that had purchased and developed properties for the purpose of rental, but had been forced to liquidate them, was not undertaking an adventure in the nature of trade regarding those properties.

¹²⁴ In *Lilydale Pastoral Co Pty Ltd v Federal Commissioner of Taxation* (1987) 15 FCR 19, 26, Pincus J stated that purchasing property to rent out fulfilled the relevant definition of 'enterprise' because it was an 'undertaking of a business or commercial kind.' However, the relevant definition of 'enterprise' in that case was 'a business or other industrial or commercial undertaking' (*Income Tax Assessment Act 1936* (Cth) s 128A(1)) and so differed from the definition of 'enterprise' that is in the GST legislation. It cannot be said with certainty that Pincus J regarded the taxpayer as carrying on a business given that he regarded the activities as a 'business or commercial kind'.

would be unlikely to be carrying on a business,¹²⁵ there is English authority that states that if the taxpayer is in a corporate form, then renting out properties is much more likely to constitute a business than would otherwise be the case.¹²⁶

Consequently, it would appear that a taxpayer who has developed properties with the purpose of renting those properties, but subsequently changes their mind, could be carrying on an enterprise because they are carrying on a business. The result is that the sale of the properties could be regarded as occurring in the course of that enterprise. In this scenario, the next issue to consider is whether such properties would be considered capital, meaning that the taxpayer need not register for GST, having not reached the registration threshold.

Although the word ‘capital’ has been considered at length in the context of the income tax legislation, there is no judicial authority as to its meaning within the GST legislation. Consequently, use could reasonably be made of the income tax interpretation of its meaning.¹²⁷ Although a thorough examination of the definition of the term ‘capital’ is beyond the scope of this article,¹²⁸ in the modern income taxation law context, capital expenditures are those that are related to the business structure, whereas revenue (non-capital) expenditures are regarded as relating to the process of earning income.¹²⁹ Although this judicial test is far from decisive, an expense is more likely to be capital if the expenditure is not recurring, results in the creation of long-lasting assets and is a one-off payment.¹³⁰

Despite the fact that Australian courts have not directly addressed the issue of whether rental properties are capital, it is implicit in some tax decisions that they are.¹³¹

¹²⁵ *Federal Commissioner of Taxation v McDonald* (1987) 15 FCR 172.

¹²⁶ *American Leaf Blending Co Sdn Bhd v Director General of Inland Revenue* [1979] AC 676, 684, though Diplock J did state that ‘[i]n the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business.’

¹²⁷ See, eg, *Ramaciotti v Federal Commissioner of Taxation* (1920) 29 CLR 49, 53 (Knox CJ).

¹²⁸ The history and background of Australian tests for ascertaining if an expense is capital can be found in Burgess et al, above n 90, 487–91 [9.20]–[9.40].

¹²⁹ *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337, 359 (‘*Sun Newspapers*’).

¹³⁰ *Ibid* 362.

¹³¹ See *Federal Commissioner of Taxation v Hyteco Hiring Pty Ltd* (1992) 39 FCR 502 (‘*Hyteco*’); *Federal Commissioner of Taxation v Cyclone Scaffolding Pty Ltd* (1987) 18 FCR 183 where it was held that proceeds of sale of rental goods were capital. Although the Courts did not explicitly state that the goods were capital, it follows that the findings that the sale proceeds were capital for income tax purposes were at least partially based on the leased goods being capital. For instance, in *Hyteco* (1992) 39 FCR 502, 511 the Court implied that the leased goods were capital by stating ‘[w]hat the present case is concerned with is a profit arising on a sale to third parties of the very apparatus with which the taxpayer conducted its business, not a profit

GSTR 2009/4 also suggests that such properties would be regarded as capital.¹³² Consequently, a taxpayer need not register for GST if they develop properties with the intention of renting them out, and without an intention to sell them, but then subsequently sell them due to changing their mind. This will be the case even if the sale is regarded as being in the course of an enterprise, because the sale will be capital in nature and capital items are not included in the calculation of the registration threshold. Furthermore, a taxpayer who builds properties with the intention of renting those properties but has the long-term intention to sell them at an indefinite point in time, but then changes their mind and sells them in a more immediate time horizon, might also be regarded as being in the same position.¹³³ A taxpayer wishing to argue that their properties were capital to avoid GST registration would need to show evidence supporting the claim that their genuine intention when developing the properties was not to sell them.¹³⁴

An unresolved issue concerns whether taxpayers who have mixed intentions when purchasing and developing properties are able to avoid GST registration by claiming

from the process by which the taxpayer operated to obtain regular returns by means of regular outlays', followed by a reference to *Sun Newspapers* on deciding if an expenditure is capital: at 511 [36]. Although the cases of *Memorex Pty Ltd v Federal Commissioner of Taxation* (1987) 77 ALR 299 and *Federal Commissioner of Taxation v GKN Kwikform Services Pty Ltd* (1991) 91 ATC 4336 involved businesses whose disposal of rental goods were found to be income rather than capital, their judgments were based on the facts of those cases, in that the sales of goods were sufficiently regular and expected (traits of gains that have an income character for tax purposes) rather than based on a denial that the goods were capital. Furthermore, inherent in McKerracher J's reasoning in *Swansea* (2009) 72 ATR 120, 141, in accepting that a taxpayer that held assets as long-term investments was carrying on an enterprise, was that those long-term assets were regarded as capital. See also *GSTR 2009/4* [41]–[43], which discusses an operation that develops properties for rental, and says that such properties are capital, and that they are 'investment assets'.

¹³² *GSTR 2009/4* [42]–[43].

¹³³ See *GXCX v Federal Commissioner of Taxation* (2009) 73 ATR 380 in which the Administrative Appeals Tribunal ('AAT') held that for the purposes of the relevant GST provisions, an intention to rent accompanied with an intention to sell in the long-term at an indefinite point in time was regarded as equivalent to a sole intention to rent. The relevant GST provisions were those that allowed the taxpayer to claim the GST component for costs used to develop properties built for sale, but not for costs used to develop properties for rent. It can be arguably extrapolated that the same logic applies in determining whether properties are capital, in that properties built for rent with a long-term view of selling them at an indefinite point are treated the same as properties solely built for rent and so are regarded as capital.

¹³⁴ See *Abeles v Federal Commissioner of Taxation* (1991) 22 ATR 504; *Crow* (1988) 19 ATR 1565; *McCurry* (1998) 39 ATR 121 for cases where the taxpayers' claimed intention upon purchasing their land was met with scepticism by the Court. In *McCurry*, Davies J said that '[i]n a case such as this, where the Court must examine the purpose of a transaction, the court is entitled to have regard not only to the evidence which the taxpayers give of what they had in mind but also to the surrounding facts and to the events which actually occurred': at 127.

that the properties are capital. It appears that a developer who originally intends only to rent the properties, or intends to rent them out and sell them at an indefinite time many years later, can claim that they are capital. The position is less certain, however, in circumstances where a taxpayer purchases and develops properties with an intention to both rent them and subsequently sell them at a definitive point in the short or medium term. When, if ever, would such a taxpayer with mixed purposes be able to claim that their properties are capital? While the income tax legislation, in denying a deduction for capital expenditures, allows a partial denial for expenditures that are partially capital,¹³⁵ the *GSTA* does not allow partially capital goods to be partially counted or not counted in determining the GST registration threshold.¹³⁶

III CONSEQUENCES OF REGISTRATION

If it is ascertained that GST registration is required, the next step is to gain an appreciation of how to calculate the amount of GST payable.

A GST Liability

In general, GST will be payable on the selling price of the real estate (calculated as 1/11 of the selling price) for taxpayers who are registered or are required to register for GST.¹³⁷ While most sales of residential property do not attract a GST liability (even for GST registered taxpayers)¹³⁸ this exclusion does not apply to sales of new residential premises.¹³⁹ Residential premises that are sold for the first time, as well as premises that have been built to replace demolished premises, are both regarded as new residential premises.¹⁴⁰ Consequently, small-scale developers required to register for GST will incur a GST liability upon selling their property. While it is true that substantially renovating a building can also change its legal status to a new residential premises,¹⁴¹ the nature and extent to which one can renovate an existing building and not be caught under such an exclusion is outside the scope of this article.

¹³⁵ In *ITAA97* s 8-1(2) the effect of the words ‘to the extent that’ is that a taxpayer is partially denied a deduction for expenditures that are partially capital in nature.

¹³⁶ *GSTA* s 188-25 refers to disregarding the counting of ‘transfer of ownership of a capital asset of yours’.

¹³⁷ *Ibid* ss 9-70, 9-75.

¹³⁸ *Ibid* s 40-65(1).

¹³⁹ *Ibid* s 40-65(2)(b).

¹⁴⁰ *Ibid* s 40-75. For a discussion regarding the current case law as it applies to this exemption, see John Tretola, Sylvia Villios and Pasqualina Callea, ‘GST and Residential Premises —Which Intention is Relevant?’ (2011) 21 *Revenue Law Journal* 69; Robin Woellner, ‘Wherever You Hang Your Hat May be Home, but is it “Residential Premises” for GST Purposes?’ (2010) 3 *Journal of the Australasian Law Teachers Association* 139; Sylvia Villios, ‘Australian GST and Residential Property —Uncertainty Abounds’ (2010) 6 *International VAT Monitor* 423.

¹⁴¹ *GSTA* s 40-75(1)(b).

However, if a new residence has been used as a rental property for at least five years, its subsequent sale will not be subject to GST.¹⁴² In practice, this rule would appear, to some extent, to be redundant. This is because, as discussed earlier in this paper, properties that are built for the purpose of earning rental income are typically not counted in determining the GST threshold when subsequently sold. This is the case even if the sales are regarded as being in the course of an enterprise, as the properties are capital and so the registration threshold will not have been reached. However, a taxpayer who is able to use this five-year statutory rule has the advantage that they need not face any of the evidentiary issues that might concern a taxpayer claiming that the properties are capital.¹⁴³

B Entitlement to Input Credits

1 Introduction to Input Credits

A developer will typically not be entitled to an input credit for the cost of the residential property that was subsequently developed.¹⁴⁴ However, a taxpayer liable to pay GST for the sale of their developed properties is also entitled to claim input credits; GST input credits, by their nature, lower GST liability.¹⁴⁵ Taxpayers will generally be entitled to claim as input credits the GST portion of costs incurred to develop the properties,¹⁴⁶ which will be equal to 1/11 of the amount they paid for such costs.¹⁴⁷ Examples of costs that would typically have GST in the price would be the price of contract labour and materials. If those costs are incurred in the same tax period as the sale of the properties, the input credits can be used to reduce the GST liability from the sale of the properties.¹⁴⁸ If they are incurred in an earlier tax period, then they will lead to an entitlement to get a refund from the Australian Taxation Office.¹⁴⁹ The tax period for small-scale developers will typically consist of four quarters of three months each.¹⁵⁰ However, for the taxpayer to be entitled to an input credit for such costs they must be registered for GST at the time those costs arose.¹⁵¹

¹⁴² Ibid s 40-75(2).

¹⁴³ As discussed earlier in this paper, a taxpayer claiming that their properties are capital will need evidence that they were originally built with the intention of renting.

¹⁴⁴ *GSTA* ss 11-5, 9-5, 40-65. However, if the property used for development was a new residential property, or vacant land, and the seller was registered for GST, and GST was included in the price, then an input credit would be available for the GST registered developer.

¹⁴⁵ Ibid ss 7-5, 7-15, 17-5.

¹⁴⁶ Ibid s 11-20.

¹⁴⁷ Ibid ss 11-25, 9-70, 9-75.

¹⁴⁸ Ibid ss 7-5, 7-15, 17-5.

¹⁴⁹ Ibid s 7-15.

¹⁵⁰ Ibid s 27-5.

¹⁵¹ Ibid s 23-10.

2 *When Should the Taxpayer Register?*

Developers carrying on an enterprise will usually be required to register for GST just after the sales contract for the developed property has been entered into. Such a taxpayer may choose to register earlier,¹⁵² but whether they should do so depends on the facts. For instance, if a taxpayer in this situation acquires property on or after 1 July 2000, they ideally should register for GST prior to incurring costs of developing their property.¹⁵³ Where the development involves the purchase of vacant land on or after 1 July 2000, then if the vacant land's sale subjects the seller to a GST liability, the purchaser's registration should occur before purchasing the land.¹⁵⁴ Registering for GST at this earlier stage will allow the purchaser to claim input credits on their costs. If the purchaser does not register for GST prior to incurring costs there is scope for them to request retrospective GST registration.¹⁵⁵

Where retrospective GST registration is requested, the Commissioner of Taxation is able to agree to such a request for those carrying on an enterprise.¹⁵⁶ However, the Commission of Taxation is only able to backdate the registration for a maximum of four years.¹⁵⁷ Consequently, unregistered developers who will have to register for their sale but who have not been able to claim input tax credits on costs that have GST included, have a four-year window to backdate registration to enable them to claim the input tax credits. On the other hand, due to the operation of the margin scheme (discussed in Part III(C)), a taxpayer who acquired their property prior to 1 July 2000 should ideally register for GST only at the time when they have to, which is right after the sales contract of their developed properties has been entered into. If they have several properties to sell they should register after entering into the first sales contract. Although such a taxpayer will not be able to claim input credits for the costs of construction, the operation of the margin scheme will ensure no GST liability arises from the sales.¹⁵⁸

3 *Entitlement to Input Credits Where Property is Acquired for Mixed Purposes*

An issue may arise as to the extent to which input credits can be claimed for a GST registered developer who exhibits more than one purpose. This will be the case where the development was undertaken for both the purposes of sale and

¹⁵² Ibid s 23-10.

¹⁵³ Ibid s 29-10. The precise point at which a relevant cost could potentially lead to an input credit if the taxpayer is registered will depend on whether they account on a cash basis or not.

¹⁵⁴ As mentioned in this case, an input credit could normally be claimed on the land.

¹⁵⁵ *GSTA* s 25-10(1)(b)(i).

¹⁵⁶ Ibid.

¹⁵⁷ Ibid s 25-10(1A).

¹⁵⁸ This principle is explained in more detail in the next part of this paper.

rental.¹⁵⁹ In this case, the extent to which a registered developer would be able to claim the input credits will depend on the circumstances. For example, a taxpayer who initially entered into the development with the sole intention of sale would be able to claim full input credits for their relevant costs,¹⁶⁰ whereas a taxpayer who entered into a development with the mixed purposes of first renting out the developed properties and then selling them would only be allowed to claim a fair and reasonable pro-rata portion of the input credit.¹⁶¹ The matter becomes even more complex if the registered developer originally had one intention upon development, but then subsequently changed their mind. In this situation, the developer would be required to make a subsequent GST adjustment to reflect the change of circumstances.¹⁶² For instance, a taxpayer that originally intended to sell the properties upon development, but then changed their mind and first rents out the developed properties prior to sale, will have to pay back a proportion of their input credits by way of adjustment.¹⁶³ Conversely, a taxpayer who started developing properties with the intention of renting them out and then selling the developed properties, but then ends up only selling the properties can, by way of adjustment, claim further input credits.¹⁶⁴

A taxpayer who develops properties with the genuine intention of renting the properties and without the requisite intention to sell, but then ends up selling them, will, as discussed in this paper, generally not be required to register for GST because the GST registration threshold will not have been reached. However, if for some reason this developer chooses to register for GST they would not be allowed to claim input credits during the development stage,¹⁶⁵ even though the sale would be subject to GST.¹⁶⁶ Due to their change of purpose, they could, however, make subsequent

¹⁵⁹ In *Commissioner of Inland Revenue v Morris* (1997) 18 NZTC 13 385, 13 393 Giles J (referring to s 21(1) of the *Goods and Services Tax Act 1985* (NZ)) said that ‘there is nothing inconsistent or illogical about two different but contemporaneous purposes.’

¹⁶⁰ *GSTA* ss 11-5, 11-15. This is assuming that the taxpayer did not change their mind once the property had been developed.

¹⁶¹ *Ibid* s 11-30; *GSTR 2009/4* [25].

¹⁶² *GSTA* div 129; *GSTR 2009/4* [67]–[68]. A GST adjustment under div 129 changes the entitlement to an input credit for an acquisition.

¹⁶³ *GSTA* div 129; *GSTR 2009/4* [54]–[57]. An AAT decision has found that if a taxpayer intends to sell their properties, ends up renting them, but continues to have a long-term, indefinite plan to sell them if possible, they will have to make the same adjustment as if they had no long-term indefinite plan to sell the properties: *GXCX v Federal Commissioner of Taxation* (2009) 73 ATR 380. Logically, this means that a taxpayer who purchases and develops a property with the intention to rent, but has a long-term plan to sell the properties at an indefinite time, will be in the same position as a taxpayer who builds and develops a property with an intention to rent but has no such intention to sell.

¹⁶⁴ *GSTA* div 129.

¹⁶⁵ *Ibid* ss 11-15, 40-65.

¹⁶⁶ *Ibid* s 9-5 as it would then fulfill all the requirements of a ‘taxable supply’.

adjustments to claim some input credits,¹⁶⁷ but as the sale would be subject to GST, they would have an overall GST liability.

C Margin Schemes

A taxpayer incurring a GST liability upon sale can normally claim input credits on most of their building costs (as long as they are registered at that time), but in most cases they will not be able to claim an input credit for the original property acquisition costs. This is because one of the requirements of entitlement to an input credit is that the acquisition has GST included in the price.¹⁶⁸ As discussed, the sale of residential real estate will not (except if considered new) trigger a GST liability, meaning that the purchaser will not be entitled to an input credit even if they are registered for GST. There are some exceptions, however, such as when the small-scale developer purchases vacant land (which, by its nature, is not considered a residential premises) from a party that is registered for GST.

However, *GSTA* div 75 does, in essence, offer a notional input credit to taxpayers not entitled to an input credit on their property purchase. The way it does this is by what this division refers to as the ‘margin scheme’.

1 Operation of the Scheme

Specifically, the legislation states that where the margin scheme applies, the GST liability will not be based on 1/11 of the sales price, but rather on 1/11 of the margin between the sales price and the following:¹⁶⁹

- i) If the property was acquired on or after 1 July 2000, then the acquisition cost of the property.¹⁷⁰ This does not include costs such as stamp duty and legal fees.¹⁷¹
- ii) If, however, the taxpayer acquired the property prior to 1 July 2000 and was registered for GST as at 1 July 2000, the relevant value is the value of the property as at 1 July 2000. This will include the value of any improvements made to the land which are present as at 1 July 2000.¹⁷²
- iii) If the taxpayer acquired the property prior to 1 July 2000, but only became registered or required to be registered for GST after 1 July 2000, the relevant value is when GST registration was made.¹⁷³

¹⁶⁷ Ibid div 129.

¹⁶⁸ Ibid s 11-5.

¹⁶⁹ Ibid s 75-5.

¹⁷⁰ Ibid s 75-10(2).

¹⁷¹ Australian Taxation Office, *Goods and Services Tax: The Margin Scheme for Supplies of Real Property Acquired on or After 1 July 2000*, GSTR 2006/8, 26 April 2006, [49].

¹⁷² *GSTA* s 75-10(3) items 1, 3.

¹⁷³ Ibid s 75-10(3) item 2.

In the latter two of these three cases, a valuation will have to be made of the property but this valuation can be made after the relevant date.¹⁷⁴ For instance, if the relevant value of the property is at 1 July 2000, the valuation can still be made at a later date as long as the valuation pertains to the relevant date. Furthermore, the taxpayer will have a choice as to how to make the valuation based on the following three methods:¹⁷⁵

- i) A valuation by an approved valuer.
- ii) The consideration received by the supplier under the contract of sale. However, this second valuation method, as explained below, can only be used in specific circumstances.
- iii) As determined before the valuation date by relevant State or Territory Government for rating or land tax purposes.

The operation of the margin scheme will mean that the taxpayer will, in substance, at the time of sale, receive an input credit of 1/11 of the relevant cost or value of the land. Furthermore, the relevant cost or value of the land will not include any costs that the taxpayer has claimed input credits on.¹⁷⁶ This is because if the property was acquired on or after 1 July 2000, then for the margin scheme, the cost of the property at acquisition is relevant so it could not include any costs on which input credits have been claimed. If the property was acquired before 1 July 2000, then for the margin scheme, the relevant value will be the value of the land at the later of when GST registration was made or 1 July 2000, which means that no input credits could have been claimed for the relevant valuation time.¹⁷⁷

2 Further Details on the Second Valuation Method

The second valuation method — the consideration received under the sales contract — can only be used when the sales contract has been entered into prior to the relevant valuation date (the date at which the property's value is relevant for the

¹⁷⁴ Australian Taxation Office, *Goods and Services Tax: How the Margin Scheme Applies to a Supply of Real Property Made on or After 1 December 2005 that was Acquired or Held Before 1 July 2000*, GSTR 2006/7, 26 April 2006, [61].

¹⁷⁵ Australian Taxation Office, *A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination*, MSV 2009/1, 14 October 2009.

¹⁷⁶ In *Sterling Guardian Pty Ltd v Federal Commissioner of Taxation* (2006) 149 FCR 255, the Full Federal Court held that where the relevant value was the consideration paid by the purchaser, the consideration did not include any costs of improvement made after the land was acquired. The legislature has reinforced this finding in *GSTA* s 75-14.

¹⁷⁷ If the relevant valuation time was 1 July 2000, then no input credits could have been claimed before this date as this is the date on which the GST came into effect. If the relevant valuation time is when the taxpayer registered for GST, then no input credits could have been claimed before then as registration is required.

margin scheme).¹⁷⁸ The valuation date, as discussed, is only an issue for property purchased before 1 July 2000, and will generally be the later of 1 July 2000 or when the taxpayer is registered for GST. Thus, in practical terms, this method will generally only be an option if the property was purchased prior to 1 July 2000 and GST registration was made after the contract for sale was entered into.

Utilising this valuation method is highly advantageous to the taxpayer as it will result in no GST liability for the sale in question.¹⁷⁹ This is because this method values the property at the sales price, meaning that the taxable margin, being the difference between the sales price and relevant property value (valued at sales price), is nil. Consequently, a small-scale developer who acquired the property prior to 1 July 2000 and has to register should hold off registering until just after the sales contract has been entered into.

Example

Simone purchases an established house and land during July 1998 for \$150 000. Upon purchase she intended to rent the house out for a few years, demolish it, build three townhouses and sell them. On 1 July 2000 the property is valued at \$250 000. During July 2011 Simone starts developing the property. She has it valued at \$650 000 at that time just before the development commenced. She registers for GST at that time because she knows that when she sells the townhouses she will be required to pay GST and so wishes to claim input credits on the relevant expenses. She then spends \$33 000 on demolishing the house and \$660 000 building three townhouses. She could claim an input credit for 1/11 of these costs, which would mean that these credits are worth \$63 000 in total. She subsequently sells the townhouses for \$750 000 each. Due to the margin scheme, her GST liability will be reduced by the relevant value of the property. This means that upon sale, her GST liability would be $[(750\,000 \times 3) - 650\,000] \times 1/11 = \$145\,456$, and when the input credits of \$63 000 are taken into account, the amount of GST payable in net terms on the development would be \$82 456.

A better strategy in this case would have been for Simone not to register for GST until the time the townhouses were to be sold. Although this would preclude her from claiming input credits for the development costs, it would also mean that the value for the margin scheme would be the sales price of \$750 000. As a result, the GST liability would be based on 1/11 of the difference between the sales price and relevant value, which would be $[(750\,000 \times 3) - (750\,000 \times 3)] \times 1/11 = 0$.

¹⁷⁸ Australian Taxation Office, *Goods and Services Tax: How the Margin Scheme Applies to a Supply of Real Property Made on or After 1 December 2005 That was Acquired or Held Before 1 July 2000*, GSTR 2006/7, 26 April 2006, [80B].

¹⁷⁹ *GSTA* ss 75-5, 75-10.

3 *Apportionment*

A development that includes subdividing a property or developing it into stratum units will typically result in several different sales. If the sales are made in different tax periods, and the relevant value for the margin scheme is the consideration of the property paid by the taxpayer, the consideration needs to be apportioned against the portions of the divided property in a fair and reasonable manner.¹⁸⁰ For instance, property purchased in 2008 for \$1 million and subsequently subdivided and developed by building two townhouses that are of equal size and value would result in each of the sales being offset with \$500 000 of the property's purchase price.

4 *Buyer's Consent*

One condition of the margin scheme is that both the seller and purchaser must consent in writing to its application.¹⁸¹ That is, a small-scale developer wishing to utilise the margin scheme must get the purchaser's consent to use the scheme. The reason why the purchaser's consent is required is because the legislation disallows the purchaser from claiming an input credit, even if registered. However, in practice, a private person purchasing from a small-scale developer would be indifferent to being barred from claiming input credits on their property purchase because they are not likely to be registered for GST. Even if the purchaser is registered, living in the property, renting it out¹⁸² or selling it,¹⁸³ these are typically not activities for which one can claim an input credit, even without it being specifically prohibited by the laws relating to the margin scheme.

IV CONCLUSION

Whether a small-scale developer's sales are subject to GST can have a substantial impact on the profitability of their development. However, for many such developers determining whether there will be such a liability will not be easy, given the considerable uncertainty in some aspects of the law.

Central to this uncertainty is the definition of enterprise in s 9-20(1) of the *GSTA* and its critical elements of

an activity, or series of activities, done:

- (a) in the form of a *business; or
- (b) in the form of an adventure or concern in the nature of trade ...¹⁸⁴

¹⁸⁰ Ibid s 75-15; Australian Taxation Office, *Goods and Services Tax: The Margin Scheme for Supplies of Real Property Acquired on or After 1 July 2000*, GSTR 2006/8, 26 April 2006, [58]–[68] suggests some fair and reasonable apportionment methods.

¹⁸¹ *GSTA* s 75-5(1)(c).

¹⁸² Ibid ss 11-15, 40-35.

¹⁸³ Ibid ss 11-15, 40-65.

¹⁸⁴ Ibid s 9-20(1)(a)–(b).

Consideration of these elements is critical in determining whether a small-scale development project could be subject to GST.

In relation to the definition of business the authors suggest that where the activities are on a small scale and are infrequent, then the extent of the development and whether the taxpayer is directly involved in the project will be important in determining whether there is an enterprise for GST purposes. The taxpayer's GST liability therefore ultimately depends on the individual facts. The post-*Whitfords Beach* cases indicate that there would be many instances where there is a marked degree of doubt about whether or not a small-scale developer is carrying on a business.

Where the activity is held not to be a business it may still be an enterprise where it is in the form of an adventure or concern in the nature of trade, but in Australia this aspect of the definition has only received limited judicial guidance. The authors, however, believe that it is reasonable to conclude that if a small-scale developer can be shown to acquire the property with an intention to develop and sell at a profit, and acts out this intention, then the activity is likely to be an adventure or concern in the nature of trade even if it is not a business. Conversely, if there is no such initial intention then the matter is likely to be resolved by whether or not the extent of the subsequent work carried out in the development constitutes a business in itself.

Importantly, small-scale developers whose sales are potentially subject to GST need to have a good knowledge of the operation of the GST provisions regarding input credits and the margin scheme, or in the alternative utilise an adviser that has such expertise. Such expertise is critical for minimising GST liability which can potentially diminish a material portion of their profit. Specifically, the timing of GST registration can have an impact on the developer's tax burden.

Despite these uncertainties, taxpayers and professionals with a sound understanding of the relevant law discussed in this article will be much better placed to determine whether any given small-scale development's sale will result in a GST liability.

MILITANT DEMOCRACY: AN ALIEN CONCEPT FOR AUSTRALIAN CONSTITUTIONAL LAW?

ABSTRACT

This article presents an overview of the development and growth of the concept of militant democracy in contemporary constitutional theory and practice, and its relevance to Australia. Militant democracy refers to a form of constitutional democracy authorised to protect its continued existence as democracy by pre-emptively restricting the exercise of civil and political freedoms. Initially, militant democracy focused on electoral integrity, adopting measures such as the prohibition of allegedly undemocratic political parties. However, in recent years militant democracy has expanded to include policies aimed at addressing threats such as religious fundamentalism and global terrorism. This article examines the extent to which Australia can be said to be a militant democracy. It investigates how militant democracy is manifesting itself in contemporary Australian democracy by analysing provisions of the *Australian Constitution*, relevant legislation and jurisprudence of the High Court of Australia. The article attempts to reconceptualise certain features of the Australian constitutional system through the lens of the militant democracy concept.

I INTRODUCTION

This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed — Paul Joseph Goebbels¹

Over the past few decades militant democracy has emerged as an important way of understanding constitutional systems around the world. Generally speaking, militant democracy is a form of constitutional democracy authorised to protect its continued existence as a democracy by pre-emptively restricting the exercise of civil and political freedoms. Initially militant democracy focused on

* Post-Doctoral Research Fellow, ARC Laureate Fellowship: Anti-Terror Laws and the Democratic Challenge, Faculty of Law, University of New South Wales.

¹ Joseph Goebbels, quoted in Karl D Bracher, Manfred Funke and Hans-Adolf Jacobsen (eds), *Nationalsozialistische Diktatur, 1933-1945: Eine Bilanz* (Bonn, Bundeszentrale für Politische Bildung, 1983) 16: 'Das wird immer einer der besten Witze der Demokratie bleiben, dass sie ihren Todfeinden die Mittel selber stellte, durch die sie vernichtet wurde', quoted in András Sajó, 'From Militant Democracy to the Preventive State?' (2006) 27 *Cardozo Law Review* 2255, 2262.

electoral integrity, adopting measures such as the prohibition of allegedly undemocratic political parties. However, in recent years militant democracy has expanded to include policies aimed at addressing, for example, the threats of religious fundamentalism and global terrorism.

The concept of militant democracy provides a different perspective to the liberal view of the state. Under the latter view, democracy is understood as an accommodating political system premised on there being a plurality of ideas and opinions. However, liberalism presents a serious dilemma for democracy: how should it defend itself against non-democratic political collective or individual actors? The concept of militant democracy was introduced to legal scholarship and constitutional practice as an attempt to address this challenge.

Militant democracy is widely used to better understand constitutional systems and evaluate and explore their practical operation, particularly in relation to the actions of the state directed at self-defence from internal threats. It is especially useful where it provides a rationale for constitutional concepts and approaches that might otherwise be considered outside the liberal conception of democracy. An example of this is the most obvious dilemma of any democracy — how to protect democracy from its potential ‘enemies’ and remain true to itself. Despite the importance of the idea of militant democracy and its wide use in constitutional scholarship,² the concept’s application has not been investigated in respect of the *Australian Constitution*. This article fills this gap by explaining and developing the concept, and by determining whether and to what extent it applies to Australian constitutional law.

This article first focuses in Part II on the concept of militant democracy and its growth in contemporary constitutional theory and practice. It argues that all democracies are militant to some extent, but warns that the concept should not be idealised, as its practical application can be problematic. Part III then examines the modern interpretation and application of this concept outside Australia. It will also discuss how the concept of militant democracy is being applied to address the ‘new’ types of threats faced by democracies. This discussion lays the background for Part IV, where the relevance and potential application of militant democracy in the Australian context is explored. This analysis draws upon the text of the *Australian Constitution*, legislation for the proscription of unlawful associations and examples from the constitutional jurisprudence of the High Court of Australia. Part V then concludes that despite the common perception of the *Australian Constitution* as a liberal document, militant democracy does have an important role to play in understanding the *Constitution* and explaining the way it operates.

² See, eg, András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004); Gregory H Fox and Georg Nolte, ‘Intolerant Democracies’ (1995) 36 *Harvard International Law Journal* 1; Patrick Macklem, ‘Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe’ (2012) 19 *Constellations* 575; Samuel Issacharoff, ‘Fragile Democracies’ (2007) 120 *Harvard Law Review* 1405; Paul Harvey, ‘Militant Democracy and the European Convention on Human Rights’ (2004) 29 *European Law Review* 407.

II MILITANT DEMOCRACY: FOUNDATIONS

A Origin and Growth of the Concept

Karl Loewenstein first introduced the term ‘militant democracy’ in the 1930s;³ however, similar ideas were evident in the works of other scholars before and during the same period. For example, Karl Popper in *The Open Society and Its Enemies*⁴ refers to the ‘paradox of tolerance’ and warns that ‘unlimited tolerance must lead to the disappearance of tolerance’.⁵ He argues that tolerance should not be granted ‘to those who are intolerant’⁶ for ‘the right not to tolerate the intolerant’.⁷ In addition he calls for ‘any movement preaching intolerance’ to be placed outside the law.⁸ In other words, democracy can be more aggressive towards those who do not believe in it and its values.⁹ Further, Popper refers to Plato’s criticism of democracy and agrees that democracy should not be only about procedure, but also about substance, meaning there should be fundamental principles and rules which cannot be recalled even by the majority’s decisions. The idea of constitutions containing an unalterable core later became an element of the concept of militant democracy.¹⁰ This idea, however, had been known to constitutional practice since 1884, when the French Constitution established the unalterable character of the provision on the republican form of government. Current constitutions of many countries make explicit reference to the idea of the unalterable character of fundamental provisions.¹¹

The archetypal example of how purely procedural democracy and tolerance towards intolerant political actors can become dangerous is the electoral success of the Nazi Party. Events in the 1930s made many people realise that democracy cannot survive without institutionalised means to protect itself against attacks from its internal enemies. Democracy cannot remain passive and silent about attempts to damage it

³ Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’ (1937) 31 *The American Political Science Review* 417; Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, II’ (1937) 31 *The American Political Science Review* 638.

⁴ Karl Popper, *The Open Society and its Enemies* (Princeton University Press, 1950).

⁵ Ibid 546.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Kent Roach, *9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 56.

¹⁰ For more recent debate on substantive and procedural democracies, see Fox and Nolte, above n 2, 14. Arguments in support of a substantive view of democracy as opposed to the purely procedural view can also be found in early works of Carl Schmitt (for details see Fox and Nolte, above n 2, 18–21).

¹¹ The most well-known example of this is the ‘eternity clause’ provision from the *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 79(3): ‘Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.’

from within by organisations and individuals abusing the privileges, rights and opportunities granted to them by the regime. In other words, liberal constitutions should not function as suicide pacts, and must be prepared to take self-defensive actions when needed.¹² These ideas and visions of democracy received wide support in the aftermath of the Second World War and the collapse of communism in Europe.¹³

There is no universal definition of militant democracy. It is defined by Otto Pfersmann as ‘a political and legal structure aimed at preserving democracy against those who want to overturn it from within or those who openly want to destroy it from outside by utilizing democratic institutions as well as support within the population’.¹⁴ Other authors refer to militant democracy as ‘a form of constitutional democracy authorized to protect civil and political freedoms by preemptively restricting their exercise’ in order to guard ‘the democratic character of a constitutional order’.¹⁵ Gregory H Fox and Georg Nolte narrow militant democracy to a set of measures to prevent the change of a state’s own democratic character by the election of anti-democratic parties.¹⁶ Samuel Issacharoff characterises militant democracy as the ‘mobilization of democratic institutions to resist capture by antidemocratic forces. The aim is to resist having the institutions of democracy harnessed to what may be termed “illiberal democracy.”’¹⁷ Paul Harvey refers to militant democracy as a system ‘capable of defending the constitution against anti-democratic actors who use the democratic process in order to subvert it.’¹⁸

As we can observe, while there are various definitions of militant democracy, authors mostly refer to the same qualities that the term ‘militant’ adds to democracy. First, militant democracy is about pre-emption, which means that states are not expected to wait until those who aim to destroy or overturn the system have real opportunity to do so; secondly, such pre-emptive measures are aimed against a specific ‘enemy’: individuals or groups of individuals aiming to harm the democratic structures of the state; thirdly, such ‘enemies’ aim to harm democratic structures by abusing rights and privileges afforded to them by democracy and an open society. These features are crucial to determine the militancy of a constitutional system. Generally speaking, militant democracy can be defined as the capacity of liberal democracies to defend themselves against challenges to their continued existence as democracies by taking

¹² See, eg, Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

¹³ Many post-communist countries have provisions on the dissolution of political parties. For details see, eg, Jiri Priban and Wojciech Sadurski, ‘The Role of Political Rights in the Democratization of Central and Eastern Europe’ in Wojciech Sadurski (ed), *Political Rights Under Stress in 21st Century Europe* (Oxford University Press, 2006) 196, 225–30.

¹⁴ Otto Pfersmann, ‘Shaping Militant Democracy: Legal Limits to Democratic Stability’, in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 47.

¹⁵ Macklem, above n 2, 1–2.

¹⁶ Fox and Nolte, above n 2, 6.

¹⁷ Issacharoff, above n 2, 1409.

¹⁸ Harvey, above n 2, 408.

preventive actions against those who want to overturn or destroy democracy by abusing democratic institutions and procedures.¹⁹ I will rely on this broad²⁰ definition of militant democracy in this article.

Militant democracies perform the task of protecting democracy against challenges to its continued existence by taking preventive actions against those who want to overturn or destroy democracy by abusing or misusing democratic institutions and procedures such as free elections, freedom of speech and association. Therefore, today ‘militant democracy is most commonly understood as the fight against radical movements, especially political parties, and their activities’.²¹ In that form, it is usually agreed that militant democracy was explicitly constitutionalized for the first time in 1949 in Germany.²² The Basic Law is often described as the ‘counter-constitution to the previous one upon which the Nazi regime had been based.’²³ The German political system was given a new form, which included the mechanism to protect founding principles against potential enemies of the state — militant democracy. Central to Germany’s militant democracy is the so-called ‘eternity clause’²⁴ that proclaims certain constitutional provisions are absolutely immune from being amended or abolished and describes the procedure to ban unconstitutional political parties:

Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.²⁵

¹⁹ Stephen Holmes, ‘András Sajó (ed), *Militant Democracy*’ (2006) 4 *International Journal of Constitutional Law* 586, 591.

²⁰ This definition is, however, not as broad as provided in some recent publications on the topic. For example, Walker interprets militant democracy as a state that has a right and a duty to take actions against significant forms of terrorism (like the Irish Republican Army or transnational groups epitomized by Al-Qaeda). In this sense Walker equates notions of ‘militant democracy’ and ‘militant state’. See Clive Walker, ‘Militant Speech About Terrorism in a Smart Militant Democracy’ (2011) 80 *Mississippi Law Journal* 1395, 1396.

²¹ Sajó, ‘From Militant Democracy to the Preventive State?’, above n 1, 2262.

²² For a summary of the German Basic Law provisions on militant democracy see, eg, Pfersmann, above n 14, 49.

²³ Elmar M Hucko, *The Democratic Tradition: Four German Constitutions* (St. Martin’s Press, 1989) 68.

²⁴ Article 79(3) of the Basic Law: ‘Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible’. The provisions mentioned in Article 79(3) refer to the: guarantee of human dignity; concept of democracy; federal state; separation of powers; rule of law; and social state.

²⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 21(2).

While the Basic Law does not ban a particular ideology from German politics and refers only to an abstract enemy, it was obviously adopted with particular groups in mind: the Nazis and Communists. In contrast, the drafters of the Constitution of the Italian Republic did not hesitate to name the enemy and chose to ensure that the previous rulers had no chance of returning to the political mainstream by explicitly prohibiting the reorganisation, in any form, of the dissolved Fascist party.²⁶

Later, the concept of militant democracy was used in democratic countries around the world to curb the activities of communist parties. For example, during the Cold War era the United States federal government launched an extensive campaign against the Communist Party USA. Part of this campaign was the enactment of new legislation which criminalised advocating the overthrow of government.²⁷ In 1950, Australia's federal Parliament enacted the *Communist Party Dissolution Act 1950* (Cth) to declare the party, and other associations likely to be under the influence of communists, illegal and made it an offence to be a member of a banned organisation.²⁸ And in 1956, the Federal Constitutional Court of Germany exercised its power under art 21 of the Basic Law and rendered the judgment which declared the Communist Party of Germany unconstitutional.²⁹

²⁶ *La Costituzione della Repubblica Italiana* [Constitution of the Italian Republic] adopted on 22 December 1947, came into force on 1 January 1948. Article XII of the Transitory and Final Provisions reads as follows:

It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party. Notwithstanding Article 48, the law has established, for not more than five years from the implementation of the Constitution, temporary limitations to the right to vote and eligibility for the leaders responsible for the Fascist regime.

²⁷ The *Alien Registration Act* 18 USC § 2385 (1940) known as the *Smith Act* provided in §§ 2–3 as follows:

Sec. 2.

(a) it shall be unlawful for any person —

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government;

...

Sec.3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of ... this title.

The Act is best known for its application against political figures as in the case of *Dennis v United States*, 341 US 494 (1951).

²⁸ *Communist Party Dissolution Act 1950* (Cth).

²⁹ Bundesverfassungsgericht [German Constitutional Court], *Communist Party Case* (1956), 5 BVerfGE 8. For details see Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd revised and expanded ed, 1997) 222.

It was expected that the fall of communism would decrease the use of militant democracy measures, given so many were introduced to guard against the 'threat' of communism.³⁰ However, due to local political and social situations, many of the young European democracies that emerged after the fall of communism included militant democracy provisions in their constitutions. It was hoped that this would help protect fragile democratic regimes from the possibility of being harmed by previous rulers.³¹ In general, these measures imposed restrictions on political parties in the form of a priori prohibition of parties' adherence to certain ideologies, or a requirement that party programs and activities be compatible with major democratic principles.³²

The most recent trend in the debate surrounding militant democracy emerged after the 11 September 2001 terrorist attacks. Many western democracies regarded themselves as the targets of an undeclared war by Islamic extremists on Western liberal democratic values.³³ The '9/11' attacks and the anti-terrorism policies and legislation that followed brought issues of militant democracy back to the forefront of constitutional and political discourse. Interest was also heightened by an increased awareness of the novel threats posed by religious fundamentalism. The possibility was raised that militant democracy could potentially be used in a much wider sense to protect democracy not only from undemocratic political parties but as well from newly emerging types of threats.

B Militant Democracy: Challenges and Concerns

There are many questions, concerns and challenges about the concept that remain unresolved, despite the substantial constitutional practice in support of it. It is important to be aware of these problems, as militant democracy has the potential to become dangerous, especially in unstable or transitional democratic regimes.

First, militant democracy is, in an important respect, self-contradictory, as it limits rights and liberties in order to secure and protect their existence.³⁴ This is why the idea has been vehemently criticised.³⁵ It is questionable whether democracy can behave in

³⁰ Shlomo Avineri, 'Introduction' in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 1, 2.

³¹ For a brief overview of militant democracy provisions in Central and Eastern Europe states see András Sajó, 'Militant Democracy and Transition towards Democracy' in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 209, 218–19 and Priban and Sadurski, above n 13.

³² A detailed account of limitations on speech and political parties from militant democracy perspectives can be found in Priban and Sadurski, above n 13, 196–238.

³³ Avineri, above n 30, 2.

³⁴ See, eg, Loewenstein, above n 3, 431; Pfersmann, above n 14, 52; Sajó, 'Militant Democracy and Transition towards Democracy', above n 31, 211; Fox and Nolte, above n 2, 6.

³⁵ Markus Thiel, 'Comparative Aspects' in Markus Thiel (ed), *The 'Militant Democracy' Principle in Modern Democracies* (Ashgate Publishing Company, 2009) 379, 417.

a militant way and remain true to itself.³⁶ This critique might be outweighed by the argument that democracy cannot afford to remain inactive when its basic structures are being attacked and its very existence is under threat. In other words, democracy is inherently self-contradictory if it allows this course of action by its enemies and continues to allow their enjoyment of all democratic privileges despite their abusive exercise of such privileges. This is why it is important that legal systems balance militant democracy measures by ensuring the strong protection of rights.

Secondly, in practice, militant democracy can be difficult to apply effectively, even where such measures seem to be justified. For example, there is a justified fear that political groups with aggressive tendencies will become even more violent and disobedient if their associational rights are suppressed. The experience of Germany, where repressive measures were widely used against the extreme right groups in the 1990s, demonstrates that such approach did not halt the rise of violence, but resulted in increased mobilisation of targeted groups and hardening an ideology.³⁷

Thirdly, it is hard to define the right moment to invoke the concept of militant democracy. It is often difficult to draw a clear line between acceptable critiques of a democratic regime and a direct or indirect attack on the foundations of that regime. That is, how can we define the point at which democracy is endangered, and, more importantly, who should make such a decision? The latter question is particularly challenging as militant democracy measures bear a risk of being misused for political purposes. That is why there is the strongly held opinion that the judiciary, at least in European jurisdictions, must carefully scrutinise the arguments of the government advanced in favour of such measures, and take into account local conditions and the degree of the threat. Judicial controls can play an important role in preventing the political misuse of militant democracy measures and preserving legal guarantees of fundamental rights where such rights may be curtailed for the sake of protecting democracy.

Some commentators argue it is quite unlikely that a political ideology such as communism or fascism will realistically have the opportunity to attack and destroy democracy.³⁸ Combined with the fact that the concept of militant democracy gives rise to some serious concerns outlined above, it can be argued that democratic

³⁶ This, for example, was a serious concern in the recent NDP party dissolution case. For details see Thilo Rensmann, 'Procedural Fairness in a Militant Democracy: the "Uprising of the Decent" Fails Before the Federal Constitutional Court' (2003) 4 *German Law Journal* 1117 < https://www.germanlawjournal.com/pdfs/Vol04No11/PDF_Vol_04_No_11_1117-1136_Public_Rensmann.pdf > (available online).

³⁷ See, eg, Michael Minkenberg, 'Repression and Reaction: Militant Democracy and the Radical Right in Germany and France' (2006) (40) *Patterns of Prejudice* 25, 43–4.

³⁸ Miguel Revenga Sanchez, 'The Move Towards (and the Struggle For) Militant Democracy in Spain' (Paper presented at the European Consortium on Political Research Conference, 18–21 September 2003) <<http://www.essex.ac.uk/ecpr/events/generalconference/marburg/papers/10/7/Sanchez.pdf>>.

states should no longer be encouraged to militarise their constitutional systems. Indeed, the idea that ‘democracy should refrain from providing legal regulations and measures of a “militant” provenance and (mainly or solely) rely on self-regulative powers of the electoral and political processes’³⁹ is plausible. However, this is not always realistic, especially in the case of young and transitional democracies.⁴⁰ In recent decades, democracy has been widely accepted as the preferred system of government; however, it is not yet completely secured from ideological and physical attacks from both internal and external enemies. Therefore, despite challenges and concerns liberal democracies may face when applying militant democracy measures, militant democracy may be employed to the extent ‘of excluding conceptually and institutionally the abuse of opportunities for restricting rights’.⁴¹

III MILITANT DEMOCRACY IN PRACTICE: POLITICAL PARTIES AND BEYOND

Militant democracy in its contemporary form was first constitutionally manifested in Germany in 1949, and included two central elements: the prohibition of unconstitutional political parties; and the unalterable character of some constitutional provisions. Further, democracies with national constitutions that do not contain explicit provisions on banning dangerous political parties are characterised as ‘passive’ or ‘tolerant’ (as opposed to ‘active’ and ‘intolerant’).⁴² Democracies with constitutions that are open to amendments and can be revised or even abolished by the majority rule, are described as ‘procedural’ (as opposed to ‘substantive’).⁴³ Since 1949, the ‘militancy’ of particular constitutional systems has been measured against these explicit parameters. However, this approach seems too narrow to accommodate the variety of ways constitutional democracies may adhere to the notion of militant democracy and it is important to look beyond these indicators to determine if a democracy is militant.

Generally speaking, the constitutional practices of democratic states reveal that constitutions of democratic nations around the world commonly contain provisions reflecting the concept of militant democracy. And even where there is no explicit reference to the militant character of a state, this may be implied from the text of its

³⁹ Thiel, above n 35, 417.

⁴⁰ For example, Peter Niesen argues that ‘Civic Society’ should be a new desirable paradigm for party ban. See Peter Niesen, ‘Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties’ (Pt 2) (2002) (3) *German Law Journal* <<http://www.germanlawjournal.com/article.php?id=169>> (available online). See also Günter Frankenberg, ‘The Learning Sovereign’ in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 113, 130–32; Thiel, above n 35, 417–21.

⁴¹ Sajó, ‘Militant Democracy and Transition towards Democracy’, above n 31, 211.

⁴² Fox and Nolte, above n 2, 22.

⁴³ *Ibid* 1.

constitutional norms and preambles.⁴⁴ As Otto Pfersmann claims, militant democracy is one of many features of democracy and ‘that democracies are always more or less militant’.⁴⁵ Sajó develops this argument further and contends that the state’s most natural characteristic is self-defence.⁴⁶ Hence, it is arguable that it is possible to find at least some signs of ‘militancy’ in the constitutional framework of nearly all democracies (including Australia) and that the ‘militancy’ of a particular constitutional system need not be determined by its constitution alone.

There are, however, instances where ordinary legislation has introduced militancy to the constitutional system of the state. For example, the Spanish Constitution of 1978⁴⁷ does not give state institutions explicit militant democracy powers; there are no provisions banning political parties and every constitutional provision is open, at least technically, to the procedure of amendment. However, it did not prevent the Law on Political Parties,⁴⁸ enacted in 2002, from introducing a procedure to outlaw political parties. It does not follow that militant democracy in Spain is not constitutionally authorised. Where laws represent a continuation of constitutional principles and are compatible with them (as was the case in Spain, where the Law on Political Parties only detailed further constitutional provision on the freedom of political parties) such legislative acts can be considered as a part of the constitutional system. Therefore, it is important to look within the constitutional system in order to see if it has features of a militant democracy state.

As discussed above, militant democracy is traditionally understood as a tool to fight abuses of the electoral process and to suppress the activities of political organisations, mainly political parties. But constitutional law is generally able to accommodate new realities of social and political life via constitutional amendments or judicial interpretation of constitutional provisions. Every generation has its own disease,⁴⁹ and, some time ago, the idea of unlimited democratic tolerance was abandoned in order to rid democratic ‘societies of unjust and oppressive forms of political rule’⁵⁰ such as fascist and communist parties. It seems only reasonable to equip modern democracies to do the same against its modern enemies. Loewenstein’s statement that ‘[f]ire is fought with fire’⁵¹ is still relevant and its interpretation should not be limited to only outlawing political parties or political parties with communist and fascist agendas.

⁴⁴ For example, art 89 of *La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] explicitly provides that the republican form of government shall not be subject to amendment.

⁴⁵ Pfersmann, above n 14, 53 (emphasis altered).

⁴⁶ Sajó, ‘Militant Democracy and Transition towards Democracy’, above n 31, 213.

⁴⁷ *La Constitución Española de 1978* [Spanish Constitution of 1978].

⁴⁸ *Ley Orgánica 6/2002, de 27 de junio, Partidos Políticos* [Law on Political Parties] (Spain) 27 June 2002.

⁴⁹ Thiel, above n 35, 379.

⁵⁰ Ibid 382, quoting Claus Offe, ‘Democracy and Trust’ (2000) 47(96) *Theoria: A Journal of Social and Political Theory* 1, 3.

⁵¹ Loewenstein, above n 3, 656.

Today, militant democracy exists and is indeed a way of understanding certain laws, including those which affect areas well beyond the traditional interpretation of militant democracy, such as threats posed by global terrorism and religious fundamentalism.⁵² Legal and political science scholars have started to debate a number of issues, such as: whether Islam is compatible with democracy;⁵³ how the principle of secularism, cherished in many modern democracies, should be interpreted in the current reality;⁵⁴ and how to fight terrorist groups that threaten to destroy or damage democracies and their citizens' usual way of life.⁵⁵ These scholarly debates reflect the reality and challenges democracies currently face. The constitutional practice of the last decade demonstrates that there are legitimate grounds to claim that the application of militant democracy is being extended beyond the prohibition of political parties.

An example of this is how militant democracy measures are being applied to address one of the more recent challenges to democracy, namely, fundamentalist and coercive religious movements.⁵⁶ Furthermore, militant democracy can be helpful in explaining why religious and ethnic groups are excluded from the political process in some democracies and why certain constitutional principles are being protected from any religious intrusion (as is happening to the principle of secularism in Turkey). Further, the jurisprudence of the European Court of Human Rights provides ample evidence that there are cases involving freedom of religion or political parties with religious agendas that could be better rationalised and understood through the prism of militant democracy.⁵⁷ For example, the Court referred to the need to protect and preserve democracy to justify the limits on manifesting religious beliefs through wearing particular types of clothes associated with Islam;⁵⁸ therefore, the Court's case law demonstrates that the rationale of militant democracy is used to address threats (alleged or real) coming from fundamentalist religious groups.

⁵² For example, András Sajó claims that protection of secularism is intimately interrelated with militant democracy. See Sajó, 'Militant Democracy and Transition towards Democracy', above n 31, 210.

⁵³ Asef Bayat, *Islam and Democracy: What is the Real Question?* (Amsterdam University Press, 2007) 8.

⁵⁴ See, eg, Macklem, above n 2; Peter G Danchin, 'Islam in the Secular *Nomos* of the European Court of Human Right' (2011) 32 *Michigan Journal of International Law* 663.

⁵⁵ See, eg, Suzie Navot, 'Fighting Terrorism in the Political Arena: The Banning of Political Parties' (2008) 14 *Party Politics* 745; Leslie Turano, 'Spain: Banning Political Parties as a Response to Basque Terrorism' (2003) 1 *International Journal of Constitutional Law* 730.

⁵⁶ See Danchin, above n 54; Macklem, above n 2; Michael D Goldhaber, *A People's History of The European Court of Human Rights* (Rutgers University Press, 2007) 88.

⁵⁷ See, eg, *Kalifatstaat v Germany* [2006] (European Court of Human Rights, Application No 13828/04, 11 December 2006); *Refah Partisi (Welfare Party) v Turkey* [2003] I Eur Court HR 209 (French); 267 (English); *ahin v Turkey* [2005] XI Eur Court HR 115 (French); 173 (English); *Dogru v France* [2008] (European Court of Human Rights, Chamber, Application No 27058/05, 4 December 2008). See also Renáta Uitz, *Freedom of Religion in European Constitutional and International Case-Law* (Council of Europe Publishing, 2007) 177.

⁵⁸ Uitz, above n 57, 177.

A similar line of argument can be traced in the so-called 'war on terror'. Sajó points out several similarities between political radicalism and terrorism, and therefore argues that militant democracy can be a relevant consideration in explaining and justifying national counterterrorism policies.⁵⁹ Further, the question of whether democracies can 'fight antidemocratic parties democratically?' came to be compared with the question, '[c]an democracies fight terrorism within the bounds of the rule of law?'⁶⁰ Fundamentalist Islam and global terrorism are not perceived only as threats to the life of citizens, but also to the entire democratic constitutional structures. Given this, the concept of militant democracy may be useful in guiding state policies to neutralise these and other challenges which might arise in the future. While drawing parallels between counterterrorism and militant democracy should be done cautiously, there is at least one feature which closely connects these concepts. If we leave aside the criminal dimension of counterterrorism policies, we can observe that there is a preventive basis to many counterterrorism measures, including but not limited to detention and interrogation by intelligence services, and some serious limitations imposed on the freedoms of speech, association and religion.⁶¹ Moreover, both notions are based on the assumption that democracies are justified in denying rights and freedoms to those who disrespect democracy.

Public international law also facilitates the concept of militant democracy, and the extension of its application beyond banning dangerous political parties. For example, the United Nations Security Council Resolution 1624, adopted on 14 September 2005,⁶² appealed to militant democracy⁶³ by calling all states to adopt measures to prevent and criminalise incitement to commit acts of terrorism.⁶⁴ The then Prime Minister of the United Kingdom, Tony Blair, warned, while advocating for the adoption of this Resolution, that

Terrorism was a movement with an ideology and strategy. This strategy was not just to kill but also to cause chaos and instability, to divide and confuse. Terrorism would not be defeated until the Council's ... passion for democracy was as great as their [terrorists] passion for tyranny.⁶⁵

⁵⁹ Sajó, 'From Militant Democracy to the Preventive State?', above n 1.

⁶⁰ Holmes, above n 19, 589.

⁶¹ In Australia, there is an extensive list of preventive counterterrorism measures such as preparatory offences, the proscription regime, the questioning and detention powers of the Australian Security Intelligence Organisation ('ASIO'), the control order regime and preventive detention orders. For further details see George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 39 *Melbourne University Law Review* 1136.

⁶² SC Res 1624, UN SCOR, 60th sess, 5261st mtg, UN Doc S/RES/1624 (14 September 2005) ('*Resolution 1624*').

⁶³ Roach, above n 9, 56.

⁶⁴ *Resolution 1624*, UN Doc S/RES/1624.

⁶⁵ United Nations Security Council, 'Security Council Meeting of World Leaders Calls for Legal Prohibition of Terrorist Incitement, Enhanced Steps to Prevent Armed Conflict' (Press Release, 14 September 2005) <<http://www.un.org/News/Press/docs/2005/sc8496.doc.htm>>, cited in Roach, above n 9, 56.

Resolution 1624 was intended to respond ‘not only to the methods of terrorists but also to “their motivation, their twisted reasoning, wretched excuses for terror ... [and their] poisonous propaganda.”’⁶⁶ Leaving aside the debate as to whether Resolution 1624 was interpreted and implemented appropriately (especially by non-democratic states),⁶⁷ the mere adoption of such an international instrument with an underlying militant democracy justification demonstrates that militant democracy has a place in the counterterrorism debate (to explain and contextualise counterterrorism laws) and is being utilised to protect democratic structures from possible attacks by terrorist groups.

IV AUSTRALIA AS A MILITANT DEMOCRACY

A Militant Democracy and the Australian Constitution

At first glance, the *Australian Constitution* does not contain any of the traditional features of a militant democracy state discussed in Part III, such as procedures to outlaw political parties or unalterable constitutional provisions. It is on this basis that someone might conclude that Australia lacks any elements of constitutional militancy. In this Part I will argue that this impression is not correct and that the concept of militant democracy is a feature Australian constitutional law. In fact, signs of militant democracy may be found in the text of the *Australian Constitution*, legislation and the decisions of the High Court of Australia.

The very first draft of the Commonwealth of Australia Constitution Bill adopted in April 1891 indicates that drafters of the *Constitution* were concerned to draft a constitution capable of maintaining the legal order to be established. Clause 52(6) of the 1891 draft of the *Constitution* granted the Federal Parliament a power to make laws with respect to ‘The Military and Naval Defence of the Commonwealth and the calling out of the Forces with a purpose to execute and *maintain* the laws of the Commonwealth, or of any State or part of the Commonwealth.’⁶⁸ The phrase ‘to execute and maintain the laws’ survived all consequent Convention debates on the draft of the *Constitution* and is present in s 51(vi) of the *Constitution* as enacted. The wording of s 51(vi) was slightly modified during the debates,⁶⁹ but there was never a question of removing the idea that the defence power included maintaining the legal order.

⁶⁶ Roach, above n 9, 55.

⁶⁷ For a detailed account of the implementation of Security Council Resolution 1624 see the Security Council Committee, *Global Survey of the Implementation by Member States of Security Council Resolution 1624 (2005)*, UN Doc S/2012/16 (9 January 2012).

⁶⁸ Commonwealth of Australia Constitution Bill (Draft) 1891 (Imp) (emphasis added).

⁶⁹ See the *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, vii–xxi; the *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, vii–xix; and the *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, (1)–(18).

Examples of the application of the defence power⁷⁰ demonstrate that in times of war the defence power of the federal legislature ‘may extend into virtually every aspect of Australian life’.⁷¹ In times of peace, the scope of the power is much more limited but it still has the potential to regulate activities only indirectly related to defence.⁷² Thus, the defence power of the federal Parliament was relied upon to ban the Communist Party of Australia in 1950⁷³ and to introduce the mechanism of control orders as part of the anti-terrorism legislative package in 2005.⁷⁴ The defence power invoked in times of peace to protect and maintain the legal order definitely speaks in favour of a militant democracy rationale underlying the doctrine of defence power as enshrined in the text of the *Constitution* and interpreted by the High Court.

Further reference to militant democracy can be found in s 61 of the *Constitution* which deals with the executive power and states that ‘[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.’ Notably, the first two drafts of the Commonwealth of Australia Bill (the 1891 and 1897 versions) did not mention the ‘maintenance’ of the *Constitution* and executive power was limited to its execution only.⁷⁵ However, the 1898 draft of the *Constitution* extends the executive power to both the execution and maintenance and makes it almost identical to the wording of s 51(vi) in relation to the purpose of defence power of the Parliament. Elaboration of the amendments to the text of the respective clause is not reflected in the protocols of the 1898 Australasian Federation Conference debates and most probably the extension of the executive power to maintain the *Constitution* was not contested by the delegates. This task of the executive is in full conformity with the spirit of militant democracy, as is s 51(vi) of the *Constitution* which enables the Parliament to legislate in order to maintain the existing legal order.

⁷⁰ On the scope of defence power see David P Derham, ‘The Defence Power’ in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (Law Book Co, 2nd ed, 1961) 157; Geoffrey Sawer, ‘Defence Power of the Commonwealth in Time of Peace’ [1951–54] 6 *Res Judicatae* 214; Geoffrey Sawer, ‘The Defence Power of the Commonwealth in Time of War’ (1946) 20 *Australian Law Journal* 295.

⁷¹ Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 825.

⁷² *Ibid* 836.

⁷³ For example, the Preamble of the *Communist Party Dissolution Act 1950* (Cth) explicitly refers to the powers of the ‘Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States.’

⁷⁴ Both legislative measures are discussed further below. See below Parts IV(B)–(C).

⁷⁵ Commonwealth of Australia Constitution (Draft) Bill 1891 (Imp) and Commonwealth of Australia Constitution (Draft) Bill 1897 (Imp).

B *Militant Democracy and Federal Legislation*

The argument that the concept of militant democracy is relevant to Australia is further bolstered by reference to federal legislation, most notably as a mechanism for the proscription of unlawful associations.⁷⁶ In 1916, the Commonwealth Parliament passed the *Unlawful Associations Act 1916* (Cth) which was introduced as an act of the nation's self-defence against the Industrial Workers of the World organisation.⁷⁷ Later, pt IIA of the *Crimes Act 1926* (Cth) replicated the proscription mechanism to a large extent, and its provisions were aimed at defeating 'the nefarious designs of the extremists in our midst.'⁷⁸ While no organisation has ever been declared unlawful under this legislation, it is hard to contest that Australian democracy was concerned with the problem of self-defence and its continued existence as a democracy from the very early years of the Commonwealth. Australia's apparent willingness to employ proscription as a mechanism to fight dangerous and subversive political movements was common to other states at that time. The fact that proscription mechanisms were aimed at fighting subversive groups and individuals located within Australia confirms that, in the first half of the 20th century, Australia was far from unique.

Another example of militant democracy in the constitutional history of Australia is the attempt to ban the Communist Party of Australia in 1950.⁷⁹ The declaration by the Commonwealth Parliament that the Communist Party was an unlawful association is a typical militant democracy measure. The Communist Party had existed since the 1920s, but it had never been close to overcoming the popular support for the Labor Party.⁸⁰ The federal Government had advocated banning the Party earlier and as a result it was banned temporarily from 1940 until 1942 within the framework of wartime regulations. However, after the Soviet Union joined the war, the Party was allowed to resume its activities and gained some support amongst Australians. In the early 1940s, a wave of industrial strikes affected Australia and the Communist Party was accused of controlling

⁷⁶ For a detailed account see Andrew Lynch, Nicola McGarrity and George Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament' (2009) 13 *Legal History* 25 and Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscriptions of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1.

⁷⁷ Lynch, McGarrity and Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament', above n 76, 29.

⁷⁸ Ibid 30–1, citing Nathan Hancock, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Parliamentary Library, Parliament of Australia, 2001–2002), quoting Prime Minister Stanley Bruce, 'Policy Speech' (Speech delivered at Dandenong, Victoria, 5 October 1925).

⁷⁹ For a detailed analysis of the Australian response to communism see, eg, Frank Cain and Frank Farrell, 'Menzies' War on the Communist Party, 1949–1951' in Ann Curthoys and John Merritt (eds), *Australia's First Cold War, 1945–1953* (George Allen & Unwin, 1984) vol 1, 109; Roger Douglas, 'Cold War Justice? Judicial Responses to Communists and Communism, 1945–1955' (2007) 29 *Sydney Law Review* 43.

⁸⁰ For a more detailed account see David Dyzenhaus, 'Constituting the Legislature' in David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) ch 2, 72–86.

these strikes and trying to destabilise the country. The 1949 elections brought the Coalition of the Liberal Party and the Country Party to power, and it did not take long for the Coalition to implement its electoral promise to ban the Australian Communist Party.⁸¹ The new Prime Minister, Robert Menzies, ensured the passage by the Parliament of the *Communist Party Dissolution Act 1950* (Cth), which came into operation on 20 October 1950. The enactment of this statute and its execution were presented to the public as the fulfilment of the constitutional responsibilities of the legislative and executive branches of government to defend the existing form of government.⁸²

The Act also provided for the Governor-General to declare other organisations associated with the Communist Party to be unlawful. The consequence of such a declaration was that these organisations were dissolved, membership became a criminal offence and the property belonging to the organisations was forfeited to the Commonwealth. Individuals could also be declared to be communists and, as a result, they were banned from employment in the Commonwealth public service. The preamble to the Act stated:

the Australian Communist Party ... engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party ... would be able to seize power ...⁸³

... the Australian Communist Party also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia ...⁸⁴

The ban imposed on the Communist Party was promoted as being ‘necessary, for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth’.⁸⁵ The execution and *maintenance* of the Constitution mentioned in the Preamble as one of the aims of this legislation refers to the very essence of executive power stipulated in s 61 of the *Constitution*. As was discussed above, ss 51(vi) and 61 of the *Constitution* are militant democracy measures aimed at protecting Australia’s continued existence as democracy. And the fact the government used the maintenance of the *Constitution* and of the laws of the Commonwealth to justify the ban of the Communist Party is a clear indication that militant democracy is present not only in Australia’s *Constitution* but also in the legislative practice of the Commonwealth Parliament.

On the same day that the *Communist Party Dissolution Act 1950* (Cth) was enacted, the Australian Communist Party, ten unions and some union officials challenged the constitutional validity of the statute. The High Court held that the Act was

⁸¹ Ibid 73.

⁸² Blackshield and Williams, above n 71, 844.

⁸³ *Communist Party Dissolution Act 1950* (Cth) Preamble para 4.

⁸⁴ Ibid para 5.

⁸⁵ Ibid para 9.

unconstitutional.⁸⁶ However, the legislation was not held unconstitutional because it banned a political party per se or because of its underlying militant democracy purpose. Rather, the Court held that the federal Parliament had exceeded its legislative powers by enacting the law.⁸⁷

C Militant Democracy in the Case Law of the High Court of Australia

In addition to the text of the *Australian Constitution* and Commonwealth legislation, militant democracy is also evident in the decisions of the High Court, most significantly in regard to the defence power. In the aftermath of 9/11 and the London and Bali bombings, the federal Parliament referred multiple times to the defence power to enact anti-terrorism legislation. One such instance was the enactment of div 104 of the Commonwealth *Criminal Code*⁸⁸ which introduced the mechanism of control orders.⁸⁹ This particular legislative measure was later challenged in the High Court in the case of *Thomas v Mowbray*,⁹⁰ in which the scope of the defence power became one of the central questions to be decided. The High Court's interpretation of the scope of the defence power is used here to illustrate how militant democracy can be inferred from this important judicial ruling and to explain its significance to the claim that Australia is indeed a militant democracy.

Shortly after 9/11, Australia began developing a comprehensive and complex counterterrorism regime. It was not hard to observe the similarity between the moral panic surrounding the fear of communism in 1950s and that surrounding the threat of terrorism.⁹¹ For example, more than 50 years ago communists were labeled 'the most unscrupulous opponents of religion, of civilised government, of law and order, of

⁸⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*').

⁸⁷ For broader implications of this case on Australian constitutional law see, eg, Roger Douglas, 'A Smallish Blow for Liberty? The Significance of the *Communist Party Case*' (2001) 27 *Monash University Law Review* 253; George Williams, 'Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*' (1993) 15 *Sydney Law Review* 3; George Williams, 'The Suppression of Communism by Force of Law: Australia in the Early 1950s' (1996) 42 *Australia Law Journal of Politics and History* 220; George Winterton, 'The *Communist Party Case*' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108.

⁸⁸ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

⁸⁹ See, eg, Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (University of New South Wales Press, 2006) 41–58; Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 *Melbourne Law Review* 143; Andrew Lynch, 'Thomas v Mowbray: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; Geoffrey Lindell, 'The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*' (2008) 10(3) *Constitutional Law and Policy Law Review* 1. (2007) 233 CLR 307.

⁹¹ Nicole Rogers and Aidan Ricketts, 'Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy' (2002) 7 *Singapore Journal of Legal Studies* 149, 167.

national security', and communism was depicted as 'an alien and destructive pest'.⁹² In March 2002, the then federal Attorney-General, Daryl Williams, declared that 'terrorism has the potential to destroy lives, devastate communities and threaten the national and global economy' and described terrorist forces as 'actively working to undermine democracy and the rights of people throughout the world'.⁹³ In light of these similarities, it was logical to rely on the same constitutional provisions as in the 1950s while trying to protect Australia from a newly emerged threat coming from both foreign and domestic 'enemies'.

In 2007, the High Court handed down its decision in *Thomas v Mowbray*. Joseph Thomas⁹⁴ was subjected to an interim control order under sub-div B of div 104 of the *Criminal Code*⁹⁵ and he challenged the constitutionality of div 104 of the *Criminal Code* in the High Court.⁹⁶ The majority of the Court (5:2) ruled that sub-div B of div 104 of the *Criminal Code* was valid.⁹⁷ The case for invalidity of div 104 was based on three grounds.⁹⁸ The most relevant issue to this article was *whether the Commonwealth had the legislative power to enact the law which introduced the control order regime?* That is, whether the defence power can be used to address not only external but internal threats.

The Commonwealth legislature lacks a specific power to deal with terrorism, as well as a general power to legislate with respect to criminal law; these matters come within state legislative power.⁹⁹ Prior to *Thomas v Mowbray*, it was also not clear whether anti-terrorism legislation could be enacted under the defence power. It became one of the central questions in *Thomas v Mowbray*. The High Court had to decide whether the control order regime was within the Commonwealth's defence power under s 51(vi) of the *Constitution*.

⁹² Ibid, quoting G Winterton, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630, 635.

⁹³ Ibid 167–8, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1141–2 (Darryl Williams, Attorney-General).

⁹⁴ For more details on Joseph Thomas' prosecution see Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement?' (2008) 19 *Public Law Review* (2008) 20, 21.

⁹⁵ *Jabbour v Thomas* (2006) 165 A Crim R 32.

⁹⁶ It was a special case an adjunct to proceedings involving the original jurisdiction by the court, but not an appeal (for details see Hector Pintos-Lopez and George Williams, "'Enemies Foreign and Domestic": *Thomas v Mowbray* and the New Scope of the Defence Power' (2008) 27 *University of Tasmania Law Review* 83, 95).

⁹⁷ For details see Lynch, above n 89, 1189.

⁹⁸ These were: (1) the violation of Chapter III of the *Constitution* in terms of the conferral on a federal court of non-judicial powers to decide on the imposition of the Control Order; (2) federal courts exercise of judicial power while issuing control orders in a manner contrary to Chapter III; and (3) the absence of legislative powers (either expressed or implied) to enact laws establishing Control Order regime. For further details see Lynch, above n 89.

⁹⁹ Lynch, above n 89, 1189.

The Court decided (6:1) that the interim control order mechanism was valid under the defence power (Kirby J dissenting). The High Court interpreted the scope of the defence power under s 51(vi) such that it can be applied beyond the prevention of an external threat, stating that ‘there need not always be an external threat to enliven the [defence] power’.¹⁰⁰ Such an enlarged conception of the defence power was endorsed in the High Court judgment for the first time. After the *Thomas v Mowbray* decision, to legislate under the defence power the federal Parliament does not need to be at war or threatened by another state, and the enemy need not necessarily be a collective or a group. Justice Kirby did not agree with this conclusion and argued that it might lead to an ‘effectively unlimited’ defence power.

Thomas v Mowbray stands as the most important case on the defence power since the *Communist Party Case*.¹⁰¹ The interpretation of the scope of the Commonwealth defence power in *Thomas v Mowbray* is easily reconciled with the concept of militant democracy: it declares that the Commonwealth can legislate under the defence power, even on matters that are unrelated to issues of ‘defence’ in its traditional understanding. It was declared by the Court that the current threat of terrorism is sufficient to broaden and modify the traditional interpretation of the defence power even though Australia was not involved in a ‘war’, in the traditional sense of the word. In other words, the defence power was ‘stretched’ to adjust this constitutional provision to a new reality and thus the concept of ‘defence’ now includes responding to threats falling short of traditional war.

Thomas v Mowbray opened the door for militant democracy to occupy a greater space in Australia’s constitutional law. The defence power was interpreted such that the federal government may take preventive measures to protect Australia’s statehood and body politic not only from external but also from internal enemies. This is exactly what the concept of militant democracy allows liberal democracies to do — to act pre-emptively to suppress attempts to harm the system from within. Interpreting the defence power in a manner compatible with the concept of militant democracy may be justified in light of the nature and extent of the threat of terrorism, which is not always necessarily an external threat.

D Australia as a Militant Democracy: Implications and Concerns

The previous three sections examined how militant democracy manifests itself in contemporary Australian democracy by analysing provisions of the Commonwealth *Constitution*, legislation and jurisprudence of the High Court. It was argued that Australia has a long-lasting commitment and ability to defend democracy where it has needed to do so. But in practice, militant democracy is not easily applied and it should not be idealised nor positioned as a universal panacea to all challenges modern democracies face. Militant democracy is an important tool to protect Australia’s

¹⁰⁰ Oscar I Roos, ‘Alarmed, but Not Alert in the “War on Terror”?’ The High Court, *Thomas v Mowbray* and the Defence Power’ (2008) 15 *James Cook University Law Review* 169, 176, quoting *Thomas v Mowbray* (2007) 233 CLR 307, 395 [251] (Kirby J).

¹⁰¹ Roos, above n 100, 169.

statehood and constitutional integrity. It is also a useful concept to explain (and sometimes justify) the actions of government that might be seen as inconsistent with the traditional understanding of how a liberal democracy should function. And while ‘militant’ features of democracy should not attract negative connotations, they must be applied in practice with caution.

Militant democracy has only limited legitimacy and not every action taken by governments can be morally justified merely by the rationale behind such measures — the protection of democratic structures. Militant democracy measures are only acceptable if there are strong procedural and institutional guarantees to ensure that limitations on individual rights and freedoms are not misused in the name of protecting democratic structures. The negative impact of various national security measures on individuals (including militant democracy measures) might be quite severe. Thus, it is generally agreed that constitutional and legislative norms on human rights have a potential to carry sufficient power to counteract the negative impact of national security policies on individual rights¹⁰² that ‘should be protected as a central and constant feature of the modern democratic state.’¹⁰³ In Australia, however, the protection of human rights is not institutionalised,¹⁰⁴ as in other western democracies, and there is no federal bill of rights.¹⁰⁵ Therefore the Australian constitutional framework is missing some important safeguards from militant democracy which can be found in other jurisdictions.

To date, Australia does not have a bill of rights, and so lacks protection for some of the most fundamental freedoms, such as the freedom from torture or a general freedom of speech. The Australian human rights framework is patchy and incomplete but nevertheless there are some express rights in the *Constitution* and some implied rights as determined by the High Court. The *Constitution* contains few express individual rights. Eight constitutional provisions refer to ‘rights’ but only three have been interpreted as protecting an individual right.¹⁰⁶ There is no mention in the *Constitution* of the concept that all persons (or citizens) benefit from a specified

¹⁰² See Keith D Ewing and Joo-Cheong Tham, ‘The Continuing Futility of the *Human Rights Act*’ [2008] *Public Law* 668; Walker, above n 89, 143; and Aileen Kavanagh, ‘Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape’ (2011) 9 *International Journal of Constitutional Law* 172.

¹⁰³ Fiona De Londras and Fegral F Davis, ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms’ (2010) 30 *Oxford Journal of Legal Studies* 19, 45.

¹⁰⁴ See, eg, Nicola McGarrity and George Williams, ‘Counter-Terrorism Laws in a Nation without a Bill of Rights: The Australian Experience’ (2010) 2 *City University of Hong Kong Law Review* 45 and Williams, ‘A Decade of Australian Anti-Terror Laws’, above n 61.

¹⁰⁵ This, however, should not be interpreted in a way that democracies with a constitutional or statutory bill of rights do not have any issues protecting their statehood.

¹⁰⁶ George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013), 111–2. Provisions of the *Constitution* that can be conceptualised as capable of protecting rights are ss 41, 44, 51(xxxi), 74, 78, 84, 100, 117.

list of fundamental rights and freedoms.¹⁰⁷ The Australian approach is unusual. The inclusion of individual rights is considered a norm in most other liberal democracies, including most common law jurisdictions.

Furthermore, unlike many constitutions in the world, the *Australian Constitution* does not offer a range of remedies where constitutional rights are infringed or violated. There is no mechanism which would enable an individual to apply to the court or any other instance to obtain an appropriate and just remedy.¹⁰⁸ In the case of constitutional powers being exceeded, a plaintiff will be left with a declaration to that effect, but no further action will be taken or granted unless a common law cause of action is raised.¹⁰⁹ In the absence of any sort of bill of rights, the only check on the abrogation of human rights in Australia, including in the name of national security, 'derives from political debate and goodwill of political leaders'¹¹⁰ and the recently introduced mechanism of parliamentary scrutiny under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).¹¹¹ This, however, can hardly be considered acceptable or sufficient as it offers very little control over the legitimacy of restrictive counterterrorism measures.

Unsurprisingly, the High Court of Australia in deciding *Thomas v Mowbray* did not find an opportunity within the Australian constitutional framework to reflect on how to minimise the effect on individual rights and liberties when the Parliament legislates with respect to the defence power. That is why the extension of the constitutional defence power to protect Australia's statehood from internal enemies appears to be somewhat problematic and worrying. Having no constitutional bill of rights and no possibility to seek any remedy other than a declaration of constitutional invalidity of an Act, measures enacted in times of peace under the defence power must be applied with great caution.

¹⁰⁷ Williams and Hume, above n 106, 113.

¹⁰⁸ Such remedies are available, for example, under the *Canadian Charter of Rights and Freedoms: Canada Act 1982* (UK) c 11, sch B pt I; *Human Rights Act 1998* (UK) c 42; *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 8 s 38; *New Zealand Bill of Rights Act 1990* (NZ).

¹⁰⁹ Williams and Hume, above n 106, 156.

¹¹⁰ McGarrity and Williams, 'Counter-Terrorism Laws in a Nation without a Bill of Rights', above n 104, 66.

¹¹¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Act established a Parliamentary Joint Committee on Human Rights to perform the functions prescribed by s 7:

- (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

V CONCLUSION

The text of the *Australian Constitution* might not seem to have an explicit militant character but one should not rush to conclude that militant democracy has no place in Australian constitutional law. Militant democracy is more familiar to Australia than it might appear. Australia's constitutional framework is quite unique as compared to other contemporary democracies,¹¹² but there are definitely some features of militant democracy similar to those of most other democracies. The text of the *Constitution*, the history of the proscription of unlawful associations and the attempt to dissolve the Australian Communist Party in 1950 are indicative of Australia's long-lasting commitment and ability to defend democracy where it has needed to do so. It has been demonstrated throughout this article that Australia's constitutional framework allows the Commonwealth Parliament to legislate to protect internal democratic structures. And the High Court decision in *Thomas v Mowbray* supports the claim that militant democracy is present in Australian law and politics.

Treating Australia as having features of a militant democracy has two important implications. On the one hand, it is a useful concept to re-evaluate some government policies (for example, national security measures enacted as part of the anti-terrorism package) which have recently been labelled as being inconsistent with the liberal approach to how a state should run and operate. On the other hand, it is another reminder that Australia is missing a very important check on the abrogation of human rights — a constitutional or legislative bill of rights. It is important that militant democracy is balanced by strong procedural guarantees of individual rights and freedoms. On a larger scale, an institutionalised bill of rights would be an effective tool to counteract the excessive use of state powers in all areas of public life.

Having features of militant democracy in Australia may be easily justified, but it can be dangerous to have them without the checks and balances that are required for the legitimate practical application of militant democracy measures. Militant democracy can be justified only as long as it is 'capable of excluding conceptually and institutionally the abuse [or misuse] of opportunities for restricting rights'.¹¹³ This is where Commonwealth legislation, as an extension of Australian constitutional values, and High Court jurisprudence that determines the validity of such legislation, require changes in order for Australia's national security policy to fully comply with valid militant democracy practices. This process could, however, take some time in Australia as a federal bill of rights is still quite a distant reality.

Australia can be said to be a militant democracy. But in light of the constitutional, legislative and judicial experience of dealing with the protection of Australia's statehood, and given the absence of a bill of rights, it is useful to keep in mind the following passage from the landmark *Communist Party Case* by Dixon J. It stands as

¹¹² For example, it has a very strict separation of powers and no bill of rights.

¹¹³ Sajó, 'Militant Democracy and Transition towards Democracy', above n 31, 211.

a reminder about the limits on excessive activism in protecting democracy from its potential internal enemies:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.¹¹⁴

¹¹⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187–8 (Dixon J).

ADMINISTRATIVE LAW PARALLELS WITH PRIVATE LAW CONCEPTS: UNCONSCIONABLE CONDUCT, GOOD FAITH AND FAIRNESS IN FRANCHISE RELATIONSHIPS

ABSTRACT

In 21st century business format franchising, the search for solutions has taken the legislature and the courts into the areas of unconscionable conduct and good faith. To date these concepts have lacked the ability to curtail franchisor opportunism in exercising contract-granted discretions. Similar difficulties afflict administrative law approaches to good faith, lawfulness and rationality, errors of law and fact finding, and fairness — criteria against which contract-based discretions have been appropriately exercised by franchisors. We examine franchising cases against the administrative law approaches, acknowledging doctrinal differences (as well as similarities) and conclude that a common body of principle underlies both areas. This allows a fresh approach to interpreting the exercise of franchisor's discretions.

I INTRODUCTION

Franchising is a significant aspect of Australian commercial life.¹ Opportunities are marketed to franchisees as if they were consumer products, but are unaccompanied by statutory warranties. Once a franchise agreement is signed and the seven-day statutory cooling off period has elapsed, the arrangement is treated as a commercial one.

In Australia, the misleading and deceptive conduct legislation provides some protection for franchisees *ex ante* from exploitative conduct by franchisors. However, the reality of relationships between franchisors and their franchisees, manifested by the sometimes strong disconnect between what was sold in an environment akin

* Associate Professor of Business Law, Business School, University of New South Wales.

** Associate Professor of Commercial Law, University of Auckland, Senior Visiting Fellow, University of New South Wales. The authors are grateful to Drs John Hopkins and Greg Weeks for their helpful comments on drafts of an earlier version of this article, to our research assistants Edmond Wong and Giridhar Kowtal and to the anonymous referees for their generous input. All errors are, of course, our own.

¹ See Michael T Shaper and Jenny Buchan, 'Franchising in Australia: A History' (2014) 12(4) *International Journal of Franchising Law* 3.

to that of a consumer sale (and the actual relationship) has led to calls for better protection for franchisees and their businesses *ex post*. The 1998 expansion of the unconscionable conduct provisions of the then *Trade Practices Act 1974* (Cth) ('*TPA*'), by the addition of s 51AC, may have been able to rebalance the relationship. But, as we will see, it has not been done. The search for tools to fundamentally rebalance the power dynamic between a franchisor and its franchisees continues.

Power imbalance has long been the Achilles heel of the franchise model. As a structural weakness it has the ability to make the model less attractive to franchisee investors. It remains problematic for the following reasons. The ability to draft the standard form contract enables franchisors to cast their obligations in discretionary terms, and the franchisees' role in terms of predominantly non-negotiated, iron-clad obligations. Franchisees accept that the blatantly 'unfair' aspects of their franchise agreements are necessary to enable the franchisor to bring rogue franchisees into line and thus to protect the brand, but arguably they are more often used to force franchisees to 'behave'. Richard Hooley writes of controlling contractual discretions.² He acknowledges that contracts may be incomplete and that 'an unfettered contractual discretion may not properly reflect the intention of the parties at the time of contracting'.³ He also, pertinently, accepts that 'in a long-term contract that depends on co-operation between the parties, an unfettered discretion afforded to one party may undermine the economic potential of the contract'.⁴ Intractable problems that can undermine the economic potential of the contract for the franchisee arise out of the contract-entrenched power imbalance between a franchisor and a franchisee.

There are difficulties for the law in attempting to balance the franchisor-franchisee relationship in order to mitigate the effects of asymmetries.⁵ These are partly a consequence of seeking to impose a traditional commercial contract paradigm, based on negotiation followed by mutual consent, on a 'necessarily and intentionally incomplete'⁶ agreement. However, regulators in many jurisdictions have nonetheless attempted to impose balance on the relationship.⁷ This article examines two responses. They are unconscionable conduct under the *Competition and Consumer Act 2010* (Cth) ('*CCA*'), and the much mooted good faith concept.

² Richard Hooley, 'Controlling Contractual Discretion' (2013) 72 *Cambridge Law Journal* 65.

³ Ibid 67.

⁴ Ibid 68. See also H Collins, 'Discretionary Powers in Contracts' in David Campbell, Hugh Collins and John Wightman (eds) *Implicit Dimensions of Contracts, Discrete, Relational and Network Contracts* (Oxford, 2003) 231.

⁵ Jenny Buchan, 'Ex Ante Information and Ex Post Reality for Franchisees: the Case of Franchisor Failure' (2008) 36 *Australian Business Law Review* 407.

⁶ Gillian K Hadfield, 'Problematic Relations: Franchising and the Law of Incomplete Contracts' (1990) 42 *Stanford Law Review* 927.

⁷ See Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* (Edward Elgar 2011) 118–19. Table 4.1 identifies examples of legislation designed to variously 'guarantee non-discriminatory treatment for all franchisees of the same franchisor' (Mexico), remedying information disparity and power imbalance (USA).

Australia's Commonwealth consumer protection legislation was amended in 1998 in statutory recognition that small businesses could be treated unconscionably within the context of a commercial relationship.⁸ Eighteen years of the possibility of a statutory unconscionable conduct action have, however, failed to reduce franchisor over-reaching. Concerns continue to be raised in relation to the asymmetrical elements of franchising,⁹ and are also evidenced by the conduct of several governmental and parliamentary inquiries at both federal and state level.¹⁰

The adoption of standard form contracts by franchisors is unavoidable. In Australia, the average ratio of franchisors to franchisees is 1:60. It is unrealistic to expect a franchisor to negotiate a bespoke contract with each franchisee. Doing so would result in inefficiency. A further difficulty in franchising is that both contracting parties (franchisor and franchisee) have multiple legal relationships. These additional contractual and statutory relationships potentially place any of the parties in a situation of conflict vis-a-vis their obligations under the franchise contract. It may not, for example, be possible to respect the contract-based expectation of one's counterparty to a franchise agreement whilst also adhering to statutory duties to one's shareholders. It is timely to consider whether a different approach to measuring fairness in franchise relationships is required.

Despite the dissenting judgment of Kirby J in *NEAT Domestic Trading Pty Ltd v AWB Ltd*,¹¹ the majority of the Australian High Court left open the question of whether administrative law remedies were available against a private entity. Both

⁸ CCA sch 3 s 22 (formerly TPA s 51AC).

⁹ See, eg, Albert H Choi and George G Triantis, 'The Effect of Bargaining Power on Contract Design' 98(8) (2012) *Virginia Law Review* 1665. See also Jenny Buchan, *Franchisees as Consumers: Benchmarks, Perspectives and Consequences* (Springer, 2013) 84-95.

¹⁰ Franchising Code Review Committee, *Review of the Disclosure Provisions of the Franchising Code of Conduct: Report to Hon Fran Bailey MP: Minister for Small Business and Tourism* (2006) ('Matthews Report'); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry Into the Franchising Code of Conduct* (2008) ('Cth Inquiry') resulting in Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Opportunity Not Opportunism: Improving Conduct in Australian Franchising* (2008) ('Opportunity not Opportunism Report'); Small Business Development Corporation, Parliament of Western Australia, *Inquiry into the Operation of Franchise Businesses in Western Australia: Report to the Western Australian Minister for Small Business* (2008) ('WA Inquiry'); Economic and Finance Committee, Parliament of South Australia, *Franchises* (2008) ('SA Inquiry') and Alan Wein, Submission to Minister for Small Business and Parliamentary Secretary for Small Business, *Review of the Franchising Code of Conduct*, 30 April 2013 ('Wein Review').

¹¹ 216 CLR 277, 300 [67] (Kirby J) questioning 'whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules'.

laws against unconscionable conduct and the developing doctrine of good faith have struggled when faced with the exercise of franchisor discretion; they are applied purely by reference to private law principles. Our thesis is that, by adapting the principles underlying administrative law to the consideration of whether a franchisor has exercised a contractual discretion appropriately, greater clarity can be brought to the assessment of whether a contract-granted discretion has been exercised in 'good faith' and fairly.

Many of the dilemmas faced in administrative law are also found within the ambit of private law. Unit franchise agreements, being standard form, executory, relational contracts that confer broad discretionary powers and few explicit obligations on franchisors, are one example. Administrative law has long possessed tools empowering the review of discretionary decision-making by public authorities. Reference to these approaches could guide franchisors, and enable judges and regulators alike, to formulate appropriate responses to problems arising out of franchise relationships.

This article is in seven parts, the first being this introduction. In the next we consider 21st century franchising, franchise agreements and the triggers for disputes that are resolved in court. We also identify the similarities that exist between the exercise of the franchisor's power and the officials exercising discretion. Part III addresses the current solution of statutory unconscionable conduct and common law good faith, and the new statutory duty of good faith. Part IV examines the administrative law jurisprudence surrounding good faith, lawfulness and rationality, errors of law and fact finding, and fairness. This is done against the possibility that the approach might be used to refine the private law concept of good faith in franchising. In Part V we observe that the solutions reached by judges applying a mix of statutory and common law rules to restrain the abuse of contractual discretions by franchisors, already draw on the framework of administrative law jurisprudence in ascertaining the presence of good faith. Doctrinal issues must be addressed and we do so in Part VI. Part VII is the conclusion.

II 21ST CENTURY FRANCHISING

The economic reasons for the success of business format franchising are well understood.¹² The franchisee's capital and local knowledge is combined with the franchisor's know-how and brand reputation. The economies of collective purchasing power are harnessed. As a result, the franchisee should 'hit the ground running' rather than risking the pitfalls a nascent stand-alone business may experience.

The success of franchising has largely been founded on its flexibility and ability to deal with fast-changing market conditions. The franchisor necessarily retains the freedom to make changes to the system to enable it to respond to market conditions

¹² Economists are, however, yet to include the cost of franchisor insolvency in the model. It remains an externality whose inclusion could challenge the rarely questioned popular notion of the success of the franchise model.

and remain competitive. To term franchise contracts ‘agreements’ is almost a misnomer. They are incomplete, drafted to protect the franchisor’s interests as well as to embed a power and risk imbalance that favours the franchisor.¹³ The long duration of franchise agreements,¹⁴ and the franchisees’ often large sunk investments, mean franchisees are vulnerable to opportunistic behaviour by franchisors. The nature of the grant enjoyed by the franchisee towards the end of its term consequently may bear little resemblance to that at the outset.

Disputes between franchisors and franchisees are of two main types. Firstly, there is a tendency by franchisors to oversell the franchise, the franchisor’s experience, ability to support its franchisees or its solvency, thus potentially misrepresenting the true nature of what the franchisee is purchasing.¹⁵ This may lead to an action under s 18(1) of the *CCA*.¹⁶ Secondly, and more relevant to the present discussion, are disputes based on performance of the franchise agreement. It is difficult for franchisees to successfully argue that their franchisor has breached a contract that imposes discretionary obligations that are few and vague. For example Hadfield notes that

the franchisee paid fees for a service that the service-provider retained full discretion to define in content and duration. ... the contract frames franchisor obligations in terms such as ‘reasonable’, ‘periodic’, and ‘from time to time’. The franchisor had no contractual duty to employ prudence or consideration in the making of decisions that directly affect the profitability of the franchisee.¹⁷

Indeed, Elizabeth Spencer states that ‘[c]lauses drafted to ensure discretion to a franchisor, leaving franchisees in a position of uncertainty and increased risk, are ubiquitous in franchising contracts.’¹⁸ As a consequence, they create ‘little in the

¹³ Buchan, above n 5. See also Elizabeth C Spencer, ‘Consequences of the Interaction of Standard Form and Relational Contracting in Franchising’ (2009) 29 *Franchise Law Journal* 31.

¹⁴ The average length of a franchise agreement in Australia is five years but some franchisors grant licences and master licences for 25 years and some for an indefinite period. For details, see Lorelle Frazer, Scott Weaven and Kelli Bodey, *Franchising Australia 2012* (Griffith University, 2012) 35.

¹⁵ See, eg, *Carlton v Pix Print Pty Ltd* [2000] FCA 337 (22 March 2000) where the franchisor misrepresented to the applicant master franchisee that the Pix Print business was successful and expanding in breach of s 52 of the *TPA*. See also *Billy Baxters (Franchising) Pty Ltd v Trans-It Freighters Pty Ltd* [2009] VSC 207 where the franchisee unsuccessfully claimed franchisor (Billy Baxter’s) had misled it about possible turnover. On appeal the Victorian Supreme Court in *Trans-It Freighters Pty Ltd v Billy Baxters (Franchising) Pty Ltd* [2012] VSCA 71 (20 April 2012) (Bongiorno and Hansen JJA and Kyrou AJA) unanimously reversed the decision.

¹⁶ Formerly s 52 *TPA*.

¹⁷ Hadfield, above n 6, 945-946.

¹⁸ Elizabeth Spencer, ‘Consequences of the Interaction of Standard Form and Relational Contracting in Franchising’ in Elizabeth C Spencer (ed), *Relational Rights and Responsibilities: Perspectives on Contractual Arrangements in Franchising* (Bond University Press, 2011) 47, 57.

way of real obligation on the part of a franchisor and no contractual right in a franchisee.’¹⁹ A further corollary is that although ‘[r]elational contracts accommodate uncertainty by leaving terms unspecified and providing high levels of discretion, ... [they] often fail to provide clear and specific answers in case of dispute’.²⁰ The courts, through recourse to doctrines such as good faith, and the legislature, through statutory remedies such as unconscionability, have applied solutions to accommodate such uncertainties that in many respects resemble the criteria for reviewing administrative action. We suggest the next step for regulators and courts is to look actively at how administrative law addresses disputes that originate from the exercise of discretion.

A Parallels between Franchise Networks and Public Bureaucracies

It has been said in relation to the values underpinning administrative law that

[t]here seem to be few, if any, aspects of economic activity in contemporary society that are not supervised by some kind of statutory [ie without an element of choice] regulator with *powers to grant, withhold, suspend or cancel licences to engage in such activity and to approve or withhold approval for particular transactions*.²¹

Here the parallel with franchising is striking, as the emphasised words describe the powers franchisors possess to grant a franchise. And having done so, to amend the grant, revoke it, provide assistance to or sanction myriad transactions by their franchisees (such as purchasing stock from a third party or providing the franchise agreement as security for a loan). A franchise agreement and its accompanying documents create an environment of private regulation with the franchisor acting as both regulator and arbiter. Spencer argues that ‘discretion facilitates action on improper considerations, and permits the substitution of subjective, personal standards for agreed-upon ones’.²² Uncertainty results from the current environment. For example, whilst the issues in *Automasters Australia Pty Ltd v Bruness Pty Ltd* were considered in the context of an express term of ‘absolute good faith’,²³ contained in cl 15 of the Automasters franchise agreement, this standard was diluted by the franchisor being obliged to do no more than ‘use its best endeavours to promote the performance and success of the franchise business’.²⁴

¹⁹ Ibid.

²⁰ Ibid 54.

²¹ Chief Justice Robert French, ‘Administrative Law in Australia: Themes and Values’ in Matthew Groves and H P Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 15 (emphasis added).

²² Spencer, above n 18, 56.

²³ *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286 (4 December 2002) [14] (*‘Automasters’*).

²⁴ Ibid.

We contend that objective standards of fairness and reasonableness now exist in Australian administrative law²⁵ — unlike perhaps in the United Kingdom — and that the developing doctrine of good faith in Australia replicates essentially the same standard. This article evaluates the validity of this proposition by examining its application to franchisor-franchisee relationships. Before exploring the approaches within administrative law, we will examine two current private law tools: unconscionability and good faith.

III THE SEARCH FOR SOLUTIONS

In a celebrated passage, Paul Finn (formerly a judge of the Federal Court of Australia) hints at the existence of a spectrum from self-interested behaviour (which nonetheless disallows exploitative conduct) to good faith and finally completely selfless behaviour encompassed by the fiduciary standard.²⁶ Andrew Terry and Cary Di Lernia observe that ‘clear dividing lines between concepts along that continuum are seldom provided’.²⁷ Nevertheless, several doctrinal tools have been employed or proposed to deal with the continuum in the context of franchise relationships. Here we consider two of these: the extant unconscionable conduct and current common law, and the new statutory duty of good faith.

A Unconscionable Conduct

Unconscionable practices by franchisors were first brought to the attention of Australia’s federal government in the 1976 ‘*Swanson Report*’.²⁸ These practices were cast as being ‘unfair or deceptive acts or practices’.²⁹ The Swanson Committee shied away from the notion of sanctioning unfair conduct because of the potential for the word ‘unfair’ to introduce uncertainty into commercial transactions. Peter Reith introduced a package of reviews in 1997 called ‘New Deal: Fair Deal — Giving Small Business a Fair Go’. By mid-1998 the *TPA* had been amended by the addition of s 51AC,³⁰ which prohibited unconscionable conduct in business-to-business transactions and the enactment of the mandatory *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Cth) (‘*Code*’). Interestingly, as

²⁵ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 337–52 (French CJ).

²⁶ Paul D Finn, ‘The Fiduciary Principle’ in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1, 4.

²⁷ Andrew Terry and Cary Di Lernia, ‘Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?’ (2009) 33 *Melbourne University Law Review* 542, 555.

²⁸ Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Australian Government Publishing Service, 1976) (‘*Swanson Report*’).

²⁹ *Ibid* 66.

³⁰ Now *CCA* sch 2 s 22.

deduced from the ‘fair go’ wording of the 1997 review, the concept of ‘fairness’ was the topic of the debate. At the 11th hour it was decided to use the expression ‘unconscionable conduct’ rather than ‘fairness’ in the new legislation in order to

build on the existing body of case law which [was seen to have] worked with respect to consumer protection provisions of the [TPA] and which [it was thought] will provide greater certainty to small businesses in assessing their legal rights and remedies.³¹

Whether conduct was unconscionable was to be ‘determined by examining all the circumstances of the case’³² with regard to listed non-exclusive, discretionary, cumulative criteria.³³ The franchisees’ sunk investment could arguably be taken into consideration as an aspect of measuring the extent to which the supplier (franchisor) acted in good faith under sch 2 s 22(1)(l) of the CCA when evaluating the unconscionability of a franchisor’s conduct. Nevertheless, this aspect of a franchisee’s vulnerability has yet to be considered.

However, uncertainty about the scope and application of the unconscionable conduct standard has continued, as evidenced by the seven government franchising and unconscionable conduct inquiries since 1998.³⁴ The Senate Standing Committee on Economics in December 2008 conducted a review on ‘[t]he need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the [TPA]’. Notably, it was loath to attribute the fact that ‘there [had] only been two successful findings under section 51AC over the past decade’³⁵ to any overall improvement in conduct of businesses. It attributed the low number of successful prosecutions to the courts’ narrow interpretation of s 51AC. Because the legislative prohibition of unconscionable conduct in business transactions is not limited to the traditional equitable categories of special disadvantage, ‘the courts have come to different understandings of what constitutes “unconscionability”’.³⁶ The difficulties are, as Terry and Di Lernia maintain, compounded by the inclusion of the extent to which the parties acted in good faith as one of the criteria for determining whether unconscionable conduct has taken place. Since Terry and Di Lernia’s 2009 observations, s 21 of sch 2 (the unconscionable conduct provision of the CCA) replaced s 51AC of the TPA. In the new section, the definition of a ‘business consumer’ (found in the old s 51AC of the TPA) became the definition of a ‘customer’ (per the new s 22 of sch 2

³¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1997, 8767 (Peter Reith).

³² Explanatory Memorandum, Trade Practices Amendment (Fair Trading) Bill 1997 (Cth) 1.

³³ See *Australian Consumer Law* sch 2 n 22(1)(a)–(k) and sch 2 s 22 (2)(a)–(k).

³⁴ See *Matthews Report*, *WA Inquiry*, *SA Inquiry*, *Cth Inquiry* and *Wein Review*. See also Senate Standing Committee on Economics, Parliament of Australia, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* (2008).

³⁵ *Ibid* 31.

³⁶ Terry and Di Lernia, above n 27, 555.

of the *CCA*). A new concept applicable to unconscionable conduct was included in s 21(4) stating that:

...

- (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
 - (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
 - (i) the terms of the contract; and
 - (ii) the manner in which and the extent to which the contract is carried out;
- and is not limited to consideration of the circumstances relating to formation of the contract.

It is too early to conclude whether the 'system' or 'pattern' envisaged in s 21(4)(b) will be interpreted to encompass franchise-wide systems or patterns, or whether it will be interpreted as system or pattern of unconscionable conduct within the performance of an individual contractual relationship. Notably, the 'good faith' criterion has been retained in the *CCA* list of factors that can indicate the presence or absence of unconscionable conduct.

Elisabeth Peden warns that the pre-occupation with developing a doctrine of good faith in Australia (which is discussed further below) has had perverse effects in encroaching on and distorting existing unconscionability doctrines as well as diminishing contractual certainty, stating that:

it seems that with the recent decisions on good faith, the judges are moving closer to the position where they will interfere with the exercise of rights or powers because of unreasonableness, rendering unconscionability unnecessary ... this current position is robbing contract law of certainty in relation to what restrictions a court might impose on contracting parties seeking to exercise rights.³⁷

It is in order to address these uncertainties that we examine the principles underlying control of administrative power. It will be seen that similar difficulties afflict administrative law, in particular the criticism made by scholars that reasonableness review lacks certainty and transparency.³⁸ Despite these obstacles, we argue that administrative law principles provide a framework as to how contractual provisions of uncertain ambit are *applied* — something traditional doctrines such as unconscionability struggle with — and ought therefore not to be disregarded too readily.

³⁷ Elisabeth Peden, 'When Common Law Trumps Equity' (2005) 21 *Journal of Contract Law* 226, 249.

³⁸ Jonathan Morgan, 'Against Judicial Review of Discretionary Contractual Powers' [2008] *Lloyd's Maritime and Commercial Law Quarterly* 230, 231.

B Good Faith

Much ink has been spilt by Australian jurists and commentators in examining the role that the doctrine of good faith plays in contract generally,³⁹ and in the context of franchising specifically.⁴⁰ The failure to achieve greater symmetry in the franchisor-franchisee relationship has led to calls by some⁴¹ for an explicit enactment of a duty of good faith into franchise agreements as a panacea to the power imbalance. Good faith as a solution has also been criticised as Australia does not possess a settled jurisprudence in relation to the doctrine.⁴² The imposition of an implied term of good faith has been cast as a ‘backward step’.⁴³ In the United States, the content and meaning of the previously settled concept of good faith is being questioned.⁴⁴ In the following sections we will venture some observations on this point.

1 Good Faith at Common Law

Our discussion primarily relates to franchise agreements. In the seminal non-franchise case of *Renard Constructions (ME) Pty Ltd v Minister for Public*

³⁹ See generally cases listed in Terry and Di Lernia, above n 27, 546–8. See also Bill Dixon, ‘Common Law Obligations of Good Faith in Australian Commercial Contracts — A Relational Recipe’ (2005) 33 *Australian Business Law Review* 87; Elisabeth Peden, ‘Implicit Good Faith — or Do We Still Need an Implied Term of Good Faith?’ (2009) 25 *Journal of Contract Law* 50; and Suzanne Corcoran, ‘Good Faith as a Principle of Interpretation: What is the Positive Content of Good Faith?’ (2012) 36 *Australian Bar Review* 1.

⁴⁰ See, eg, *Burger King Corporation v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 558 (‘*Burger King*’) and *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310 (18 August 2000) (‘*Far Horizons*’).

⁴¹ Elizabeth Crawford Spencer, Submission No 39 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Franchising Code of Conduct*, 1 January 2008, 34–5; *SA Inquiry*, above n 10, 56–9, citing Frank Zumbo, Submission No 43 to the Economic and Finance Committee, *Franchises*, 3 March 2008. See also Philip Coleman, Submission No 16 to Government of Department of Industry, Innovation, Science, Research and Tertiary Education, *Review of the Franchising Code of Conduct 2013*, 12 February 2013, 5–7 and Elizabeth Spencer and Simon Young, Submission No 25 to Department of Industry, Innovation, Science, Research and Tertiary Education, *Review of the Franchising Code of Conduct 2013*, 14 February 2013.

⁴² Terry and Di Lernia, above n 27, 542 and *SA Inquiry*, above n 10, 56–7, citing Franchise Council of Australia, Submission No 17 to the Economic and Finance Committee, *Franchises*, 21 January 2008.

⁴³ Peden, above n 39, 53.

⁴⁴ See Howard O Hunter, ‘The Growing Uncertainty about Good Faith in American Contract Law’ (2004) 20 *Journal of Contract Law* 50 for a discussion of the range of interpretations of the concept of good faith that US courts are adopting in relation to the concept of good faith in contracts. See also Corcoran, above n 39, 6.

Works,⁴⁵ the majority of the New South Wales Court of Appeal found an implied term that the principal had to act in good faith and reasonably. However, Meagher JA in the minority found a more straightforward basis for the ruling namely: that the non-compliance by the principal with an express term of the contract could be taken to require the principal to act on accurate information when forming a view as to whether the contractor had shown cause for the principal to cancel the contract.⁴⁶

To Suzanne Corcoran good faith is conduct that is appropriate; '[t]o be appropriate the result must not be absurd and should also be fair and balanced in the circumstances'.⁴⁷ Her comments relate to the interpretation of contracts that may 'involve determining what the parties would credibly have agreed upon had they turned their minds to the question'.⁴⁸ To this point the analysis does not do franchise contracts, or other voluntarily executed, but non-negotiated, relational, commercial contracts, any disservice. But, as Corcoran continues, 'the principle of good faith is a guide to judging what can credibly be advanced as to a permissible motivation'.⁴⁹ We will see in Part III B (3) an example of a permissible motivation for one party being far outside the contemplation of the other.

Difficulties exist in attempting to introduce the concept of good faith into contractual relationships. First, the actual *mechanism* for introducing the duty must be settled; and secondly, the *content* of the duty must be defined.

In relation to mechanism, Bill Dixon identifies two 'quite disparate' approaches by courts: terms that reflect the presumed intention of the parties (that are dependent on the circumstances of each case) and terms based on imputed intention; that is, implied

⁴⁵ (1992) 26 NSWLR 234; see also the summary of the long-running *Renard* saga in John Ingold, 'The Renard Saga — The High Court Refuses Leave to Appeal' (1993) 28 *Australian Construction Law Newsletter* 70, 70–1, where Ingold notes:

The Minister had improperly exercised the power to terminate the contractor's employment under cl 44.1, thereby repudiating the contract. Priestley and Handley JJA thought that the principal had to act reasonably under cl 44.1, both when considering the cause shown by the contractor and then, at the next stage, when considering whether to exercise the power to take over the works or cancel the contract. In this case, the Minister had not acted reasonably. Meagher JA thought that there was no requirement that the principal act under cl 44.1 in an objectively reasonable manner. However, he thought that the principal could not be "satisfied" within the meaning of cl 44.1 if he did not comprehend the factual background on which satisfaction is required. Here, the principal's mind was "so distorted by prejudice and misinformation that he was unable to comprehend the facts in respect of which he had to pass judgment". Meagher JA thus came to the same result as the majority, that there had been an invalid exercise of the power under cl 44.1 and that the Minister had thereby repudiated the contract.

⁴⁶ *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 276.

⁴⁷ Corcoran, above n 39, 8.

⁴⁸ *Ibid* 8.

⁴⁹ *Ibid*.

by law as a legal incident of a particular class of contract.⁵⁰ The need in the first approach to satisfy the five criteria in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*⁵¹ ensures this high hurdle will be unlikely to be cleared where the contract has ‘efficacy’ without implying good faith. Further, in relation to any specific action it is likely that a franchisor and its franchisees have differing presumed intentions.

The second approach must also satisfy two requirements; an identifiable class of relationships and necessity. In terms of the present discussion, it has been judicially observed that ‘the classes of contracts in which the law will imply terms are not closed’.⁵² It is not therefore farfetched to suggest that contracts that confer significant powers and discretions on the party drafting the contract, but not on the other, constitute such a class. The second requirement is ‘necessity’.⁵³ It must be established that ‘[u]nless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless or perhaps be seriously undermined’.⁵⁴ However, Dixon suggests that wider considerations of policy have also been used to support the implication of contractual terms as a matter of law.⁵⁵ In the franchising context these might include (a) the vulnerability of a class such as franchisees, (b) the standard form nature of agreements and (c) the need to protect franchisees from discriminatory treatment. These considerations would be balanced against the interests of the franchisees in having the integrity of the franchise system maintained by the franchisor. Similar policy considerations inform decision-makers in the public sphere.

Besides disapproving of such a wider ground, Dixon is critical of the manner in which courts in Australia have played fast and loose with the grounds for implying good faith as an obligation in contracts. He notes that consideration of the class of contract attracting the obligation and the necessity test are often ignored.⁵⁶ In addition, he states that the use of vulnerability as a test ‘raises doctrinal issues of ...

⁵⁰ Bill Dixon, ‘Good Faith in Contractual Performance and Enforcement — Australian Doctrinal Hurdles’ (2011) 39 *Australian Business Law Review* 227, 233.

⁵¹ (1977) 180 CLR 266, 283. These are listed by Lord Simon of Glaisdale as:

(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

⁵² *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468, 487 (Hope JA).

⁵³ Dixon, above n 50, 234.

⁵⁴ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 450. See also *Liverpool City Council v Irwin* [1977] AC 239.

⁵⁵ Dixon, above n 50, 234. See also *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 194–5.

⁵⁶ Dixon, above n 50, 238.

the interplay between common law and equitable remedies'.⁵⁷ Dixon's objections have less cogency if the outcomes are seen as applications of fundamental principles, such as the administrative law based duty to act rationally. For example, *Vodafone Pacific Ltd v Mobile Innovations Ltd*⁵⁸ might better be seen as a case involving abuse of or failure to exercise a particular discretion rather than the more strained finding of breach of an implied term to act in good faith.

The second difficulty identified by Dixon, Peden and other commentators is the content of the duty of good faith where it does exist:

'[w]e caution anyone who is confident about the meaning of good faith to reconsider', write two leading American scholars, White and Summers ... So far the courts have not offered much by way of explanation of the content of the implied term of good faith, other than emphasising that it requires contracting parties to act reasonably, at least when exercising express rights and discretions. Although there are many recent cases in which judges have expressed the requirement of good faith in terms of 'reasonableness', the concept of good faith is still not unambiguous.⁵⁹

In particular, there appears to have been a "blurring" between the different standards of reasonableness, unconscionability and good faith'.⁶⁰ Many instances involving unconscionability in fact concern the exercise of contractual powers and discretions. The discussion that follows will also demonstrate that cases involving the alleged failure to act in good faith in franchising relationships also concerned the exercise of contractual powers and discretions. These common features hint at fundamental underlying behaviour — in the form of use of discretionary powers in a way that neither the weaker party nor the drafter originally intended — that also exists in the administrative law arena.

The administrative law framework exhibits many characteristics of these contractual doctrines. However, it contains both procedural requirements, as to fairness, as well as substantive requirements of honesty and rationality which are explored in Part IV. The utility of these doctrines for the exercise of contractual powers and discretions by franchisors in particular is examined in Part V.

2 *Legislative Definition of Good Faith*

Witnesses before several inquiries into franchising in Australia have opposed the introduction of an explicit defined duty of good faith⁶¹ being adopted thus

⁵⁷ Ibid 241.

⁵⁸ [2004] NSWCA 15 (20 February 2004).

⁵⁹ Peden, above n 37, 234 (citations omitted).

⁶⁰ Ibid 245.

⁶¹ The ACCC is opposed to imposing a general obligation to act in good faith via the *Code* for three reasons: (1) The potential impact on the operation of the *Code* and the work of the ACCC; (2) The degree of uncertainty about the interpretation that may

far.⁶² As a concession to the repeated calls for implementation of a specific good faith requirement, the *Code* was amended in 2010 by the introduction of cl 23A, which states: '[n]othing in this code limits any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith.'⁶³

It 'preserves and recognises any developments in the case law on the concept of "good faith"'.⁶⁴ The reasons given for the then rejection of a more explicit standard in the *Code* are instructive. Whereas it was regarded as desirable to insert a set of statutory examples of 'unconscionable conduct', this was not thought possible 'with a concept like "good faith" ... which is an overarching principle guiding how parties *should* behave to each other'.⁶⁵ Another reason, articulated by Bryan Horrigan, was that apart from in New South Wales, the doctrine of good faith has not found general recognition throughout Australia.⁶⁶ Indeed Horrigan argued that there needed to be a more developed body of law on which a statutory definition could draw before a definition was viable, and that to attempt a definition before this would add uncertainty.⁶⁷

create ambiguity and confusion and increase conflict, and (3) The fact that nothing currently prevents parties from contractually agreeing to act in good faith: Australian Competition and Consumer Commission, Submission No 60 to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Franchising Code of Conduct*, September 2008, 19.

⁶² See, eg, *Matthews Report*, above n 10, 13 where recommendation 25 states: 'A statement obligating franchisors, franchisees and prospective franchisees to act towards each other fairly and in good faith be developed for inclusion in Part 1 of the Code'. Two years later, the *Opportunity not Opportunism Report* recommended that a clause be inserted into the *Code* prescribing a good faith Standard of Conduct for franchisors, franchisees and prospective franchisees in 'relation to all aspects of a franchise agreement': at 115. It should also be noted that the Franchise Agreements Bill 2011 (WA) incorporating good faith before the Western Australian legislature was only defeated by one vote. Section 11 would have defined the duty to act in good faith as to the duty to 'act fairly, honestly, reasonably and cooperatively.' Section 2 would have required parties to a WA franchise agreement to act in good faith:

...

- (a) in any dealing or negotiation in connection with —
 - (i) entering into or renewing the agreement; or
 - (ii) the agreement; or
 - (iii) resolving, or attempting to resolve, a dispute relating to the agreement; and
- (b) when acting under the agreement.

⁶³ Introduced by *Trade Practices (Industry Codes — Franchising) Amendment Regulations 2010 (No 1)* (Cth).

⁶⁴ Explanatory Statement, Select Legislative Instrument 2010, No 125 (Cth) 5.

⁶⁵ Senate Standing Committee on Economics, above n 34, 40 [5.42] (emphasis in original).

⁶⁶ *Ibid.*

⁶⁷ *Ibid* 40 [5.43].

These objections make the proposed approach advanced in Part V of this article more pertinent. It provides not merely a stopgap solution to the deficits identified above, but principles against which to evaluate conduct as being ‘in good faith’ and ‘fair’.

3 *Good Faith following the 2013 Government Review*

In 2013, the Australian government commissioned another review of the *Code*.⁶⁸ Despite concerns over ‘good faith’, the 2013 reviewer recommended the introduction of an express obligation to act in good faith into the *Code*.⁶⁹ This recommendation was adopted and implemented in 2014 to replace the 1998 *Code*. The 2014 *Code* now provides:

6 Obligation to act in good faith

Obligation to act in good faith

- (1) Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to:
 - (a) the agreement; and
 - (b) this code.

This is the ***obligation to act in good faith***.

Civil penalty: 300 penalty units.

- (2) The obligation to act in good faith also applies to a person who proposes to become a party to a franchise agreement in respect of:
 - (a) any dealing or dispute relating to the proposed agreement; and
 - (b) the negotiation of the proposed agreement; and
 - (c) this code.

Matters to which a court may have regard

- (3) Without limiting the matters to which a court may have regard for the purpose of determining whether a party to a franchise agreement has contravened subclause (1), the court may have regard to:
 - (a) whether the party acted honestly and not arbitrarily; and
 - (b) whether the party cooperated to achieve the purposes of the agreement.

Franchise agreement cannot limit or exclude the obligation

- (4) A franchise agreement must not contain a clause that limits or excludes the obligation to act in good faith, and if it does, the clause is of no effect.
- (5) A franchise agreement may not limit or exclude the obligation to act in good faith by applying, adopting or incorporating, with or without modification, the

⁶⁸ *Trade Practices (Industry Codes — Franchising) Regulations 1998* (Cth) (‘Code’).

⁶⁹ *Wein Review*, above n 10, x–xi.

words of another document, as in force at a particular time or as in force from time to time, in the agreement.

Other actions may be taken consistently with the obligation

- (6) To avoid doubt, the obligation to act in good faith does not prevent a party to a franchise agreement, or a person who proposes to become such a party, from acting in his, her or its legitimate commercial interests.
- (7) If a franchise agreement does not:
 - (a) give the franchisee an option to renew the agreement; or
 - (b) allow the franchisee to extend the agreement;

this does not mean that the franchisor has not acted in good faith in negotiating' or giving effect to the agreement.⁷⁰

Clause 6 applies to 'parties to a franchise agreement'. It would afford franchisees no protection from decisions made by an ultimate owner of the franchise network. Significantly, many franchisors become insolvent.⁷¹ Therefore, in the context of insolvency cl 6 is problematic. An administrator is an agent of the insolvent party.⁷² The duty to act in good faith would be extended to an administrator of the franchisor or franchisee in any matter relating to the franchise agreement. An administrator has, however, an overriding duty under the *Corporations Act 2001* (Cth) to 'assist the creditors in recovering'⁷³ moneys owed to them. Clause 6(2) would give the counterparties of the insolvent party an entirely wrong expectation about the duty the administrator owed them.

This takes us to cl 6(6). It is hard to see how a franchisor would do anything other than prioritise its own interests ahead of the franchisees' interests if it could meet the good faith standard by acting purely in its own commercial interests. Clause 6(6) would not, for example, change the outcome for the franchisee in *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd*⁷⁴ where the franchisor was pursuing legitimate commercial objectives. A by-product of the franchisor's decision to exit the franchise model was that the franchisee lost the right to sell insurance products that accounted for 80 per cent of its revenue.⁷⁵ This rendered the franchisee business unviable. This would have been acceptable under cl 6(6). One can only speculate on the consequences of McDonald's telling its franchisees they could now sell everything except burgers, fries and Happy Meals®.

⁷⁰ *Competition and Consumer (Industry Codes — Franchising) Regulation 2014* (Cth) sch 1 div 3, cl 6.

⁷¹ Buchan, above n 9, 115–17.

⁷² *Corporations Act 2001* (Cth) s 437B.

⁷³ Christopher Symes and John Dunns, *Australian Insolvency Law* (LexisNexis Butterworths, 2009) 240.

⁷⁴ [2006] VSC 223 (21 June 2006).

⁷⁵ *Ibid* [6].

It is submitted that in light of the above, neither good faith, as an evolving common law standard, nor good faith in cl 6, can satisfactorily address the *ex post* legitimate expectations of franchisees. American commentator Howard Hunter put his finger on the problem when he observed that '[t]he substance of good faith derives from the expectations of the parties as expressed in the agreement itself, and so the scope of what is meant by good faith will change from agreement to agreement and party to party'.⁷⁶

An assessment of good faith in the performance of a franchise agreement, based on the flawed premise that both parties contributed to the content of the franchise agreement, is doomed. Further, not only does the notion change from agreement to agreement, but also from context to context.

C Influence of Statutes on Common Law

A fruitful line of inquiry relevant to the present article, but beyond its immediate scope, is the influence of statutory principles or the policies underlying statutes on the development of common law principles. The concept was explained by Lord Diplock in *Erven Warnink BV v J Townend & Sons (Hull) Ltd* as follows:

Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.⁷⁷

Professor Atiyah has questioned whether the courts may 'justify jettisoning obsolete cases, not because they have been actually reversed by some statutory provision, but because a statute suggests that they are based on outdated values?'⁷⁸

The question has been answered affirmatively in New Zealand⁷⁹ and in the United States.⁸⁰ However, two important qualifications to the doctrine were stated by the United States Supreme Court: the courts must ensure the express limits on the changes implemented by legislation do not thereby imply approval of the common law as it applies beyond those limits, and secondly, they must ensure the protection of the doctrine of precedent and the validity of certainty in the law.⁸¹

⁷⁶ Hunter, above n 44, 51.

⁷⁷ [1979] AC 731, 743.

⁷⁸ P S Atiyah, 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1, 6.

⁷⁹ See Gehan N Gunasekara, 'Judicial Reasoning by Analogy with Statutes: Now an Accepted Technique in New Zealand?' (1998) 19 *Statute Law Review* 177.

⁸⁰ *Moragne v States Marine Lines*, 398 US 375 (1970).

⁸¹ *Ibid* 351.

When applied to franchising the relevance of these concepts is evident. As we have seen, there has been a steady legislative trend in Australia, however, the fulfilment of this change has been left largely up to the courts. Given the encapsulation of the doctrine of good faith within that of unconscionability, it is no longer possible to argue that the provisions pertaining to unconscionable conduct⁸² and the parallel provisions of the *Code* – many catalogued below and requiring in essence fairness and transparency in dealings between franchisors and franchisee – signify legislative endorsement of the existing common law governing these relationships.

Against this backdrop particularly, attention is now turned to administrative law principles and their potential to provide criteria that would enable a common law court to measure whether discretion granted within a franchise relationship had been exercised within appropriate parameters.

IV RELEVANT ADMINISTRATIVE LAW JURISPRUDENCE

We outline below the main categories triggering the opportunity for, and the mechanisms enabling, review of administrative decisions. We suggest these afford alternative benchmarks against which franchisors could test their intended exercise of discretions.

A Limits on the Use of Discretion

Administrative decisions may proceed along two lines: review or appeal. A review to examine the legality of a decision focuses on the decision-makers' powers or authority, and on whether the decision was made within the authority conferred (*intra vires*) or was beyond its ambit (*ultra vires*).⁸³ Appeal, on the other hand, involves examining not just the legality of a decision, but its merits. This distinction has ramifications in the context of questioning commercial decisions such as those made by franchisors. A court examining a franchisor's abuse of a decision-making power conferred by contract ought not to question the decision's commercial or strategic merits. However, a court can legitimately inquire whether the decision was *intra vires* – within the scope of the power conferred by the contractual provision that confers the power in question.

The fundamental values of administrative law require decision-making authorities to be 'lawful, to act in good faith, to be [procedurally] fair and to be rational'⁸⁴ in the exercise of their powers. Franchisors are arguably, in a practical sense, in the position of decision-makers vis-a-vis franchisees, and exercise authority over them. A court assessing the validity of the exercise of the franchisor's powers under the agreement

⁸² CCA sch 2 s 22.

⁸³ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J). See also Greg Weeks, 'Litigating Questions of Quality' (2007) 14 *Australian Journal of Administrative Law* 76.

⁸⁴ French, above n 21, 23.

is essentially involved in a process of construction not dissimilar to that involving the exercise of statutory powers.

*B Good Faith, Lawfulness and Rationality, Errors of Law and
Fact Finding and Fairness*

The administrative law principles of good faith, lawfulness and rationality, errors of law and fact finding, and fairness are summarised below. In Part V we demonstrate how these principles could guide franchisors in their exercise of contractual discretions.

1 *Good Faith*

In the administrative law sphere good faith requires that decisions are made honestly and conscientiously.⁸⁵ However, under Australian administrative law, good faith signifies a broader concept than narrow dishonesty. Thus, decisions need to be made within the scope of the grant of power under which they are made. An unlawful delegation of the exercise of a power, or abdication of discretion, would constitute a breach of this requirement. There must be ‘an honest or genuine attempt to undertake the task’ to which the decision-maker has been assigned.⁸⁶ For Lord Russell, unreasonableness was found where delegated laws were ‘partial and unequal in their operation as between different classes: if they were manifestly unjust; if they disclosed bad faith; [or] if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men’.⁸⁷

Two related criteria for review — when an administrative decision-maker acts under dictation or adopts overly rigid policies — are also relevant in the context of franchising. Franchise systems are hierarchical with national, regional and master franchisees having discretion to make decisions affecting franchisees. Corporate governance principles do not underpin the relationships between players in franchise systems.⁸⁸ Where a decision-maker adopts an overly-rigid policy preventing the exercise of discretion based on the merits of individual cases, this can be challenged through judicial review. For example, a government policy that there would be no additional universities in New Zealand conflicted with a legitimate expectation that a tertiary institution’s application for university status would be properly considered.⁸⁹

⁸⁵ Ibid.

⁸⁶ *NAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 805 (26 June 2002) [41] (Hely J).

⁸⁷ *Kreuse v Johnson* [1898] 2 QB 91, 99–100 (Lord Russell) cited in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 365.

⁸⁸ Buchan, above n 9, 101–9.

⁸⁹ *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65. We note that the doctrine of legitimate expectation has been questioned in Australia. See also *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, as discussed in Janet McLean ‘Contracting in the Corporatised and Privatized Environment’ (1996) 7 *Public Law Review* 223.

It is easy to envisage similar instances occurring within the franchising framework: for example, as occurred in *Burger King*, where the franchisor adopted the strategy of not approving recruitment of franchisees by its Australian area developer in the Burger King system (discussed below).⁹⁰

Courts are reluctant to find the existence of bad faith in its narrow meaning of dishonesty or impropriety, and plaintiffs therefore rarely succeed on this ground. It has on occasion arisen in the franchising context.⁹¹ For administrative lawyers, good faith means more than the ‘mere absence of dishonesty’.⁹² Wade and Forsythe state ‘[a]gain and again it is laid down that powers must be exercised reasonably and in good faith. But, in this context, “in good faith” means merely “for legitimate reasons”’. Contrary to the natural sense of the words they import no moral obliquity’.⁹³

In other words, good faith requires consideration of the ‘purposes and criteria that govern the exercise of the power’.⁹⁴ This in turn necessitates consideration as to the lawfulness of the power’s exercise (its terms and scope) and the rationality of the decision (whether relevant criteria were considered and irrelevant ones discarded). These further grounds for judicial review and their relevance to franchise relationships will be examined next.

2 *Lawfulness and Rationality*

In considering whether a decision-maker has abused a discretionary power, the administrative courts may consider whether the person has acted lawfully and rationally. Lawfulness and rationality often overlap although this bar is also set high:

Lack of rationality may manifest in illogicality that fails to take into account mandatory relevant considerations. In such a case, there may be an error of law for failure to apply statutory criteria or an improper exercise of power. Or it may yield a decision so unreasonable that no reasonable person could have made it. A factual finding without any evidentiary base may be irrational and reviewable ...⁹⁵

We note that courts reviewing administrative decisions regard such matters as capable of measurement. Whether this basis for review is also capable of application to contractual performance and enforcement is contentious with strong opposition

⁹⁰ *Burger King* (2001) 69 NSWLR 558.

⁹¹ *Automasters* [2002] WASC 286 (4 December 2002). *Contra* discussion below of the franchisor’s conduct in *Far Horizons* [2000] VSC 310 (18 August 2000) in Part V.

⁹² French, above n 21, 28.

⁹³ William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 354.

⁹⁴ French, above n 21, 29.

⁹⁵ *Ibid* 24.

being put forward to such an extension.⁹⁶ We suggest, however, that such opposition largely stems from misapprehension as to whether the grounds for review are the so-called ‘broad’ or ‘narrow’ ‘*Wednesbury*’ grounds.⁹⁷

Thus, Morgan has no quarrel with application of the broader *Wednesbury* criteria to the exercise of contractual powers, writing:

It is orthodox in examining the way the decision has been taken (and so is, in that sense, “procedural”) rather than the quality of the decision arrived at. It requires the courts to decide, by interpretation of the relevant statutory power, which matters must be taken into account by the decision-maker, and which must not: and then to see that these have or have not been considered, accordingly. The court must also consider the motivation behind the decision, to see that this accords with the purpose for which the statutory power has been conferred.⁹⁸

By contrast, Morgan finds the narrow formulation of *Wednesbury* unreasonableness — a decision so unreasonable that no decision-maker could make it⁹⁹ — objectionable ‘because it apparently enables the courts to review the substance of a decision, rather than focusing upon the decision-making process’.¹⁰⁰ We agree that application of this standard to the exercise of contractual powers would be ‘destructive of party autonomy and commercial certainty’.¹⁰¹ We contend that the more orthodox *Wednesbury* formula does have its counterpart in the construction of contractual provisions conferring powers on one party.

Indeed the example cited by Morgan supports our thesis and is not dissimilar to ones found in the franchise arena. *Lymington Marina Ltd v MacNamara*¹⁰² involved a contractual licence and its terms permitting the licensee to sub-licence its rights under it. In construing the wording of the licence the court ruled the only permitted criterion was the suitability of the proposed sub-licensee and that the commercial interests of the marina were not a relevant criterion. The statutory matrix overlaying franchise relationships (for instance a franchisee’s rights to assign its interests) in Australia contains similar criteria.¹⁰³

Further, we cannot take exception to Morgan’s injunction that courts ‘must give full effect to a contractual term drafted to exclude any judicial review of discretion,

⁹⁶ Morgan, above n 38.

⁹⁷ Named after the decision of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (‘*Wednesbury*’).

⁹⁸ Morgan, above n 38, 233.

⁹⁹ *Wednesbury* [1948] 1 KB 223, 229 (Lord Greene MR).

¹⁰⁰ Morgan above n 38, 234.

¹⁰¹ Ibid 235. See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (French CJ) in relation to the narrow version of unreasonableness.

¹⁰² [2007] EWCA Civ 151.

¹⁰³ Code cl 20(3).

such as one conferring “absolute discretion”,¹⁰⁴ although we do not believe such broadly worded terms are desirable in franchise agreements as they can corrode relationships and trust. Neither do we support his overall conclusion that ‘the courts should go further and disclaim any jurisdiction to review the exercise of contractual discretions’.¹⁰⁵ Leaving solutions to the market alone, as he suggests, has clearly not worked where franchising is concerned, as evidenced by the large number of inquiries and legislative interventions in Australia.¹⁰⁶ The remainder of this article therefore proceeds on the basis that the broad *Wednesbury* grounds for reviewing the exercise of discretion have relevance to the exercise of contractual powers.

3 *Errors of Law and Fact-Finding*

Although being a common ground for review in administrative law, it may be thought that errors of law are unlikely to arise in a franchise relationship. Consider, however, the requirement in franchise operating manuals that franchisees must comply with all relevant health and safety regulations. An arbitrary decision by the franchisor that these requirements have not been complied with may amount to an error of law. In addition, a ‘conclusion of a fact-finding body can sometimes be so unsupportable — so clearly untenable — as to amount to an error of law’.¹⁰⁷ We suggest this thinking may be extended to decisions made by a franchisor.

Fact-finding is likely to be contentious where franchise relationships are involved. Franchisors and their agents are empowered to make findings of fact concerning aspects of the franchisee’s performance. A ‘carrot and stick’ approach sometimes involves franchisees being rewarded for attaining standards and criteria set by the franchisor, or penalised for failing to attain them. Often, however, the exercise of important rights and remedies hinges on findings of fact by a franchisor; these include the franchisee’s right to renew or assign the franchise and, most importantly, the franchisor’s right to terminate the franchise.

The criteria for fact-finding and grounds for its review devised by administrative lawyers could assist in franchising. It has been said that fact-finding falls into two categories in administrative law. In the first, the decision-maker is given the power to decide whether the requisite state of affairs exists — in other words to find out the actual facts.¹⁰⁸ As long as the fact-finding process is valid the actual finding cannot be challenged as this would amount to questioning its merits as opposed to its legality.¹⁰⁹

¹⁰⁴ Morgan, above n 38, 241.

¹⁰⁵ Ibid 242.

¹⁰⁶ See Schaper and Buchan, above n 1, Table 3 for a full list of reviews into the Australian franchising sector.

¹⁰⁷ *Bryson v Three Foot Six* [2005] NZSC 34, [26]. See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355–6.

¹⁰⁸ Geoff Airo-Farulla, ‘Reasonableness, Rationality and Proportionality’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 212, 216.

¹⁰⁹ Ibid.

In the second category, however, the power itself is contingent on the objective existence of the requisite facts:

the requisite state of affairs is a 'jurisdictional' fact on which the power's existence depends. A decision maker who acts on the basis of an incorrect finding that the fact exists has made a legal error about the power's existence. Similarly, a decision maker who refuses to act, on the basis of an incorrect finding that the fact does not exist, has also made a legal error about the power's existence.¹¹⁰

The distinction has arisen in franchising disputes such as the *Far Horizons* case in Part V.

4 *Fairness*

Administrative law requires that decisions be reached fairly, meaning that they are made impartially and are seen to be impartial, after affording a proper opportunity to those affected to be heard.¹¹¹

We can also reflect on the main rationale for the bias rule which is to encourage *good* decision-making, that is, rational decisions based on accurate findings of fact.¹¹² Such decisions are inherently likely to be superior to those influenced by ulterior considerations. Of course, in the franchising context, the franchisor's self-interest may well be one relevant consideration although it ought not to be the only one. Researchers have pointed to the perverse economic incentives franchise relationships afford for inefficient decision-making by franchisors that are able to leverage the sunk costs of franchisees.¹¹³ This explains why franchisees may remain in business despite incurring losses.

Besides impartiality, the second major requirement of fairness is the requirement to follow due process and to afford the subject of the decision an opportunity to put forward their case. As Cameron Stewart states:

Procedural fairness is due where a person enjoys a substantial benefit and expects that it will continue...if a decision is made to take away the benefit, the decision maker is bound to hear the side of the person enjoying the benefit before they make the decision.¹¹⁴

¹¹⁰ Ibid 217–18.

¹¹¹ French, above n 21, 15, 23.

¹¹² Matthew Conaglen, 'Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias' [2008] *Public Law* 58, 73.

¹¹³ See generally Hadfield, above n 6, 951–2; Roger D Blair and Francine Lafontaine, *The Economics of Franchising* (Cambridge University Press, 2005).

¹¹⁴ Cameron Stewart, 'The Doctrine of Substantive Unfairness and the Review of Substantive Legitimate Expectations' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 280-1.

The application of this principle to the circumstances where decisions are made by franchisors that affect franchisees is obvious. This is the case not only when penalties are imposed on a franchisee for non-compliance with the system, but in a myriad other instances where decisions are made by a franchisor that impact substantially on the benefits conferred by the grant.¹¹⁵

Where a franchisor exercises the right to terminate a franchise it is a requirement in Australia under the *Code* that the franchisee is given an opportunity to remedy the deficiency.¹¹⁶ This is not the same as a right to a hearing, but it is implied that the franchisee will have the opportunity to communicate the fact and degree to which it has remedied any deficiency. In *Automasters*, discussed in Part V, it transpired that the franchisor had pre-judged the question of termination, being motivated by extraneous factors. The case squarely satisfies even the subjective requirement of honesty advocated by Hooley as a basis for controlling contractual discretion.¹¹⁷ By way of contrast, in *Far Horizons*, the franchisor was not only transparent as to its decision-making processes but afforded ample opportunity to the franchisee to put its case.

A major tenet of administrative law is the balance struck by the courts between the decision's fairness and the public interest in upholding the administrator's decision, even when it is unfair.¹¹⁸ In the franchise context public interest is akin to the interests of the franchise system as a whole, assuming the system is viable. Sometimes, a decision may appear to be unfair to a particular franchisee. When viewed from the point of view of the entire system, however, the decision may be justified. What this also suggests is that, when undertaking decisions prejudicial to its franchisees, a franchisor ought to consider not just its self-interest but rather the integrity of the franchise system. This should be balanced against factors relevant to the franchisee such as the amount of its non-recoverable sunk costs.

C Accommodating Flexibility

Administrative law allows administrative decision-makers the flexibility to innovate and to adopt changes dictated by policy needs and other considerations. A decision-maker will, for instance, often amend guidelines as to how to comply with a policy. Once again, we believe that the framework provided by administrative law is adaptable to afford franchisors the freedom to make changes in response to market conditions, and to innovate, whilst ensuring that the value of fairness is preserved. As mentioned earlier, Aronson notes that 'the majority in the High Court of Australia decision *NEAT Domestic Trading Pty Ltd v AWB Ltd*¹¹⁹ "specifically reserved for future consideration the question of whether a private

¹¹⁵ For instance to vary the territory or increase royalties and advertising levies.

¹¹⁶ *Code* cl 21(2)(b).

¹¹⁷ Hooley, above n 2.

¹¹⁸ Stewart, above n 114, 283.

¹¹⁹ (2003) 216 CLR 227, 297 [49]–[50] (Gleeson CJ, McHugh, Hayne and Callinan JJ).

sector body might be reviewable’.¹²⁰ We suggest that franchisors present this opportunity.

V FRANCHISE DISCRETIONS THROUGH AN ADMINISTRATIVE LAW PRISM

Franchisors need clarity; so do franchisees. There is some English authority for the view that ‘administrative law principles are applicable in the consideration of [contract based] discretions’.¹²¹ For example, in *Paragon Finance Plc v Nash*¹²² the English Court of Appeal had to decide whether a mortgagee’s discretion to vary interest rates was subject to an implied term fettering its exercise. The Court found there was an implied term that the mortgagee was bound not to exercise the discretion ‘dishonestly, for an improper purpose, capriciously or arbitrarily’.¹²³ An example of capricious behaviour was given where interest rates were raised because of the colour of the borrower’s hair and an example of an improper purpose would be where interest rates were raised ‘to get rid of’ a nuisance borrower.¹²⁴ Hooley notes, in the context of genuinely negotiated contracts that ‘it can rarely be the intention of the parties that [apparently unfettered contractual discretion] may be exercised without restraint’.¹²⁵ Later English cases have cast doubt on the width of the Court’s dicta however.¹²⁶

On the other hand it is now beyond doubt that in Australia, at least, the prevailing common law and statutory matrix have in substance resulted in principles akin to those existing in administrative law being applicable also in the franchising context. For example the *Code* stipulates that franchisors must not unreasonably withhold consent to the transfer of a franchise,¹²⁷ and stipulates criteria that may be considered by a franchisor in withholding or giving assent for a franchisee to transfer the franchise. The list¹²⁸ contemplates the addition of other criteria in the franchise agreement.

¹²⁰ Mark Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2005) 12 *Australian Journal of Administrative Law* 79, 88–9. See also for a discussion of *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277. The case is of particular relevance to franchising, as the defendant was a statutorily created monopoly. A franchisor that is a supplier to its franchisees enjoys a role as a privately created monopoly vis-a-vis its franchisees. Its monopoly activities are subject to the lightest regulatory scrutiny via the process under s 47 of the *CCA* for notification of exclusive dealing that, without having been notified, would be a breach of the Act.

¹²¹ Peden, above n 37, 238.

¹²² [2002] 2 All ER 248.

¹²³ Ibid 261 (Dyson, Astill and Thorpe LLJ).

¹²⁴ Ibid.

¹²⁵ Hooley, above n 2, 67.

¹²⁶ See, eg, *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200.

¹²⁷ *Code* cl 20 (2)–(3).

¹²⁸ Relating to such matters as the qualifications and suitability of the transferee and the transferor’s discharge of all outstanding obligations to the franchisor.

How far such additional criteria may go before being ultra vires the requirement to be 'reasonable' is pertinent to the discussion undertaken in this article.

Jeannie Marie Paterson notes that 'courts have drawn on principles familiar in the context of judicial review of the exercise of administrative power, to require contracting parties to conform to basic standards of good decision-making'.¹²⁹ A court may find that the exercise of discretion is impliedly subject to constraints. It is in this context that the legal principles informing the exercise of the franchisor's discretionary power might draw on the criteria traditionally drawn upon in judicial review cases. We now consider examples of how the principles outlined in Part IV could clarify how the same issues may be resolved in complex private law franchise relationships.

*Automasters*¹³⁰ is a case spanning practically all the grounds traditionally pertinent to judicial review, including good faith, lawfulness, rationality and fairness. A franchisor had sought to terminate a franchise agreement despite an independent quality assessment recommending otherwise, and even though it was not satisfied the information on which the decision was based was accurate. Furthermore, the franchisor was motivated by irrelevant matters.¹³¹ Finally, the decision was procedurally unfair as the franchisor withheld details of an independent quality assessment report favourable to the franchisee, and failed to attend mediation as required by the *Code*.

Unsurprisingly, the Court found the franchisor acted unconscionably under s 51AC of the *TPA*. Had the franchisor been guided by the grounds of judicial review it would have been clear which considerations it could have taken into account.

An application of the good faith concept in the franchising arena can be seen in a United States decision. In *Dunfee v Baskin-Robbins Inc*,¹³² site location decisions under the franchise agreement remained exclusively with the franchisor, and any site relocation had to be authorised by a Baskin-Robbins Vice President. The plaintiff, whose existing site had become unsuitable, sought relocation. The Vice President was never consulted. Instead, the District Manager, after consulting with Baskin-Robbins' Divisional Manager, advised (on the basis of erroneous information) that the relocation was not possible. Although the plaintiff succeeded on the basis the franchisor was in breach of the covenant of good faith and fair dealing implied into commercial dealings in the United States,¹³³ it would equally have been possible to challenge the outcome as an unlawful delegation were administrative principles applied. Besides improper delegation, the decision to deny relocation was also procedurally unfair under administrative law criteria: not only did Baskin-Robbins fail to

¹²⁹ Jeannie Marie Paterson, 'Implied Fetters on the Exercise of Discriminatory Contractual Powers' (2009) 35 *Monash University Law Review* 45, 47.

¹³⁰ [2002] WASC 286 (4 December 2002).

¹³¹ *Ibid* [210]. Justice Hasluck found these to be the franchisee's laying of criminal charges against a former manager, one of the franchisor's favourites and the franchisee's complaint to the Australian Competition and Consumer Commission.

¹³² 720 P 2d 1148 (Mont, 1986).

¹³³ Now found in *Uniform Commercial Code*, 1 UCC § 304 (2001).

follow its own procedure for considering site relocations, but the franchisee was given inaccurate information as to the basis on which the decision had been made.

In *Dunfee v Baskin-Robbins Inc* it was also found that an alternative arguable basis for the liability of the franchisor was that it owed fiduciary duties to the franchisee in respect of the head lease. Despite discretion and power imbalances being a major focus of fiduciary duties, the imposition of such duties within franchising relationships has been rare.¹³⁴ Cases where fiduciary duties have been found to arise are outliers and involve, usually, aspects peripheral to the franchise agreement itself. One such example (as discussed below) is *Burger King*,¹³⁵ which involved a franchisee being cut out of a prospective joint venture involving a third party and the franchisor, amongst other matters.

Even here, the analogy with public law principles affords an opportunity for comparison. Although there have been instances where decisionmakers have been found to be in the position of a fiduciary these have been restricted to a narrow range of circumstances such as where an administrative discretion to apply funds exists.¹³⁶ An example was where a council was found to owe a fiduciary duty to ratepayers as to how rates moneys were spent.¹³⁷ In the franchising context it will be argued below that the enhanced transparency mandated by the disclosure provisions of the *Code* and the accountability this engenders largely removes the pressure for courts to import fiduciary duties into franchise relationships. On the other hand the *principle* of transparency can be seen to underlie both fiduciary relationships and administrative law in these instances.

A franchisor's discretionary contractual powers are often worded in identical terms to statutory powers employing unmistakably discretionary language such as 'may'. Consider, for example, the power to terminate a franchisee's grant for breaches of the agreement. It has been observed in relation to administrative law that '[e]ven the most discretionary powers are not taken to be arbitrary powers'.¹³⁸ In other words, 'discretionary powers must be exercised according to legal principles'.¹³⁹ We suggest that the principle could be similarly applicable where powers emanate from franchise agreements. In considering the *lawfulness* of a franchisor's actions, consideration

¹³⁴ A claim that the franchisor owed fiduciary duties in connection with obtaining a lease for the franchisee was unsuccessful in *Blackmore Laboratories Ltd v Diskin Pty Ltd* [1989] NSWSC (20 December 1989) [7] where McLelland J held that the franchise agreement did not permit such a term to be implied.

¹³⁵ (2001) 69 NSWLR 558.

¹³⁶ See Christine Brown, 'The Fiduciary Duty of Government: An Alternate Accountability Mechanism or Wishful Thinking?' (1993) 2(2) *Griffith Law Review* 161, 175.

¹³⁷ *Bromley LBC v Greater London Council* [1983] AC 768, 815 (Lord Wilberforce).

¹³⁸ Matthew Groves and H P Lee, 'Australian Administrative Law: The Constitutional and Legal Matrix' in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 3.

¹³⁹ Louise Longdin, *Law in Business and Government in New Zealand* (Palatine Press, 2006) 119.

ought to be given to the terms in which the franchisor's powers are framed and the constraints expressly or implicitly imposed upon them.

In the franchising context, lawfulness would require examining whether the franchisor's actions are authorised by the franchise agreement. This is a matter of construction but not always a straightforward one.¹⁴⁰ The franchisor's decision would be lawful by analogy with an administrative law paradigm, provided it complied with the framework created by the grant of the power under which the decision is made.¹⁴¹ This would take account of the kinds of changes in the external environment contemplated, for instance, by the operating manual.

A somewhat different issue arises when the franchisor's conduct does not emanate from the agreement, operating manual or other document but amounts to simple commercial pressure-tactics and leveraging off the franchisee's weak *ex ante* bargaining position. While we would not suggest stifling the normal 'give and take' of commerce or negotiating tactics that occur in the commercial world,¹⁴² the reality is that opportunistic behaviour by franchisors is a concern where much of the interaction between franchisor and franchisee takes place 'off the [formal] contract'.¹⁴³

Where the franchisor's conduct is connected to the exercise or threatened exercise of discretionary powers, review of the franchisor's actions ought to be permitted. It is precisely in these circumstances that the public law analogies are useful. A focus on the terms of the contractual discretion lends greater certainty than reliance on the 'unconscionable conduct' standard which, ultimately, suffers from the same deficiency as the Chancellor's foot.

A franchisor may have a contract-based discretion to determine facts and to make a decision based on its findings. For example, in *Far Horizons*¹⁴⁴ a franchisor's decision not to grant an existing franchisee an additional store licence was found

¹⁴⁰ See, eg, *Maranatha Ltd v Tourism Transport Ltd* (Unreported, High Court of New Zealand, Rodney Hansen J, 3 April 2007) where a franchisor decided that the cost of an airport licence fee (which the franchisor had previously absorbed) should in future be passed on to franchisees and ultimately to customers through a 'user pays' surcharge when they used the franchisees' airport shuttle services. The franchise operating manual was altered to require that the user pays surcharge set by the franchisor would apply. In addition, the franchisees were required to display and use the franchisor's current maximum fare schedule. This case has been analysed in Gehan Gunasekara, 'Standard Form Commercial Contracts, Unilateral Variation and the Legal Response: the Case of Franchising' (2007) 13 *New Zealand Business Law Quarterly* 263. In *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd* [2006] VSC 223, Dodds-Streeton J determined that the franchisor had acted within the discretionary wording of the franchise agreement, and had not acted in bad faith.

¹⁴¹ French, above n 21, 23.

¹⁴² *Australian Competition and Consumer Commission v G C Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

¹⁴³ Hadfield, above n 6, 928.

¹⁴⁴ [2000] VSC 310 (18 August 2000).

to have been made in good faith. An equally valid interpretation of the franchisor's power to grant the licence would be to ask whether the decision had been made in a *fair* manner? It had been. The franchisor, McDonald's, has a procedure for determining which franchises met the criteria for additional stores: regular QSC¹⁴⁵ assessments with feedback being given, and franchisees being graded. Under McDonald's documented policy:

An 'expandable' franchisee was one whose existing units had regularly earned at least a B grade on QSC. He or she also had to have sufficient financial and management resources to support expansion, in addition to a good record of community involvement and an attitude of cooperation with the company and other franchisees.¹⁴⁶

In *Far Horizons*, an existing licensee would qualify as eligible to take a further licence where they satisfied the McDonald's requirements in respect of seven specified criteria. One of these was the extent to which the franchisee had demonstrated a 'positive' outlook on McDonalds and its system, a criterion which had not been met by the plaintiff.¹⁴⁷ The analogy with judicial review suggests that, provided consideration had been given to the listed criteria, it would be injudicious for a court to question a franchisor's determination of the matter. The decision in *Far Horizons* indicates the judge was cognisant of precisely this danger:

My task is not to determine whether Mr Tregurtha was correct in his assessment of Mr Hackett on Positive Contribution. I am to decide whether there was material upon which Mr Tregurtha could have made the decision he reached and, even so, whether the decision was based on irrelevant or improper considerations.¹⁴⁸

Certain procedural steps must be taken before a franchisor can exercise the right to terminate.¹⁴⁹ Significantly, courts have found as a matter of construction that termination has not been reasonable where the franchisor failed to give the franchisee prior notice and an opportunity to rectify breaches.¹⁵⁰

It might be questioned whether any instances arise in franchise relationships involving the second category of *fact-finding*; that is, the franchisor's right to exercise the power in question depends on the prior existence of the fact from an objective standpoint.

¹⁴⁵ The acronym means Quality, Service and Cleanliness.

¹⁴⁶ John F Love, *McDonald's: Behind the Arches* (Bantam, revised ed, 1995) 398.

¹⁴⁷ [2000] VSC 310 (18 August 2000) [108].

¹⁴⁸ Ibid [70].

¹⁴⁹ Steps are usually set out in the relevant individual franchise agreement and, as applicable, in cl 27, 28 or 29 of the *Code*.

¹⁵⁰ See generally *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 NZLR 289, 309 (Lord Browne-Wilkinson), affirming the statements made by the New Zealand Court of Appeal; in this regard, see *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* [2000] 3 NZLR 169, 184 (Henry J).

An example is *KA Old v Snack Systems Limited*,¹⁵¹ where the franchisor's decision to withhold consent to the assignment was effectively quashed because a breach of the agreement had not been objectively established.

A separate criterion for review would be whether the franchisor acted *fairly*? Such an approach would offer an alternative to the legislative responses to reducing asymmetry that have been adopted in Australia. These have focused on enhanced disclosure, for example, of the circumstances in which franchisors have previously unilaterally varied agreements.¹⁵² This approach is reactive rather than prospective and offers less protection to franchisees than would simply requiring franchisors to act fairly.

The first element of administrative fairness – that there is no bias in decisions – is problematic where franchisors, often, are their own arbiters. For example a franchisor might determine whether franchisees have complied with the system or met franchisor-set criteria for obtaining some benefit. This is particularly the case when a franchisor has, as is likely, a pecuniary interest in the outcome. The franchisor may thus be incentivised to decide in a particular manner.¹⁵³ In *Picture Perfect v Camera House Ltd*,¹⁵⁴ for example, the franchisor used its powers to prescribe approved suppliers to change the franchisees' supplier of film products to a related company of the franchisor following a change in its ownership. The Court accepted, in interlocutory proceedings, that an arguable case existed that the purpose of the contractual power was to enable bulk buying advantages for franchisees and was not solely to benefit the franchisor or its related company. This was an instance of possible bias. The principle is thus relevant in the franchise context.

Ascertaining whether some types of decision might have been biased has been made easier by the *Code*. Franchisors are required to disclose such matters as franchisor ownership of interests in suppliers from which franchisees are required to acquire goods or services, and whether franchisors will receive any financial benefits from suppliers.¹⁵⁵ This does not prevent franchisors from making biased decisions about matters that fall outside the wording of the *Code*. An example is the decision by REDgroup Retail Pty Ltd, owner of franchisors Angus & Robertson, to appoint administrators when book retailing was in decline. The administrators concluded 'it is difficult to maintain an argument that the Group was insolvent for any material period prior to 17 February 2011'.¹⁵⁶ Administrators are placed in an awkward

¹⁵¹ (Unreported High Court of New Zealand, Master Towle, 10 August 1994).

¹⁵² *Code* cl 17A (inserted by *Trade Practices (Industry Codes-Franchising) Amendment Regulations 2010 (No 1)* (Cth)).

¹⁵³ Longdin, above n 139, 129.

¹⁵⁴ [1996] 1 NZLR 310.

¹⁵⁵ *Code* sch 1 cl 9(c), (j).

¹⁵⁶ S Sherman, J Melliush and J Lindholm, 'REDgroup Retail Pty Limited and Associated Companies (Administrators Appointed): Report by Administrators Pursuant to Section 439A(4)(a) of the *Corporations Act 2001*', (Ferrier Hodgson, 25 July 2011) 6.

position as they are bound by the *Code* but as previously noted, have concurrent overriding statutory duties under the *Corporations Act 2001* (Cth).

The disclosure obligations of the *Code* serve another purpose. Although they constitute a discrete obligation, breach of which may result in the granting of statutory remedies,¹⁵⁷ it has been observed from the public law standpoint that ‘disclosure is not an obligation, but rather a mechanism for obtaining insulation against the effects of bias law’s disqualification rule’.¹⁵⁸ It is unsurprising, then, that much franchise regulation is aimed at disclosure, particularly where conflicts are perceived to arise through franchisors having economic interests in third parties that franchisees are required to buy from. Disclosure, in these instances, removes the sting of any complaint that may otherwise arise, confirming that Australian franchise regulation conforms to the bias paradigm.

The objection that franchisors will always be found to be biased due to having a significant pecuniary interest in the exercise of their discretion can be met by the observation that, as is the case in the administrative law field, the basis for judicial intervention rests on a different ground such as improper purpose or taking into account an irrelevant consideration. Two examples will suffice.

The first example where bias arose was *Burger King*,¹⁵⁹ the culmination of a protracted dispute between Burger King and its Australian franchisee/area developer. Under a ‘Development Agreement’, Hungry Jacks was required to develop a stipulated number of restaurants each year. Having resolved to remove Hungry Jacks and resume control of the chain directly, Burger King imposed a ‘third party freeze’ by not approving recruitment by Hungry Jacks of franchisees. This ensured breach, by the latter, of its Development Agreement. Although the New South Wales Court of Appeal held that the agreement was subject to implied terms of cooperation, reasonableness and good faith, the case can also be seen as an example of procedural unfairness through lack of impartiality, in addition to irrationality due to the franchisor being influenced by improper considerations.

By contrast, the franchisor in *Far Horizons*, discussed above, ensured that the decision not to offer the additional licence was procedurally fair. Thus, the

decision as to Positive Contribution was not that of Mr Cork [a regional manager who had dealt with the franchisee]; it was [McDonalds director of operations] Mr Tregurtha’s decision. There is no evidence of personal antipathy between Mr Tregurtha and Mr Hackett....no evidence that Mr Tregurtha’s decision was the result of some direction from above or that it was affected by his knowledge that Mr Cork, and perhaps those above him, wanted to discipline Mr Hackett.¹⁶⁰

¹⁵⁷ See generally Australian Consumer Law sch 2 ch 5; *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101.

¹⁵⁸ Conaglen, above n 112, 69 (citations omitted).

¹⁵⁹ (2001) 69 NSWLR 558.

¹⁶⁰ *Far Horizons* [2000] VSC 310 (18 August 2000), [69].

VI DOCTRINAL ISSUES

Two doctrinal matters will be addressed before we conclude. First, administrative law might be said to be distinguishable from contract law due to the role played by consent in the case of the latter. However, franchise agreements do not reflect a negotiated bargain between parties; they reflect the intention of the drafting party.¹⁶¹ Just as legislative intent is that of the drafter at the time of enactment and cannot readily be changed *ex post*, the same applies in the sphere¹⁶² of standard form relational contracts. This is even more so where the legislative provision is of wide ambit, conferring discretion on a party to enact subsidiary legislation: the discretion given should not be unfettered and absolute, whether the provision conferring it emanates in contract or statute.¹⁶³ Any scrutiny of the exercise of discretion must, likewise, examine the purpose for which the discretion was conferred.

Some might argue that an application of substantive standards not apparent on the terms of the contract undermines the balance of interests struck by the parties (as encapsulated in the express terms of the franchise agreement). Therefore, such standards interfere with the basic autonomy of the contracting parties. But, as we have seen, franchise agreements are essentially incomplete and are incapable of encapsulation through express terms alone.¹⁶⁴ It may be then that the balance of interests struck by the parties requires resort to the very types furthering the fundamental purpose of the contract rather than detracting from it.

A second, related issue is that courts often apply a de facto ‘business judgment rule’ to decisions made by franchisors, effectively quarantining them from scrutiny.¹⁶⁵ To Hadfield, this approach by courts is flawed as it fails to take account of the economic imperatives present in the relational arrangements that underpin franchising.¹⁶⁶ The rule is also inappropriate as it focuses exclusively on the franchisor’s interests (‘one half’ of the franchise relationship in Hadfield’s words) as opposed to recognising the mutually co-operative nature of the interests that underlie the business format.¹⁶⁷ We agree with Hadfield in this regard.

¹⁶¹ Spencer, above n 18, 35.

¹⁶² See generally Stephen J Choi and G Mitu Gulati, ‘Contract as Statute’ (2006) 104 *Michigan Law Review* 1129.

¹⁶³ See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 348–9 [23]–[25] (French CJ).

¹⁶⁴ Hadfield, above n 6.

¹⁶⁵ Ibid 980–4.

¹⁶⁶ Ibid 983.

¹⁶⁷ Ibid.

VII CONCLUSION

Writing extra-judicially, the Chief Justice of the High Court of Australia observed:

Nature demonstrates that apparent complexity can be generated by uncomplicated rules. Fractal forms based on simple interactions are to be found in plants, animals, clouds, snowflakes, population patterns and galaxies. ... Like organic and inorganic forms in nature, the apparent complexities of different areas of the law, whether they be statute or judge-made, are frequently generated by a few underlying principles.¹⁶⁸

In this article, we have shown the truth of this statement in relation to the basic principles underlying administrative law and the principles of contractual interpretation underlying franchising agreements. We have shown that standards akin to those found in public law have been applied to the exercise of contractual powers under franchise agreements. Corcoran identifies that ‘public law is the most obvious area to impose statutory good faith obligations [in legal relationships] because the relative position of the actors tend to be such that the possibilities for abuses of power are strong’.¹⁶⁹

This article has shown that the possibilities, and the incentives, for abuses of power by franchisors (and even master franchisees), are equally compelling.

Sir Robin Cooke has stated that ‘the judicial role is ... to ensure that those responsible for decisions in the community do so in accordance with law, fairly and reasonably’.¹⁷⁰ We contend this is a principle capable of wider application, and ought to inform the interpretation of contractual powers of decision where a decision-maker acts in an administrative capacity. We have demonstrated the application of the principle to franchising relationships which fall squarely within this category.

The advantage of an approach based on administrative law principles is that it avoids having to determine whether the implication is through law or by fact — a distinction that has bedeviled Australian courts.¹⁷¹ It also relieves the courts of having to determine whether the relationship between franchisor and its franchisees is a fiduciary one. If it were then each would be bound to take account of the ‘legitimate interests of the other party’.¹⁷² The common law approach, and that enshrined in the 2014 *Code*, fall short because both provide an escape hatch for the contracting party that can justify its lack of good faith on the ground that the exercise of the particular

¹⁶⁸ French, above n 21, 15.

¹⁶⁹ Corcoran, above n 39, 11.

¹⁷⁰ R Cooke ‘The Struggle for Simplicity in Administrative Law’ in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, 1986) 5, 16–17.

¹⁷¹ See generally discussion in the cases cited by Dixon, above n 50, 235–7.

¹⁷² Corcoran, above n 39, 11.

discretion was for ‘legitimate commercial interests.’¹⁷³ This justification does not support a discretion evaluated against administrative law benchmarks.

At the same time, recourse to administrative law approaches preserves many of the best features of each mechanism by allowing the factual circumstances of each case to be taken into account along with broader issues of policy. In *Council of the City of Sydney v Goldspar Australia Pty Ltd*, Gyles J observed that

[t]he best way for a single judge to travel through this thicket [of varying opinions about implying terms as to reasonableness and good faith] is to concentrate upon the particular contractual provision in question, the particular contract, in the particular circumstances of the case.¹⁷⁴

This indeed is the same process that occurs when a court reviews a decision made by an administrator in a public law context.¹⁷⁵

In the franchising context the franchisor’s powers and discretions are usually stated in very broad terms. Does this mean the powers they confer are unlimited? As Shellar JA stated in *Alcatel Australia Ltd v Scarcella*, employing the reasoning of Barwick CJ in *Pierce Bell Sales Pty Ltd v Frazer*:¹⁷⁶

[i]f a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the power is vested or, alternatively, that the powers are being exercised in a capricious or arbitrary manner for an extraneous purpose, which is another way [sic] of saying the same thing.¹⁷⁷

The principles governing administrative law are generally well understood, whatever labels might be attached to them. Ultra vires has been described as the central principle of administrative law.¹⁷⁸ A logical application has been to examine what actions of a franchisor are within the powers conferred by the agreement, taking into account restrictions that may be imposed by the *Code*. We have seen that other principles of wide application in both public and private spheres include the requirement to act rationally, honestly and in a manner that is procedurally fair. In relation to franchising, we have argued that the criteria for judicial review provide an alternative framework for the courts to review the exercise of contractual rights by franchisors, in addition to that provided by the much-misunderstood doctrine of good faith in contractual performance and enforcement.

¹⁷³ *Competition and Consumer (Industry Codes — Franchising) Regulation 2014* (Cth) sch 1 div 3, cl 6.

¹⁷⁴ (2006) 230 ALR 437, 499.

¹⁷⁵ See generally Weeks, above n, 83.

¹⁷⁶ (1973) 130 CLR 575, 587.

¹⁷⁷ (1998) 44 NSWLR 349, 368.

¹⁷⁸ Wade and Forsyth, above n 93, 35.

We propose that clarity as to how discretion will be exercised enables both parties to align their expectations accurately. Franchisees need to appreciate that good faith and fairness cannot apply at all times, and to all parties. They do, however, need to know when it is reasonable to expect a franchisor will operate in good faith and fairly, and what that behaviour looks like. Neither the common law concept of good faith, nor the 2014 statutory measure can be the panacea their protagonists believe they will be. If, on the other hand, a franchisor's conduct was able to be assessed against the benchmarks of administrative law principles, their discretions would be able to remain in place – no change would be required to their standard contracts. But, there would be clear boundaries to curtail how they could interpret and use discretions.

Much of the uncertainty and conceptual confusion still surrounding good faith dissipates when it is observed that decisions based on it are in fact based on a more fundamental foundation of principles that also underlie administrative law. These principles would afford greater certainty to franchisors, franchisees and the courts when a dispute arises over the manner in which a franchisor exercises discretion. At the very least, it gives flesh and blood to the abstract notion of good faith. From a practical standpoint, being able to draw on administrative law paradigms in addition to contractual ones would help mediators and courts in assessing which actions of franchisors are legitimate.

In this article, we have shown that the ability to balance competing principles allows flexibility to courts when devising solutions in specific situations — such as relational contracts. As principles such as fairness under administrative law can be given greater or lesser weight than other competing principles — such as the common law principle of sanctity of contract — flexibility can be afforded to courts beyond strict adherence to the doctrine of *stare decisis* and traditional contract law doctrine.

We acknowledge that ‘judicial review is not quite as powerful in practice as it is in theory’.¹⁷⁹ However, the existence of the standard for reviewing unreasonableness is comforting. We believe it is timely for a conversation to take place between administrative law and private law. Franchise contracts provide an ideal starting place.

¹⁷⁹ H W Arthurs, ‘The Administrative State Goes to Market (and Cries “Wee, Wee, Wee” All the Way Home)’ (2005) 55 *University of Toronto Law Journal* 797, 798.

***INDEPENDENT COMMISSION AGAINST CORRUPTION
v CUNNEEN (2015) 318 ALR 391***

I INTRODUCTION

In the case of *Independent Commission Against Corruption v Cunneen*,¹ the High Court of Australia considered for the first time the scope of the New South Wales Independent Commission Against Corruption's jurisdiction to investigate 'corrupt conduct'. Turning against existing ICAC practice, a majority of the Court interpreted the operative s 8(2) provision of the *Independent Commission Against Corruption Act 1988* (NSW) as requiring corrupt conduct that adversely affects the probity, and not merely the *efficacy*, of the exercise of a public official's functions. Prior to *Cunneen*, the meaning of 'adversely affects' under s 8(2) was unclear and in need of clarification. However, the High Court's approach lacks a sound legislative or policy basis and, coupled with the New South Wales Parliament's subsequent legislative reform, unnecessarily restricts the scope of the ICAC's jurisdiction into the future.

II THE FACTS

The case arose from allegations made against Margaret Cunneen, the Deputy Senior Crown Prosecutor for New South Wales, that on 31 May 2014 she counselled the third respondent (Sophia Tilley, her son's girlfriend) to pretend to have chest pains at the scene of a motor vehicle accident to prevent police measuring Tilley's blood alcohol level. It was alleged that this was done with the intention to pervert the course of justice.² The respondents were summoned by the New South Wales ICAC to give evidence at a public inquiry to investigate the allegations, but commenced proceedings in the Supreme Court seeking a declaration that the ICAC was acting beyond its power.³ The proceedings were dismissed, but a majority of the New South Wales Court of Appeal allowed an appeal and declared that the ICAC did not have the power to conduct the inquiry,⁴ on the basis that Cunneen's alleged conduct was not 'corrupt conduct' for the purposes of s 8(2) of the Act. The ICAC applied for special leave to appeal to the High Court, which was granted, the application heard before the Full Court.

* Student Editor, Adelaide Law Review, University of Adelaide.

¹ (2015) 318 ALR 391 ('*Cunneen*').

² See *Independent Commission Against Corruption Act 1988* (NSW) s 8(2)(g) ('*ICAC Act*').

³ *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571 (10 November 2014).

⁴ *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014).

III THE ISSUES

The key issue before the Court was the scope and meaning of the phrase ‘adversely affects’ in s 8(2) of the *ICAC Act*, which deals with corrupt conduct by any person that ‘adversely affects’ the ‘exercise of official functions’ by a public official. The Court was thus concerned with the impact of Cunneen’s actions upon the investigating police officer, rather than her own functions as a prosecutor. Prior to *Cunneen*, the provisions of s 8 ‘had stood [principally] unaltered since the enactment of the *ICAC Act* in 1988’⁵ and had received minimal judicial attention.⁶ However, two alternative interpretive approaches regarding the scope of s 8(2) were presented before the Court. Firstly, the established view of the ICAC, that conduct must only affect the *efficacy or use* of the public official’s functions to constitute ‘corrupt conduct’ — ie they could have exercised their functions in a different way or come to a different decision.⁷ Or secondly, that conduct must adversely affect the *probability* of the exercise of official powers⁸ — ie it must cause officials to exercise their functions in a corrupt manner.⁹ The majority of the Court (French CJ, Hayne, Kiefel and Nettle JJ, with Gageler J in dissent) chose the second approach. It concluded the alleged conduct did not constitute ‘corrupt conduct’ under s 8(2), as it merely prevented the police from carrying out a full investigation, and dismissed the ICAC’s appeal.

IV THE DECISION

A The Meaning of ‘Corrupt Conduct’ Within Section 8

Section 8 of the *ICAC Act* contains two alternative limbs with distinct meanings for ‘corrupt conduct’. Section 8(1)(a) provides for corrupt conduct by *any person*, whether or not a public official, that ‘adversely affects’ the ‘honest or impartial’ exercise of official functions by a public official.¹⁰ It also provides in sub-ss (1)(b)–(d) for conduct by *public officials* that involves dishonesty or partiality, a breach of public trust or the misuse of public resources for private benefit. Section 8(2) provides for corrupt conduct by *any person*, whether or not a public official, that ‘adversely affects’ the exercise of official functions by a public official. However, the ‘honest or impartial’ requirement of sub-s (1)(a) is absent — instead, s 8(2) focuses on the relevant conduct of ‘any person’, requiring that it fall within one of the categories of criminal conduct listed (including bribery, tax evasion and perverting the course

⁵ *Cunneen* (2015) 318 ALR 391, 413 [98] (Gageler J). Excepting the 1990 amendment, which inserted ‘which could involve’ in place of ‘which involves’.

⁶ See *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 628; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 23.

⁷ *Cunneen* (2015) 318 ALR 391, 392 [2] (French CJ, Hayne, Kiefel and Nettle JJ).

⁸ *Ibid.*

⁹ *Cunneen v ICAC* [2014] NSWCA 421 (5 December 2014) [71] (Basten JA), [189] (Ward JA).

¹⁰ *ICAC Act 1988* (NSW) s 8(1)(a).

of justice).¹¹ Section 9 attaches the additional requirement that conduct must also constitute a criminal offence, disciplinary offence or breach of a code of conduct.¹²

B *The High Court's Approach*

1 *Context Versus Plain and Ordinary Meaning*

The majority took a contextual approach to interpreting s 8(2) of the *ICAC Act*, rejecting the 'plain and ordinary meaning' approach advocated by counsel for the ICAC. They emphasised the broad, 'protean' nature of the phrase 'adversely affect',¹³ concluding that its meaning was to be drawn from the legislative provisions surrounding it. As such, they analysed the interrelationship between ss 8(1) and (2), recognising they were not mutually exclusive and the potential for 'corrupt' conduct to fall underneath both. Section 8(6) of the Act makes specific provision for this, highlighting that the mention of a particular kind of conduct in one provision is not to be read as 'limiting the scope of any other provision'. Nevertheless, as highlighted by the majority, s 8(2) was clearly intended to do some 'additional work' by virtue of its inclusion and the absence of the phrase 'honest and impartial'.¹⁴

The majority concluded that the purpose of s 8(2) was to extend the reach of s 8(1)(c)–(d) to persons other than public officials.¹⁵ As such, the meaning of 'adversely affect' in s 8(2) was to be informed and limited by its meaning in s 8(1).¹⁶ As sub-ss (1)(b)–(d) are concerned with the 'improbability' of public officials (ie dishonesty, partiality and breach of public trust),¹⁷ a requirement of 'improbability' would be imported into s 8(2). Despite the effect of s 8(6), the majority concluded that it would be textually illogical and improbable that s 8(2) was 'directed at any broader range of improbability in the exercise of official functions' than that set out in s 8(1).¹⁸ Thus, to satisfy the requirements of s 8(2), the exercise by public officials of their official functions would have to be affected by the conduct of another person in one of the ways set out in s 8(1)(b)–(d).¹⁹ The majority thus created a requirement in s 8(2) for wrongdoing on the part of the public official *in addition to* the corrupt conduct of the other person.

By contrast, Gageler J emphasised in dissent the importance of giving statutory terms their 'ordinary grammatical meaning' before turning to consider context.²⁰ As such, his Honour highlighted that 'adversely affect' simply requires that conduct

¹¹ Ibid ss 8(2)(a)–(y).

¹² Ibid s 9(1).

¹³ *Cunneen* (2015) 318 ALR 391, 405 [57] (French CJ, Hayne, Kiefel and Nettle JJ).

¹⁴ Ibid 401–2 [38]–[42] (French CJ, Hayne, Kiefel and Nettle JJ).

¹⁵ Ibid 402 [43] (French CJ, Hayne, Kiefel and Nettle JJ).

¹⁶ Ibid 402–3 [42]–[44] (French CJ, Hayne, Kiefel and Nettle JJ).

¹⁷ Ibid 403 [46] (French CJ, Hayne, Kiefel and Nettle JJ).

¹⁸ Ibid.

¹⁹ Ibid 402–3 [42]–[44] (French CJ, Hayne, Kiefel and Nettle JJ).

²⁰ Ibid 409 [77], 410 [82] (Gageler J).

have the ‘potential to limit or prevent the proper exercise’ — ie the efficacy — of official functions.²¹ Indeed, the ordinary meaning of the phrase ‘connotes nothing more than impediment or impairment’.²² Moreover, adopting this meaning gives s 8(2) a ‘relatively precise operation’ and does not import any ‘unexpressed qualitative element’ or limitation of improbity.²³ As emphasised by Gageler J, ‘limitations and qualifications’ should not generally be read into a statutory term unless ‘clearly required by its terms or context’.²⁴ On his Honour’s interpretation of s 8 and the *ICAC Act* more broadly, no such limitation was warranted.

Rather than reading down s 8(2) to conform to s 8(1)(b)–(d), Gageler J kept in mind the operation of s 8(6) and noted the relationship between s 8(1)(a) and (2) (both directed towards the conduct of another person), concluding that s 8(2) was intended to have a different scope of operation.²⁵ Moreover, looking to the Act as a whole, his Honour argued that the general power given to the ICAC in s 2A to investigate corruption ‘involving or affecting’ public officials should logically correspond to the more specific type of corrupt conduct defined in s 8 — with s 8(1) intended to cover conduct *involving* public officials, and s 8(2) relating to conduct *affecting* public officials, without requiring any wrongdoing or improbity on their part.²⁶

Rather than complicating the meaning of ‘adversely affect’ in s 8(2) by reference to s 8(1), Gageler J took a more logical approach — looking to the ordinary meaning of the phrase, the words parliament had intentionally used and omitted, and the actual structure of the section. This approach also helps to rationalise the inclusion of the criminal offences in s 8(2)(a)–(y) of the Act, which direct attention towards the conduct of the *other person* and implicitly suggest that this conduct is itself serious enough to negate the need for the public official to also act in a corrupt manner.²⁷

2 Purpose, Objects and Legislative History

As a general principle of statutory construction, the purpose and objects of a piece of legislation can be taken into account in its initial interpretation.²⁸ Moreover, extraneous legislative materials can be considered to confirm the ordinary meaning

²¹ Ibid 409 [74], 410 [81] (Gageler J), citing *Cunneen v Independent Commission Against Corruption* [2014] NSWCA (5 December 2014) 421 [22] (Bathurst CJ).

²² Ibid 410 [82] (Gageler J).

²³ Ibid.

²⁴ Ibid 409 [77] (Gageler J), quoting *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 310. See also, *Thompson v Goold & Co* [1910] AC 409, 420.

²⁵ *Cunneen* (2015) 318 ALR 391, 409 [76], [79] (Gageler J).

²⁶ Ibid 410 [83] (Gageler J).

²⁷ See also Explanatory Note, Independent Commission Against Corruption Bill 1988 (NSW), pt 3, cl 8(2).

²⁸ *Acts Interpretation Act 1987* (NSW) s 33. The same principle also applies at the federal level, see: *Acts Interpretation Act 1901* (Cth) s 15AA.

of a term or to resolve an ambiguity.²⁹ As highlighted by the High Court in *Cunneen*, the role of the Court in statutory construction is then to ‘choose from among the range of possible meanings the meaning which parliament should be taken to have intended’.³⁰

In seeking to determine the scope of s 8(2) of the *ICAC Act*, both the majority and Gageler J drew upon the legislative materials relating to the original Independent Commission Against Corruption Bill of 1988. The majority emphasised by reference to the second reading speech that the ICAC was not ‘intended to function as a general crime commission’,³¹ and that the wider efficacy-based interpretation of s 8(2) would result in the inclusion of a ‘wide variety of offences having nothing to do’ with the common understanding of ‘corruption’ within the scope of the ICAC’s investigative power.³² Including, for instance: the telling of lies to a police officer; harbouring a criminal; or even the stealing of a public authority’s vehicle, such as a garbage truck).³³ Justice Gageler, however, countered the majority’s argument with his own equally ‘improbable’ and ‘inconvenient’ consequences if the ‘narrower probity’ reading of s 8(2) were adopted.³⁴ Just as it may be undesirable for the ICAC to investigate an ‘isolated case of a witness telling a lie to a police officer’ (as in the present case), Gageler J suggested that the ICAC should not lack the power to ‘investigate, expose, prevent or educate about State-wide endemic collusion among tenderers in tendering for government contracts’.³⁵

As Gageler J validly points out, either outcome could be seen as contrary to the objects of the Act and the underlying purpose of the ICAC.³⁶ As such, this line of argument does little to clarify the preferred statutory construction; indeed, ‘the suggested absurdities rather cancel each other out’.³⁷ Moreover, it disregards the role of ss 12A and 20(3) of the Act, which provide a ‘legislative answer’ by directing the exercise of the ICAC’s discretionary powers towards corrupt conduct of a ‘serious and systemic’, and not merely ‘trivial’, nature.³⁸

²⁹ *Acts Interpretation Act 1987* (NSW) s 34(1), (2)(e). Again, the same principle also applies at the federal level, see: *Acts Interpretation Act 1901* (Cth) s 15AB.

³⁰ *Cunneen* (2015) 318 ALR 391, 405 [57] (French CJ, Hayne, Kiefel and Nettle JJ).

³¹ *Ibid* 405 [54] (French CJ, Hayne, Kiefel and Nettle JJ). See also [4], quoting New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 674–5.

³² *Cunneen* (2015) 318 ALR 391, 404–5 [52] (French CJ, Hayne, Kiefel and Nettle JJ).

³³ *Ibid*.

³⁴ *Ibid* 412 [92] (Gageler J). See also 411–13 [89]–[93].

³⁵ *Ibid* 412 [92] (Gageler J).

³⁶ *Ibid* 412–13 [93] (Gageler J).

³⁷ Peter Heerey, ‘Corrupt Conduct: the ICAC’s *Cunneen* Inquiry’ [2015] *Bar News: The Journal of the New South Wales Bar Association* 49, 51.

³⁸ *Ibid* 413 [95] (Gageler J). This is supported in practice, with the ICAC only undertaking four (out of a total 125) investigations into corrupt conduct under the broader efficacy-based interpretation of s 8(2) since December 1990: Murray Gleeson and Bruce

Justice Gageler further noted the lack of any express indication in the broader legislative materials that s 8(2) was intended to import a requirement of ‘probity’.³⁹ Public administration and the investigation of public rather than private individuals is clearly a central focus of the Act,⁴⁰ however, references to ‘honesty’ or ‘corruption connected with public administration’⁴¹ do little to clarify whether s 8(2) is directed towards the probity of individual public officials, or public administration more broadly. A review into the ICAC’s jurisdiction in 2005 failed to provide any additional guidance. Despite the recommendations of Mr Bruce McClintock SC to place sub-ss 8(1) and (2) in separate sections to ‘distinguish more clearly between corrupt conduct *by* public officials and [indirect] corruption *of* public administration’,⁴² these were not adopted by the New South Wales Parliament.

C The ‘Ordinary’ Understanding of Corruption

The legislative materials surrounding the *ICAC Act* provide little meaningful guidance regarding the interpretation of s 8(2). However, looking to the overarching purpose of the Act and the ordinary understanding of corruption, the broader approach of Gageler J has a more supportable basis. The majority in *Cunneen* invoked the concept of an ‘ordinary’ understanding of corruption on several occasions, but limited it to implying ‘dishonest or partial exercise of an official function’ — ie improbity.⁴³ The majority concluded that this narrower interpretation accords more closely with the objects of the Act on the basis that it only allows those offences affecting the ‘integrity’ of public administration to fall within the ICAC’s jurisdiction.⁴⁴ This, however, sets an ambiguous threshold and rests on a presumption that ‘corruption’ as it is commonly understood necessarily requires an element of ‘improbity’ on the part of both individuals involved. Moreover, to reason that the ‘the provisions of the *ICAC Act* as a whole ... operate more harmoniously’⁴⁵ on this interpretation is

McClintock, ‘Independent Panel — Review of the Jurisdiction of the Independent Commission Against Corruption: Report’ (Report, NSW Department of Premier and Cabinet, 30 July 2015) (*‘Independent Panel Report’*) 30–1.

³⁹ *Cunneen* (2015) 318 ALR 391, 414–15 [101]–[102] (Gageler J).

⁴⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 676.

⁴¹ *Ibid* 675–6.

⁴² *Cunneen* (2015) 318 ALR 391, 416–17 [109] (Gageler J), quoting Bruce McClintock, ‘Independent Review of the Independent Commission Against Corruption Act 1988: Final Report, 2005’ (Report, 2005) 53 [4.3.5] (emphasis in original) (*‘2005 Report’*).

⁴³ *Ibid* 401 [38] (French CJ, Hayne, Kiefel and Nettle JJ), citing *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014) [62] (Basten JA).

⁴⁴ *Cunneen* (2015) 318 ALR 391, 403 [46] (French CJ, Hayne, Kiefel and Nettle JJ). See *ICAC Act 1988* (NSW) s 2A(a) for use of the word ‘integrity’.

⁴⁵ *Cunneen* (2015) 318 ALR 391, 406 [59] (French CJ, Hayne, Kiefel and Nettle JJ).

erroneous, as it retrospectively adjusts the meaning of ‘corruption’ in s 2A to fit the Court’s chosen construction of s 8(2).⁴⁶

By contrast, Gageler J acknowledged that ‘corruption’ connotes a broader ‘moral impropriety’ and has ‘never acquired a more precise’ legal or ordinary meaning.⁴⁷ Indeed, corruption ‘takes its meaning from its context’⁴⁸ and is a question of fact and degree in the circumstances of each case. In light of the Act’s overarching purpose — to establish the ICAC with a broad mandate to combat endemic corruption and increase public confidence in the integrity of the New South Wales public administration as a whole⁴⁹ — a more expansive and inclusive approach towards determining what constitutes corrupt conduct under s 8(2) would surely have a more sound legislative and policy basis. As suggested by both Gageler J in *Cunneen* and McClintock in his 2005 Report, conduct should be considered corrupt for the purposes of the *ICAC Act* ‘because of its potential to adversely affect official functions’, such that the integrity of the public official has been perceivably undermined, not because of any wrongdoing on their part.⁵⁰

This broader approach to the statutory construction of s 8(2) is also supported by past practice of the ICAC in carrying out its investigations. For instance, its finding of corrupt conduct where an individual had fraudulently provided forged trade qualifications in licence applications to the Department of Fair Trading (‘Operation Squirrel’),⁵¹ and where a person had falsely claimed academic qualifications that mislead officials dealing with his application, allowing him to become a public official by fraudulent means (‘Operation Bosco’).⁵² Such corrupt conduct clearly has the capacity to reduce public confidence in the integrity of public administration, yet it would fall beyond the scope of the ICAC’s jurisdiction under the narrower probity-based interpretation of s 8(2) taken by the majority in *Cunneen*. It is broadly impermissible to rely upon the ICAC’s previous actions — undertaken

⁴⁶ By reasoning in this way, the majority in *Cunneen* appears to engage in the type of circular, syllogistic argument for which it criticises the majority in the earlier Court of Appeal decision in their interpretation of the legislation: Ibid 400 [33] (French CJ, Hayne, Kiefel and Nettle JJ).

⁴⁷ *Cunneen* (2015) 318 ALR 391 409 [76] (Gageler J).

⁴⁸ *Independent Panel Report*, above n 38, 22.

⁴⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 673, 675.

⁵⁰ *Cunneen* (2015) 318 ALR 391 416–7 [109] (Gageler J), quoting McClintock, 2005 Report, above n 42, 53 [4.3.3].

⁵¹ *Cunneen* (2015) 318 ALR 39 415 [103] (Gageler J), citing Independent Commission Against Corruption, ‘Report on Investigation into Certain Applications Made to the Department of Fair Trading for Building and Trade Licences’ (Report, November 2003). See also, *Independent Panel Report*, above n 38, 31 [6.3].

⁵² *Cunneen* (2015) 318 ALR 39 415 [104] (Gageler J), citing Independent Commission Against Corruption, ‘Report on Investigation into Mr Glen Oakley’s Use of False Academic Qualifications’ (Report, 2003). See also, *Independent Panel Report*, above n 38, 31 [6.3].

in purported pursuance of its legislative mandate — to determine the appropriate statutory construction of s 8(2). However, in light of the New South Wales Parliament's decision not to adopt McClintock's proposed s 8 reforms in 2005, it could be argued (as Gageler J indeed does) that this evidenced an express intention by Parliament not to override the existing (ie broader, efficacy-based) interpretation of the section, as relied upon in previous ICAC investigations.⁵³

V LOOKING TO THE FUTURE — LEGISLATIVE CHANGE AND THE SCOPE OF THE ICAC'S POWER

Despite concerns about the impact of *Cunneen* upon the validity of prior ICAC investigations and findings,⁵⁴ the state of the law has since been clarified. In May 2015, the New South Wales Parliament introduced the *Independent Commission Against Corruption Amendment (Validation) Act 2015* to retrospectively validate ICAC actions previously taken under s 8(2),⁵⁵ and in September 2015 a bill implementing the recommendations of an Independent Panel commissioned by the New South Wales Government to investigate the scope of the ICAC's power was passed.⁵⁶ The esteemed Panel, comprised of former High Court Chief Justice the Honourable Murray Gleeson AC and the aforementioned Mr Bruce McClintock SC, made two key recommendations which were both adopted by Parliament: firstly, to leave s 8(2) unchanged but extend the ICAC's jurisdiction regarding 'corrupt conduct' to include certain acts of 'non-public officials that could impair public confidence in public administration' in a new s 8(2A);⁵⁷ and secondly, to limit the ICAC's power to make findings of 'corrupt conduct' against individuals to 'serious' cases under a new s 74BA.⁵⁸

⁵³ *Cunneen* (2015) 318 ALR 391, 417–18 [111]–[115] (Gageler J). It is worth noting, however, that this argument is potentially limited by the fact that Parliament did choose to adopt other of McClintock's recommendations in 2005, namely, insertion of ss 2A and 12A into the *ICAC Act*.

⁵⁴ Eg *Operation Credo* and *Spicer*. See, eg, Independent Commission Against Corruption — New South Wales, 'Public Statement Regarding *ICAC v Cunneen*' (Public Statement, 20 April 2015); Australian Broadcasting Corporation, 'Corruption Findings Face Legal Challenge After ICAC'S High Court "Disaster"', 7.30, 15 April 2015 (Adam Harvey) <<http://www.abc.net.au/7.30/content/2015/s4217249.htm>>.

⁵⁵ See Explanatory Note, Independent Commission Against Corruption Amendment (Validation) Bill 2015 (NSW). Validity upheld by *Duncan v ICAC* [2015] HCA 32 (9 September 2015).

⁵⁶ Independent Commission Against Corruption Amendment Bill 2015 (NSW). See the second reading speech: New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 2015 (Mike Baird). See also *Independent Panel Report*, above n 38, vii.

⁵⁷ Explanatory Note, Independent Commission Against Corruption Amendment Bill 2015 (NSW), 1. See Independent Commission Against Corruption Amendment Bill 2015 (NSW) sch 1 cl 3, inserting s 8(2A) into the *ICAC Act 1988* (NSW).

⁵⁸ Explanatory Note, Independent Commission Against Corruption Amendment Bill 2015 (NSW), 1. See Independent Commission Against Corruption Amendment Bill 2015 (NSW) sch 1 cl 15, inserting s 74BA into the *ICAC Act 1988* (NSW).

The Panel acknowledged the uncertainty surrounding the scope of s 8(2) prior to *Cunneen* and thus accepted the decision of the High Court as authoritatively producing a ‘coherent statutory policy, resting on a widely accepted understanding of corruption’.⁵⁹ Moreover, the Panel adopted the unnecessarily restrictive reasoning of the Court with regards to the intended scope of s 8(2), including its invocation of absurd results and argument that an otherwise broad and inappropriate amount of conduct would come within the scope of the ICAC’s jurisdiction.⁶⁰ However, it also (correctly) recognised that the Court’s construction of s 8(2) left ‘beyond the scope of corrupt conduct [and beyond the ICAC’s investigative jurisdiction] some matters which should be covered’.⁶¹ Namely, the type of conduct previously investigated by the ICAC under s 8(2) and highlighted by Gageler J in *Cunneen* — including, for instance, collusive tendering for government contracts and fraudulently obtaining government approvals, leases and employment.

As such, the Panel’s proposal to insert a supplementary s 8(2A) (and the New South Wales Parliament’s action to legislate accordingly) was both a necessary and beneficial outcome, as it ensures that the ICAC’s investigative jurisdiction is not unduly constrained by the narrow statutory construction adopted by the majority of the High Court in *Cunneen*. It maintains the *ICAC Act*’s focus on preserving the ‘integrity and reputation of public administration’, but ensures that conduct not involving any wrongdoing by a public official (such as that mentioned above) can still fall within the scope of ‘corrupt conduct’ in s 8 where that conduct impairs or could impair ‘public confidence in public administration’.⁶² Moreover, the Panel’s Independent Report explicitly makes clear that this reference to confidence is ‘not confined to faith in the *probity* of individual public officials’⁶³ — thus resolving any potential legislative ambiguity as was formerly connected with the phrase ‘adversely affect’ in s 8(2). Importantly, the insertion of s 8(2A) helps to ensure that such indirect, yet potentially serious and systemic, corrupt conduct does not go un-investigated — especially given that other New South Wales public authorities with potential jurisdiction, including the police, DPP and Crime Commission, often lack the extensive investigatory and coercive powers afforded to the ICAC under the Act.⁶⁴

In his second reading speech for the September 2015 Bill, Premier Mike Baird highlighted that the Panel’s recommendation constituted a ‘fresh approach’ to the

⁵⁹ *Independent Panel Report*, above n 38, ix.

⁶⁰ See, eg, *ibid*, 24 [4.2.8].

⁶¹ *Ibid* ix.

⁶² *Ibid* ix–x; Independent Commission Against Corruption Amendment Bill 2015 (NSW) sch 1 cl 3.

⁶³ *Independent Panel Report*, above n 38, 40 (emphasis added), also quoted in New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 2015 (Mike Baird) 1.

⁶⁴ See, eg, *ICAC Act 1988* (NSW) divs 2-3, ss 17(1), 24(3), 26, 33, 37. ICAC is not, for instance, bound by the rules of evidence, can override privilege and the right against self-incrimination in certain circumstances, and has the power to conduct compulsory examinations and public inquiries.

scope of s 8, neither supporting the ‘broader definition of corrupt conduct proposed by the ICAC’, nor limiting the ICAC’s jurisdiction to the ‘High Court’s narrower definition’.⁶⁵ This reflects the difficult balancing Act required by the Independent Panel and the New South Wales Parliament in seeking to amend the *ICAC Act* post-*Cunneen* — characterised by, on the one hand, a desire to uphold the High Court’s interpretation as a gesture of legal deference and to maintain legal certainty in light of past confusion about the scope of s 8(2), coupled with a recognition that the result in *Cunneen* did not necessarily reflect the type of conduct that should fall within the scope of the ICAC’s jurisdiction in practice. This perhaps helps to explain why the Independent Panel considered the insertion of the new s 8(2A) as a legislative matter ‘for Parliament’,⁶⁶ yet found the novel construction of s 8(2) to properly lie within the High Court’s jurisdiction.

The proposed s 74BA (to explicitly constrain ICAC investigations solely to ‘serious’ cases) is, however, more difficult to rationalise. It smacks of a political impetus to appear to be restricting the ICAC’s powers, without proper regard for the terms or objects of the legislation, or indeed the ICAC’s past track record. In light of the operation of the existing ss 12A and 20(3) in the Act, it simply appears unnecessary.⁶⁷ Moreover, it unreasonably restricts the ability of the ICAC to effectively investigate corrupt conduct. As the ICAC itself submitted to the Independent Panel, often the ‘degree of seriousness of conduct or whether it raises systemic issues’ will not be *prima facie* apparent and the scope for ‘further investigation’ is thus necessary.⁶⁸ Corruption is, by its very nature, ‘secretive and difficult to elicit’.⁶⁹ A similarly restrictive provision in Victoria’s Independent Broad-based Anti-Corruption Commission legislation, introduced in 2011, has been widely criticised on the same basis.⁷⁰

⁶⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 2015 (Mike Baird) 1.

⁶⁶ *Independent Panel Report*, above n 38, 29 [5.4.3–4].

⁶⁷ *Ibid* 65 [9.6.8]. See above n 38.

⁶⁸ *Ibid* 67 [9.7.2].

⁶⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 675.

⁷⁰ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 60(2): ‘The IBAC *must not* conduct an investigation under subsection (1) unless it is reasonably satisfied that the conduct is serious corrupt conduct.’ (emphasis added) See also, Stephen Charles, ‘Victoria’s Corruption Body Lacks ICAC’s Bite’, *The Age* (online) 11 September 2014 <<http://www.theage.com.au/comment/victorias-corruption-body-lacks-icacs-bite-20140910-10etp7.html>>; Royce Miller, ‘IBAC Admits it Cannot Do its Job’, *The Age* (online), April 16 2014, <<http://www.theage.com.au/victoria/ibac-admits-it-cannot-do-its-job-20140415-36pv9.html>>; Peter Sise, *Victoria’s New Independent Broad-Based Anti-Corruption Commission Becomes Fully Operational* (14 March 2013) Clayton Utz <http://www.claytonutz.com/publications/edition/14_march_2013/20130314/victorias_new_independent_broad-based_anti-corruption_commission_becomes_fully_operational.page>.

New South Wales Premier Mike Baird sought to justify the proposed s 74BA on the basis that a balance needed to be struck between the ICAC's 'extraordinary' powers and their ability to 'abrogate fundamental rights and privileges'.⁷¹ This is a crucial point and lies at the heart of the Act.⁷² However, as Gageler J highlights in *Cunneen*, the intrusive nature of the ICAC's powers and its ability to use those powers coercively in conducting investigations is not itself sufficient reason to narrowly interpret the operative provisions of the *ICAC Act* — '[t]here is no common law right not to be investigated for a crime'.⁷³ This does not negate the need for oversight and regular review of the ICAC's jurisdiction, but we should not be too quick to allow the Courts to overrule express legislative provision of an intentionally broad, discretionary power.

VI CONCLUSION

The decision of the High Court in *Cunneen* has had far-reaching consequences for the scope of the New South Wales ICAC's power to investigate corrupt conduct and for statutory interpretation more broadly. What began as an isolated investigation into lies allegedly told by a senior crown prosecutor to a New South Wales police officer has ended in significant legislative change and a restricted investigative mandate for the ICAC. The scope of s 8(2) had long been unclear, and it is with some relief that the law, at least, is now settled. However, the unduly restrictive approach of the majority in *Cunneen* should be carefully critiqued. Their reasoning invokes unnecessarily complex methods of statutory construction and is not clearly supported by either the legislative history of the Act, its overarching purpose or past practice of the ICAC.

The subsequent legislative reforms by the New South Wales Parliament, based as they were upon the recommendations of the Independent Panel Report, display a similarly flawed approach. Rather than approaching what was a poorly drafted and ambiguous legislative power in s 8(2) — and addressing the fundamental question of the proper scope of the ICAC's power — in a considered, consultative and responsive manner, Parliament's proposed insertion of s 8(2A) appears merely as a band-aid solution to remedy the effects of the High Court's decision in *Cunneen*. Although it creditably ensures that certain conduct by persons other than public officials may still fall within the scope of s 8 'corrupt conduct' if it affects public confidence in public administration, it is essentially the product of complex and unnecessary judicial reasoning and a long-standing failure by the New South Wales Parliament to remedy

⁷¹ Explanatory Note, Independent Commission Against Corruption Amendment Bill 2015 (NSW), 3.

⁷² New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 675.

⁷³ *Cunneen* (2015) 318 ALR 391 411 [87] (Gageler J). Indeed, in invoking the 'principle of legality', the majority fails to explicitly 'identify any right or principle ... put in jeopardy' by continuing to allow the ICAC to investigate conduct under the broader efficacy-based construction of s 8(2), as opposed to the narrower probity-based construction it ultimately adopted: *Ibid* 411 [86]–[88] (Gageler J), and see 404 [54] (French CJ, Hayne, Kiefel and Nettle JJ).

deficiencies in the construction of s 8 of the *ICAC Act*. Additionally, the proposed insertion of s 74BA appears to ignore the existing limitations placed upon the ICAC's jurisdiction by the 'serious' and 'systemic' requirements in ss 12A and 20(3) of the Act, unnecessarily restricting the ICAC's much-needed discretion to investigate a broad range of corrupt conduct still plaguing the New South Wales public sector.

Ultimately, *Cunneen* has generated a process of retrospective legislative amendments that not only limits the effectiveness of the ICAC in seeking to investigate and prevent corrupt conduct, but also fails to present a coherent policy towards combatting corruption in the New South Wales public administration into the future. This is reflective of a state government that is increasingly questioning the role and purpose of its once groundbreaking and widely respected Independent Commission Against Corruption.⁷⁴ However, it also reflects a broader confusion about the proper role of the Courts vis-à-vis Parliament in making the law of this country. *Cunneen* reveals the potentially tumultuous consequences when Parliament fails to make clear its intention with regards to the interpretation and operation of legislation, leaving the courts to reach a statutory construction which appears to be at odds with the legislative history, objects and effective operation of the Act.

⁷⁴ See, Office of the Inspector of the Independent Commission Against Corruption, 'Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988 Operation "Hale" ICAC re Margaret Cunneen SC & Ors' (Report, Independent Commission Against Corruption, New South Wales, 4 December 2015); and see, eg, Paul Kelly, 'Anti-Corruption Body Loses Its Way', *The Australian*, 5–6 December 2015, 15–6; Michaela Whitbourn, 'ICAC "acted illegally" in Margaret Cunneen inquiry, Inspector says', *The Sydney Morning Herald* (online), 5 December 2015 <<http://www.smh.com.au/nsw/icac-acted-illegally-in-margaret-cunneen-inquiry-inspector-says-20151203-glfbvd>>.

DALLAS BUYERS CLUB LLC v IINET LTD **[2015] FCA 317 (7 APRIL 2015)**

I INTRODUCTION

In the case of *Dallas Buyers Club LLC v iiNet Ltd*,¹ Perram J of the Federal Court of Australia exercised the Court's discretion under r 7.22 of the *Federal Court Rules 1979* (Cth) ('FCR') and ordered for the preliminary discovery of certain account holder details held by the six internet service provider ('ISP') respondents. However, cautious of Dallas Buyers Club LLC's ('DBC') endeavours, his Honour stayed the order pending the applicant satisfying certain requirements. This case note considers the reasonableness of Perram J's judgment against the backdrop of the FCR, as well as domestic and international case law. It then evaluates the influence of the decision upon the broader Australian society. This case note concludes with the acceptance of Perram J's reasoning, however questions the impact of the decision in light of recent legislative and market reform in the sphere of illegal downloading.²

II BACKGROUND

A Factual Background

The factual details of DBC's application were relatively brief. Using software called Maverik Monitor 1.47 ('Maverik Monitor'), DBC contended that it had identified 4,726 IP addressees³ that had unlawfully shared its copyrighted film, Dallas Buyer's Club, via BitTorrent (a peer-to-peer file sharing network).⁴ DBC alleged that such sharing amounted to an infringement of their copyright under the *Copyright Act 1968* (Cth). And, while DBC could not personally identify the infringers, it submitted that the evidence arising from the Maverik Monitor indicated that each of the ISPs possessed unique IP account information that could assist in the culprits' identification. Therefore, DBC asked the Court to exercise its r 7.22 powers and order that the ISPs produce such information for DBC's examination.

* Student Editor, *Adelaide Law Review*, The University of Adelaide.

¹ [2015] FCA 317 (7 April 2015) ('*Dallas Buyers Club*'). The application was brought by United States corporation Dallas Buyers Club LLC and its United States parent corporation, Voltage Pictures LLC ('Voltage').

² Although copyright infringement pursuant to the *Copyright Act 1968* (Cth) does not amount to a criminal offence, the common phrase 'illegal downloading' will be employed to connote a breach of civil law in the context of online piracy.

³ Internet Protocol addresses.

⁴ *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [1].

In a more broader, nationwide context, the application was brought at time when the issue of illegal downloading was amongst considerable scrutiny — and for good reason. Reports have shown that over one quarter of Australian internet users regularly engage in illegal downloading activities, primarily targeting music tracks, films, television programmes and video games.⁵ Further, pirating in Australia is said to cost the domestic economy alone an estimated \$900 million each year.⁶ Interestingly, in defence of their misbehaviour, pirates often assert that the legal means of obtaining their downloaded content is excessively (and unjustifiably) priced.⁷ Thus ironic, it would seem, that the Dallas Buyer's Club film is about a HIV-positive male who, unable to afford overly priced medication, circumvents the law in order to treat both himself and other sufferers of the HIV/AIDS virus. That aside, however, given the heightened issue of illegal downloading in Australia, the *Dallas Buyers Club* decision was closely monitored by aggrieved filmmakers, anxious pirates and the like.

B Legislative Framework

Similar to the operation of a 'Norwich Pharmacal Order' in equity,⁸ under r 7.22 of the *FCR*, where a 'prospective applicant'⁹ believes they have a right to obtain relief against an unidentified party, they may seek the assistance of the court to identify that person. Rule 7.22 relevantly provides:

- (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant satisfies the Court that:
 - (a) there may be a right for the prospective applicant to obtain relief against a prospective respondent; and
 - (b) the prospective applicant is unable to ascertain the description of the prospective respondent; and
 - (c) another person (the other person):
 - ...
 - (ii) has, or is likely to have, or has had, or is likely to have had, control of a document that would help ascertain the prospective respondent's description.
- (2) If the Court is satisfied of the matters mentioned in subrule (1), the Court may order the other person:

⁵ TNS, 'Online Copyright Infringement Research: A Marketing Research Report' submission to the Department of Communications, 24 June 2015, 3.

⁶ Australian Content Industry Group, 'The Impact of Internet Piracy on the Australian Economy' (February 2011) Australian Policy Online <<http://apo.org.au/research/impact-internet-piracy-australian-economy>>.

⁷ TNS, above n 5, 5.

⁸ Deriving from the UK case, *Norwich Pharmacal Co v Commissioners of Customs & Excise* [1974] AC 133.

⁹ As defined by r 7.21.

...

- (b) to produce to the Court at that examination any document or thing in the person's control relating to the prospective respondent's description; and

Importantly, although a party may satisfy the basic requirements of r 22(1), the inclusion of the term 'may' in r 22(2) signifies that any order remains at the discretion of the court.

III ISSUES

The ISPs sought to object DBC's application on a number of technical, arguably 'ambitious' bases.¹⁰ Indeed, as Perram J noted, the strategy of the respondents placed 'nearly everything in issue'.¹¹ Nonetheless, notwithstanding the volume of matters before the Court, the application gave rise to three broad questions. First, does the application meet the threshold requirements of preliminary discovery under r 7.22? Second, if the answer to the first question is yes, should the Court exercise its discretion and order that the ISPs provide DBC with the subject account holder details? And third, if the Court is to exercise its discretion, should it impose conditions upon its order?

IV DECISION

After having determined that the 'matter be listed [at a later date] for the making of orders',¹² on 6 May 2015 Perram J ordered for the preliminary discovery of relevant account holder names and residential addresses — subject, however, to specific conditions regarding the use of the disclosed information.¹³ So as to enforce compliance, Perram J further ordered that the process of discovery be stayed until his Honour was satisfied that DBC had met the set requirements.¹⁴

The reasoning of Perram J's decision will now be discussed in detail. However, as stated above, his Honour's verdict involved the consideration of a broad range of issues. As such, this case note will be limited to the discussion of legal matters central to the decision.¹⁵

¹⁰ *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [30].

¹¹ *Ibid* [4].

¹² *Ibid* [110].

¹³ *In Dallas Buyers Club LLC v iiNet Limited (No 3)* [2015] FCA 422 (6 May 2015).

¹⁴ *Ibid*.

¹⁵ The consideration of all tenuous contentions raised by the respondents, such as the reliability of the Maverik Monitor or the true owner of the Dallas Buyers Club film, offers little value to the understanding of the Court's decision.

A *The Operation of Rule 7.22*

In the context of the *Dallas Buyers Club* decision, the wording of r 7.22 is relatively straightforward. An applicant (DBC) must illustrate to the court that it *may* have a right to obtain relief against a party that it cannot independently identify. Furthermore, the applicant must show that another person (each ISP) has, or is likely to have, a document *that would help ascertain* the identity of the alleged wrongdoer. On its face, therefore, DBC's application would appear satisfactory.

1 *The Strength of the Prospective Action*

It was put forth by the ISPs that the evidence obtained by the Maverik Monitor failed to reveal 'substantial' copyright infringement.¹⁶ This argument arose from the expert report filed by DBC,¹⁷ which detailed the general process of downloading a file from the BitTorrent network.¹⁸ Notably, the expert report revealed that each file downloaded from the network is broken down into many 'pieces'¹⁹ for the 'efficient distribution to participants.'²⁰ Hence, each BitTorrent user will effectively download various 'slivers of a film from ... multiple computers.' And, in turn, each user will only distribute small slivers of a film to other BitTorrent participants. Thus, the ISPs argued, the alleged offenders did not, as provided in s 86 of the *Copyright Act 1968* (Cth), 'communicate the film to the public'. Put simply, the account holders had not infringed upon DBC's copyright.²¹

Nevertheless, Perram J appropriately dismissed this argument, observing that the term 'communicate' is defined under s 10 of the *Copyright Act 1968* (Cth) to encompass actions that 'make [the film] available online'.²² His Honour accepted that, even if a user made 'a single sliver of the film' available online, this would still provide 'strong circumstantial evidence' that the user had infringed upon DBC's copyright.²³ Furthermore, for the purposes of an application under r 7.22, Perram J noted that DBC need only show that the foreshadowed claim 'has some prospect of succeeding', as opposed to having to establish a 'prima facie case of infringement'.²⁴ Indeed, this is the position at common law.

In the Full Court of the Federal Court's decision of *Hooper v Kirella Pty Ltd* it was held that an applicant seeking preliminary discovery is not required to satisfy

¹⁶ *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [28].

¹⁷ Being the expert report of German resident, Dr Simone Richter.

¹⁸ See *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [27].

¹⁹ Sometimes being no more than a few hundred kilobytes.

²⁰ *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [27].

²¹ *Ibid* [28]-[29].

²² *Ibid* [29].

²³ *Ibid* [30].

²⁴ *Ibid*.

the court of ‘the existence of a prima facie case against the prospective respondent’.²⁵ However, a court is to ensure that the process is not abused to commence ‘merely speculative proceedings’.²⁶ This language is echoed in the Supreme Court of New South Wales decision of *Stewart v Miller*,²⁷ where the Court, having considered similar preliminary discovery rules, cited the unreported decision of *Exley v Wyong Shire Council*²⁸ and stated that the court’s power should not be used for oppression or to aid speculative claims. Such line of reasoning also led Foster J, in the case of *Allphones Retail Pty Ltd limited v Australian Competition and Consumer Commission*, to state that ‘the foreshadowed claim must have some prospect of succeeding’.²⁹

Consequently, upon consideration of the relevant case law, and having specific regard to the construction of r 7.22,³⁰ one may readily side with the reasoning of Perram J; DBC’s prospective claim was much more than merely ‘hopeless’.³¹

2 *The Breadth of the Court’s Power under r 7.22(2)*

As DBC conceded, in some instances, the account holder information held by the ISPs would not directly identify the alleged copyright infringer (ie the relevant account holder would not necessarily be the same person who had downloaded the Dallas Buyers Club film).³² Therefore, the ISPs asserted that the language of r 7.22(2) operates only to allow preliminary discovery where it leads to the direct identification of a prospective defendant.³³ However, as DBC noted (and as Perram J agreed), this argument had been unsuccessfully raised in prior instances.³⁴

Both the decisions of *Roads and Traffic Authority (NSW) v Australian National Car Parks Pty Ltd*³⁵ and *Roads and Traffic Authority of New South Wales v Care Park Pty Ltd*³⁶ involved car park operators wishing to identify entrants who had used their car

²⁵ (1999) 96 FCR 1, 11 [33]. This case considered the previous Federal Court rules relating to preliminary discovery which is discussed under heading ‘2 *The Breadth of the Court’s Power under r 7.22(2)*.’

²⁶ Ibid.

²⁷ [1979] 2 NSWLR 128, 139.

²⁸ [1976] NSWSC (9 December 1976).

²⁹ [2009] FCA 980 [54] (emphasis added). This case was cited by Perram J in *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [30].

³⁰ Noting, most importantly, the term ‘may’ in r 7.22(1)(a) of the FCR.

³¹ As Foster J found in the decision of *Allphones Retail Pty Ltd limited v Australian Competition and Consumer Commission* [2009] FCA 980 (28 August 2009) [86].

³² *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [1].

³³ Ibid [56].

³⁴ Ibid [58].

³⁵ [2007] NSWCA 114 (15 May 2007) (‘*Australian National Car Parks*’).

³⁶ [2012] NSWCA 35 (9 March 2012) (‘*Care Park*’).

park facilities without paying.³⁷ As the drivers of each infringing vehicle were not necessarily the registered owners, the courts were required to determine whether preliminary discovery could be ordered where the information held by a third party would merely *assist* in the identification of a prospective defendant, as opposed to *reveal* the prospective defendant. In both decisions, preliminary discovery was allowed.

Significantly, the court in *Australian National Car Parks* noted that ‘the possibility that additional evidence may be required to make out a prima facie case ... does not mean that the information [sought] lacks ... utility or forensic worth.’³⁸ Indeed, all that is required is that the information sought be capable of assisting the applicant in establishing a prima facie case.³⁹ As the court in *Care Park* stated, the purpose of preliminary discovery is to ‘facilitate the enforcement of civil cases of action’⁴⁰ and, therefore, the rule ‘should be applied beneficially, purposively and not technically.’⁴¹

While the ISPs did not dispute the outcome of the cited decisions, they contended that the judgments (having been decided under the *Uniform Civil Procedure Rules 2005* (NSW)) had no application to the interpretation to the *FCR*. However, as Perram J noted, the language of the old *Federal Court Rules 1979* (Cth)⁴² largely mirrored that of the *Uniform Civil Procedure Rules 2005* (NSW).⁴³ And, notwithstanding that the wording had changed, the explanatory statement to the *FCR* relevantly provides that the altered language of r 7.22 ‘do[es] not substantially alter existing practice.’⁴⁴ Consequently, Perram J considered that he was still bound by the precedent set by the *Australian National Car Parks* and *Care Park* cases.⁴⁵ Moreover, and in any event, his Honour queried ‘why a rule designed to aid a party in identifying wrongdoers should be so narrow’.⁴⁶

On the basis of the above reasoning, Perram J properly concluded that discovery under r 7.22 is not confined to documents that identify a specific prospective defendant, but also encompasses documents that would *help* identify a specific prospective defendant.⁴⁷

³⁷ Thus in breach of the car parks’ conditions of entry. See, eg, *Australian National Car Parks* [2007] NSWCA 114 (15 May 2007), [3].

³⁸ Ibid [27].

³⁹ Ibid [27].

⁴⁰ [2012] NSWCA 35 (9 March 2012), [8].

⁴¹ Ibid [55].

⁴² The predecessor to the *FCR*.

⁴³ So much so that the court in *Australian National Car Parks* [2007] NSWCA 114 at [10] stated that, in interpreting the *Uniform Civil Procedure Rules 2005* (NSW), ‘[a]ssistance may ... be gleaned from caselaw’ relating to the *Federal Court Rules 1979* (Cth).

⁴⁴ Explanatory Statement, *Federal Court Rules 2011* (Cth) 10.

⁴⁵ *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [71].

⁴⁶ Ibid [66].

⁴⁷ Ibid [49]–[72].

3 Exercising the Court's Discretion and Conditions of Document Use

Having being satisfied that the Court's power to order preliminary discovery was enlivened, Perram J then considered each of the eight additional objections put forth by the ISPs.⁴⁸ While his Honour nevertheless exercised the Court's discretion in favour of DBC, there were, however, two objections of considerable importance.

First, the ISPs submitted that, should DBC be granted preliminary discovery, the entity would engage in the practice of 'speculative invoicing'.⁴⁹ Justice Perram accepted this possibility, noting that Voltage had engaged in speculative invoicing previously in the US.⁵⁰ Moreover, while his Honour acknowledged that speculative invoicing is not unlawful in Australia,⁵¹ he queried whether such action amounted to 'misleading or deceptive conduct' under the *Competition and Consumer Act 2010* (Cth) or potentially unconscionable conduct under the *Australian Securities and Investments Commission Act 2001* (Cth).⁵² Regardless, the issue of speculative invoicing was of sufficient concern to Perram J, resulting in an order that any correspondence DBC intended to send the alleged infringers be first submitted to the Court for its approval.⁵³ Citing the English decision of *Golden Eye (International) Ltd v Telefonica Uk Ltd*,⁵⁴ Perram J considered that the vulnerability of the prospective respondents required the Court's protection.⁵⁵ Indeed, comparable to the *Golden Eye* decision, the prospective respondents in the current scenario may be without access to the specialised legal advice required to defend DBC's claim. Thus, they may be forced to accept DBC's settlement sum, even if they are innocent.⁵⁶

Second, the ISPs argued that the privacy protections of the *Telecommunications Act 1997* (Cth) (that each was bound by) should outweigh the need to order preliminary discovery. Justice Perram, in rejecting this notion, rightfully noted that the *Telecommunications Act 1997* (Cth) does not operate to exclude the disclosure of

⁴⁸ Ibid [73].

⁴⁹ The term 'speculative invoicing' in this context refers to the act of DBC writing to each alleged copyright infringer and claiming that they owe a substantial amount of money, but are, however, willing to accept a smaller sum for settlement (this sum would still be above the amount the DBC would expect to receive in court awarded damages) per *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [73].

⁵⁰ Ibid [81].

⁵¹ Ibid [82].

⁵² While his Honour raised these issues, he was not required to assess them beyond the purposes of assessing DBC's application for preliminary discovery.

⁵³ *Dallas Buyers Club LLC v iiNet Limited (No 3)* [2015] FCA 422 (6 May 2015) [13].

⁵⁴ [2012] EWHC 723 (Ch) ('*Golden Eye*')

⁵⁵ Approval of such monitoring methods can also be found in the Canadian decision of *Voltage Pictures LLC v John Doe* [2014] FC 161.

⁵⁶ [2012] EWHC 723 (Ch), 749-50 [119].

private information required by law.⁵⁷ Nonetheless, his Honour considered that the implied undertaking attaching to each document disclosed in court was not sufficient protection for each prospective respondent.⁵⁸ Hence, his Honour ordered that the information only be disclosed on the basis that it be used solely ‘for purposes relating to the recovery of compensation for infringement’.⁵⁹ Importantly, this condition also attached to the agents of both DBC and Voltage.⁶⁰

V BROADER IMPACT OF DECISION

Notwithstanding the outcome in *Dallas Buyers Club*, it appears the victory for filmmakers has been short lived. In the later decision of *Dallas Buyers Club LLC v iiNet Limited (No 4)*,⁶¹ upon review of DBC’s draft, Perram J refused to lift the stay order of his earlier decision. His Honour considered that DBC was attempting to engage in speculative invoicing practice and could only demand ‘the cost of an actual purchase of a single copy of the [f]ilm’, along with damages arising from the costs associated with identifying the infringer.⁶² Thus, the damages DBC originally anticipated it would receive were reduced substantially. It would seem, therefore, that the precedent set by *Dallas Buyers Club* may in the future amount to no more than ‘a mere footnote.’⁶³

Nonetheless, since the decision of *Dallas Buyers Club*, legislative change has seen the implementation of more stringent laws surrounding illegal downloading activity. Consequently, while the decision itself may not inhibit pirating activities, the new laws may. For example, on 26 June 2015 the *Copyright Act 1968* (Cth) was amended for the express purpose of reducing online copyright infringement.⁶⁴ Broadly, the amendments allow copyright owners to apply to the Federal Court of Australia for an injunction to block Australian internet users from accessing overseas websites that contain infringing material.⁶⁵

⁵⁷ As stated in s 280 of the *Telecommunications Act 1997* (Cth): *Dallas Buyers Club* [2015] FCA 317 (7 April 2015) [84].

⁵⁸ For the operation and enforceability of the implied undertaking see High Court decision *Hearne v Street* (2008) 235 CLR 125.

⁵⁹ *Dallas Buyers Club LLC v iiNet Limited (No 3)* [2015] FCA 422 (6 May 2015) [22].

⁶⁰ *Ibid.*

⁶¹ [2015] FCA 422 (6 May 2015) [22].

⁶² *Ibid* [16]-[19].

⁶³ Catherine Logan and Vanessa Ip, ‘Culture transcending the law: the future of internet piracy in Australia’ (2015) *Internet Law Bulletin* 82, 82.

⁶⁴ Explanatory Statement, *Copyright Amendment (Online Infringement) Bill 2015* (Cth) 2.

⁶⁵ *Ibid.*

Furthermore, whilst there has been delay in its implementation, the ‘Copyright Notice Scheme’⁶⁶ is soon to impact illegal downloading significantly. The proposed measures seek to implement a ‘three-strikes’ policy, whereby an ISP is required to notify and educate its customers each time it receives a notice from a copyright holder claiming that their rights have been infringed.⁶⁷ Upon an infringer receiving a third notice, the copyright holder will be able to apply to court to seek preliminary discovery of the infringer’s details.⁶⁸

However, outside these regulatory changes perhaps lies the most influential curtailer of illegal downloading — the market.⁶⁹ The recent influx of online streaming services in 2015 (such as Netflix, Presto and Stan) has seen Australian consumers being offered legally obtainable content at more accessible prices. And, as market competition rises, one may argue that the accessibility of such services should also rise. As stated above, many Australians engage in illegal downloading due to the perceived excessive pricing of market alternatives.⁷⁰ Significantly, prior to the introduction of the abovementioned streaming services, the majority of Australian digital movie consumers indicated they would voluntarily cease pirating films if a cheaper subscription service were available.⁷¹ As one author notes, albeit in the context of the music industry, the digital age of the 21st century ‘is here to stay’.⁷² Therefore, if music artists (or filmmakers) wish to limit illegal downloading, they must engage new methods in order to make their content ‘readily available at a reasonable cost’.⁷³

In any event, regardless of whether internet users are discouraged from engaging in illegal downloading due to threat of litigation, restricted website access or the availability of market alternatives, it is clear that the pirating landscape in Australia is undergoing drastic change.

VI CONCLUSION

Justice Perram’s judgment in *Dallas Buyers Club* is both carefully considered and logical. Yet, while a seemingly landmark decision for aggrieved copyright holders,

⁶⁶ Communications Alliance Ltd, ‘Copyright Notice Scheme’ (April 2015) Communications Alliance Ltd <<http://www.commsalliance.com.au/Documents/all/codes/Copyright-Notice-Scheme-Industry-Code>>.

⁶⁷ Ibid i-ii.

⁶⁸ Ibid.

⁶⁹ Logan and Ip, above n 62, 84.

⁷⁰ TNS, above n 5, 5.

⁷¹ Ibid.

⁷² Jordi McKenzie, ‘P2P File-Sharing: How Does Music File-Sharing Affect Recorded Music Sales in Australia?’ in Peter Tschmuck, Philip L Pearce and Steven Campbell (eds), *Music Business and the Experience Economy: The Australasian Case* (Springer, 2013) 79, 95-6.

⁷³ Ibid

his Honour's subsequent judgment in *Dallas Buyers Club LLC v iiNet Limited (No4)*⁷⁴ suggests that its precedent may offer no more of a threat to pirates than that of a 'toothless tiger'.

Nonetheless, although copyright holders might receive only limited benefits from the decision of *Dallas Buyers Club*, they may find a level of relief in the recent changes to the online and regulatory environments which, through both enforcement and accessibility means, should see the substantial decline of illegal downloading in Australia.

⁷⁴ [2015] FCA 422 (6 May 2015).

Christopher Tomlins*

**RE-INTERPRETING BLACKSTONE'S COMMENTARIES:
A SEMINAL TEXT IN NATIONAL AND
INTERNATIONAL CONTEXTS**

EDITED BY WILFRID PREST

HART PUBLISHING, 2014

XIV + 245 PP

ISBN 978 1 84946 538 0

I INTRODUCTION

Re-Interpreting Blackstone's Commentaries is the second volume of essays edited by Wilfrid Prest (and published by Hart) to address the impact and influence of William Blackstone's *Commentaries on the Laws of England* (1765–69) on the common law world and their reception elsewhere. The first volume — *Blackstone and his Commentaries: Biography, Law, History* — appeared in 2009.¹ The core essays in both volumes had their origins as contributions to Adelaide symposia held in 2007 and 2012, respectively, so readers can likely anticipate that a third volume on *Blackstone and his Critics* will appear in 2017, given that a further Adelaide symposium of that name took place in December 2015.

Blackstone's *Commentaries* are hardly untrodden turf, which means that a project like Prest's is haunted by the possibility that it is actually quite difficult to tell readers anything they don't already know. The first volume hovered a little uncertainly between the historical and the legal. Essays dealt with a variety of subjects: Blackstone's life and character; the nature and sources of the jurisprudence on display in his *Commentaries*; reactions to the *Commentaries* at home (notably from the acerbic Jeremy Bentham, who has the volume's second longest index entry after Sir William himself) and overseas (the United States, France and Germany); and the long half-life of the *Commentaries* in juridical usage. It concluded with two short essays on bibliographic and iconographic sources. By comparison, the second volume has tried quite hard to stake out a different and more focused terrain, which one might best describe as '*beyond ...*'. In matters of interpretation, essayists move *beyond* legal analysis and legal history to literary criticism and art history. In assessing the *Commentaries*' dissemination and impact, they pursue Blackstone *beyond* the usual

* Professor of Law (Jurisprudence and Social Policy), University of California, Berkeley.

¹ Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009).

concentration on the British Atlantic world into new, less familiar climes — the French Atlantic (Louisiana and Quebec) and Australasia. In charting the *Commentaries*' influence, finally, they move *beyond* the history of common law adjudication to the distinctly contemporary subject of American constitutional originalism and its genealogy. It is perhaps inevitable in any collection of essays that the results are mixed, but for the most part *Re-Interpreting Blackstone's Commentaries* is both instructive and enjoyable, which, given apparent circumstance — an exceptionally familiar work written by a 'conventionally dull' man² — is no small achievement.

After two volumes of essays, it is worth asking whether the Adelaide Blackstone project has an 'agenda'. If any, it appears to be to dispute both the familiarity of the work and the dullness of its author. The latter is perhaps the more formidable task. After ten years work on his own biography of the man, it is not altogether surprising that Prest himself should have undergone something of a conversion experience.³ Prest's opening essay in *Blackstone and his Commentaries* even proposed that 'Blackstone's life story would be well worth attention even if the *Commentaries* had never been published'.⁴ But this is hard to accept, for without the *Commentaries* Blackstone is no more memorable than any other minor scion of the mid-Hanoverian elite. He is an educated man, not unaccomplished as an academic, a competent college bureaucrat

² Gareth Jones, *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England* (University of Toronto Press, 1973) xii. See also Stanley N Katz, 'Introduction to Book I' in William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (4 volumes) (University of Chicago Press, 1979) vol I, iii. Plucknett wrote, wearily (or warily), in 1939:

There probably ought to be a life of Blackstone; but it is a very difficult life to write. There is little incident in it, anecdotes are scarce, even the portraits are unattractive ... nor was his rise rapid enough, nor his early struggles severe enough to make a conventional 'success story.' If his life shows anything at all, it is that a great book may sometimes proceed from a man who personally has little of the ordinary signs of greatness about him...

Theodore F T Plucknett, 'Book Reviews' (1939) 52 *Harvard Law Review* 721. For reasons the significance of which will become apparent, the first two biographies of Blackstone (the occasion for Plucknett's review) were by American lawyers: Lewis C Warden, *The Life of Blackstone* (The Michie Company, 1938), and David A Lockmiller, *Sir William Blackstone* (University of North Carolina Press, 1939). No competing biography appeared until a self-published work by Ian Doolittle, *William Blackstone: A Biography* (2001). This was followed by Wilfrid Prest's definitive study: Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008).

³ Compare Prest's hesitancy at the outset, observing in 1999 that 'the very nature of Dr Blackstone's life "seems at first — or even second — glance, neither particularly colourful nor eventful"': Wilfrid Prest 'Blackstone and Biography' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 3, with the effusions of the finish-line, hoping that biographer had not become 'so blindly enamoured' of his subject 'as to overlook altogether his failings and shortcomings': Prest, *William Blackstone*, above n 2, 12.

⁴ Prest, 'Blackstone and Biography', above n 3, 13.

and university politician, a lawyer and judge whose career is untouched by notoriety, a Tory member of parliament, a canny bibliophile, and throughout careful, cautious, and at least publicly somewhat aloof.⁵ He marries quite late (at age 38) and dies quite young (at age 56), ‘obese and testy’.⁶ It would be interesting to know more about his wealth, for he started life with little and seems to have accumulated (or borrowed) handsomely, certainly enough to acquire and support a comfortable country house on the Thames at Wallingford, even before the multiple editions of the *Commentaries* began fattening his purse.⁷ We can allow that he led a full life and contributed to his surroundings, but by itself this is hardly enough to justify so much attention. Without the *Commentaries*, comparisons to Edward Gibbon and Adam Smith would seem absurd.⁸

So our reason for attention to the man has to be the work for which he is famous throughout the Anglophone common-law world (and beyond). Here, the accumulating output of the Adelaide project indeed broadens our understanding by ‘de-familiarising’ the *Commentaries* in several distinct ways, thereby opening Blackstone’s work to new and varied uses.

II WORDS AND VISIONS

First, how were the *Commentaries* composed? In the initial volume of essays Carol Mathews called attention to the centrality of architecture to Blackstone’s life, and to the place of architectural and spatial metaphor in the *Commentaries*.⁹ Christina Martinez deepens the engagement in the second volume in her essay, ‘Blackstone as Draughtsman: Picturing the Law’. One of three contributors addressing Blackstone’s

⁵ See generally Prest, *William Blackstone*, above n 2; Norma Aubertin-Potter, “‘A Might Consumption of Ale’: Blackstone, Buckler and All Souls College, Oxford”, in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 35–46; and Ian Doolittle, ‘William Blackstone and William Prynne: An Unlikely Association?’ in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 47.

⁶ Prest (ed), *Blackstone and his Commentaries*, above n 1, 1.

⁷ Blackstone’s father, a London textile merchant, died in debt, hampering his wife, who also died in straitened circumstances. William became dependent upon the largesse of his maternal family. Prest provides some details of his income in the pre-*Commentaries* years, but not systematically. Beginning his life with essentially nothing, Blackstone’s estate at his death was worth £25 000 in 1781, or approximately US\$4.2 million in current money (A\$6.0 million). In 1761, when he acquired the house, it appears he was already worth some £1500 (US\$310 000 current, A\$440 000). See generally Prest, *William Blackstone*, above n 2, 69–70, 80–1, 111, 113, 120, 122, 139, 149, 163, 178–9, 186–7, 193, 217–19, 303–4, 315–16. For conversion of historical sterling currency values to current US dollars see: Eric Nye, *Pounds Sterling to Dollars: Historical Conversion of Currency* <www.uwyo.edu/numimage/currency.htm>.

⁸ Prest, *William Blackstone*, above n 2, 10.

⁹ Carol Matthews, ‘A “Model of the Old House”: Architecture in Blackstone’s Life and *Commentaries*’, in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 15.

'Words and Visions' (the title of part one of the volume), Martinez argues that Blackstone was committed to a deeply visual conception of orderliness expressed initially in youthful architectural drawing (and verse¹⁰) and transposed to the *Commentaries* through tabular arrangement of topics, classification schemes and schematic diagrams. 'Blackstone strove to render law's connections visible, connections which, to this point, had remained mostly visible and unseen'.¹¹ But his aesthetic was that of the artist rather than the common lawyer, leading him to sacrifice detail ('the law as it really was'¹²) that might complicate or otherwise spoil the overall image he desired to create. It was, moreover, a decidedly rule-bound aesthetic:¹³ one will not encounter Hogarth's sinuous 'line of grace' in Blackstone's architectonics.¹⁴

In 'Blackstone's *Commentaries*: England's Legal Georgic?', Michael Meehan offers additional and telling aesthetic insights on the composition of the *Commentaries* by drawing attention to the literary form of the English georgic, contemporary with the *Commentaries* and interwoven with their more mundane legal taxonomy.¹⁵ Associated with John Dryden, but in particular with Joseph Addison and Alexander Pope,¹⁶ the georgic, says Meehan, celebrated the glory of the present, an 18th century glory of 'patriotism ... Augustan peace and stability ... and nationhood' succeeding the turbulence of the 17th century and the Glorious Revolution.¹⁷

The georgic's potency is well-established. Anthony Low has stressed that the georgic is a mode of poetic composition

that stresses the value of intensive and persistent labor against hardships and difficulties; that it differs from pastoral because it emphasizes work instead of ease; that it differs from epic because it emphasizes planting and building instead of killing and destruction; and that it is preeminently the mode suited to the establishment of civilization and the founding of nations.¹⁸

¹⁰ See Prest, *William Blackstone*, above n 2, 46–8.

¹¹ Christina S Martinez, 'Blackstone as Draughtsman: Picturing the Law', in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 31, 48.

¹² Ibid 55.

¹³ Ibid 52–4.

¹⁴ On Hogarth, representation and law, see Christopher Tomlins, 'After Critical Legal History: Scope, Scale, Structure' (2012) 8 *Annual Review of Law and Social Science* 31, 43–8.

¹⁵ Michael Meehan, 'Blackstone's Commentaries: England's Legal Georgic?' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 59.

¹⁶ See, eg, Scott M Cleary, 'Slouching toward Augusta: Alexander Pope's 1736 "Windsor Forest"' (2010) 50 *Studies in English Literature 1500–1900* 645, 646–8.

¹⁷ Meehan, above n 15, 60.

¹⁸ Anthony Low, *The Georgic Revolution* (Princeton University Press, 1985) 12.

Annabelle Patterson has emphasised its

rather subtle contributions to the counter-revolutionary programs of the British government, promoting a conservative ideology based on the ‘georgic’ values of hard work (in others), land-ownership as a proof of worth ... and above all the premise that hardship is to be countered by personal “Resolution and Independence” rather than social meliorism.¹⁹

According to Meehan, the much-remarked literary effectiveness of the *Commentaries* lay in taking on both the style and substance of the English georgics, offering ‘a post-pastoral vision of the world in which nature must be enhanced and only fully “possessed” through human labour, and through an extension of knowledge’.²⁰ Blackstone represented law in the service of georgic achievement, labouring over centuries to restore a fallen world from ‘ignorance and fragmentation’, an ordered totality possessed of a mind and a voice of its own, a living entity whose wise and solicitous designs underpinned ‘the “present Glory” of the English legal establishment’.²¹

To this secular analysis one should add the undoubted influence of Blackstone’s deep, even fervent (in his youth at least) commitments to establishment Anglicanism.²² In their stately poise the *Commentaries*, one might argue, proclaimed Joseph Addison’s ‘great Original’, publishing ‘to every land /The work of an Almighty hand’²³ — albeit a hand bound by the mechanical perfection of what He had created rather than, as in the more remote past, imposing at will upon the profane world. In the *Commentaries*, what Ian Doolittle calls ‘that beautifully balanced construct, the English constitution’ stood in for God.²⁴

Kathryn Temple’s essay, ‘Blackstone’s “Stutter”’: The (Anti)Performance of the *Commentaries*, completes *Re-Interpreting Blackstone’s Commentaries*’ inquiry into matters of composition. Meehan has told us that Blackstone gave law both voice and carriage, harmonious and elegant. Interesting, then, Temple argues, that Blackstone in person suffered an awkward ‘dysfluency’. In an oral and performative legal culture, Blackstone’s dysfluency ‘suggests an anti-performance as performative in its own way as any oratorically sophisticated performance could have been’.²⁵ For

¹⁹ Annabelle Patterson, ‘Hard Pastoral: Frost, Wordsworth, and Modernist Poetics’ (1987) 29 *Criticism* 67, 74.

²⁰ Meehan, above n 15, 62.

²¹ Ibid 64, 66.

²² See, eg, Wilfrid Prest, ‘The Religion of a Lawyer? William Blackstone’s Anglicanism’ (2004) 21 *Parergon* 153.

²³ See Arthur Quiller-Couch (ed), *The Oxford Book of English Verse: 1250–1900* (Clarendon Press, 1900) 496–7.

²⁴ Doolittle, *William Blackstone*, above n 2, 104. And see Paul Halliday, ‘Blackstone’s King’, in Wilfrid Prest (ed), *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 176.

²⁵ Kathryn Temple, ‘Blackstone’s “Stutter”’: The (Anti)Performance of the *Commentaries* in Wilfrid Prest (ed), *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 3, 10–11.

Temple, Blackstone's want of personal elegance is an opportunity to explore the relationship in legal culture between the printed word, of which he was master, and the spoken, of which, clearly, he was not. What Temple calls Blackstone's 'stutter'²⁶ was a symptom of his discomfort with orality, but also of his 'didactic loyalty ... to text' that 'performed the necessity of the book as a method of access to law — and implicitly of access to justice'.²⁷ Just as Alexander Pope contrasted a body deformed and stunted (by Pott's disease, a form of tuberculosis that affects the spine) to the perfection of his poetic form, Temple argues, so Blackstone 'contrasts his less than fluent speech to the perfections of writing and thus to the new dominance of print as its own sort of performance'.²⁸

In a commentary on Temple's essay, Simon Stern attempts to deflate somewhat her interpretive balloon.²⁹ One must distinguish among styles of exposition. Oral agility may impress juries but is ill-suited for disquisitions upon doctrine. By the latter standard, the speaking Blackstone may be judged appropriately measured and deliberate rather than inarticulate, a jurist who exhibits a form of fluency appropriate to his role. Stern concludes, quoting from Prest's biography, that 'whatever failing Blackstone may have had as an orator at the bar, he proved "highly effective when speaking from a prepared text, preparing his carefully arranged material in an accessible and polished fashion"'.³⁰ Were I Kathryn Temple, I might think my point made. And indeed, Stern agrees that whatever their differences might be in assessing Blackstone's dysfluency, or lack thereof, the *Commentaries* are emblematic of the way in which writing comes 'to provide the paradigmatic form of legal expression and to define the basis of legal elegance'.³¹

III BEYOND ENGLAND

The interpretive 'beyond ...' explored in the first part of *Re-interpreting Blackstone's Commentaries* is followed by the geographic, 'Beyond England', of part two. Prest's introduction to part two stresses the *Commentaries*' considerable influence outside England, but also the challenge involved in mapping their 'dissemination, reception, and impact'.³² A start was made in the first volume, where essays by

²⁶ By which she means the lack of oral agility carefully concealed by the elaborated formality of his lecturing and by his oft-remarked reticence, or diffidence, in lawyerly conduct, but exposed in inarticulate parliamentary performances, and in his awkward, almost abrasive, demeanour as judge.

²⁷ Temple, above n 25, 17, 19.

²⁸ Ibid 18–19.

²⁹ Simon Stern, 'William Blackstone: Courtroom Dramatist?' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 21.

³⁰ Ibid 29.

³¹ Ibid.

³² Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 71.

Michael Hoeflich, John Emerson and Horst Dippel followed Blackstone into familiar (America) and less familiar (France and Germany) climes. Hoeflich stressed how the *Commentaries*' practical utility in the 19th century United States had come to depend upon extensive textual glossing, but also upon their convenience as an ur-text of the 'rudiments' of Anglophone law.³³ Emerson recorded 'lukewarm' Gallic appreciation for Blackstone as not much more than a facile scribbler 'peripheral to the French legal and political system', yet simultaneously a certain admiration for his intelligent synthesis of centuries of law, which no French jurist had managed.³⁴ Dippel found considerable regard for Blackstone's constitutionalism among German liberals during the first half of the 19th century, but less among those of the second half, for whom, in Rudolph von Gneist's words, 'the interpolation of Blackstone's *Commentaries*' meant that 'no modern English constitutional law can come into being', for where a 'complete correlation with the past is missing, it will also be missing for the future'.³⁵

Re-interpreting Blackstone's Commentaries adds four new and distinctive slices to the record of Blackstone abroad. In 'Blackstone in the Bayous: Inscribing Slavery in the *Louisiana Digest* of 1808', textual comparison allows John Cairns to spot Blackstone lurking amid the provisions of the first Louisiana Civil Code (in full *The Digest of the Civil Laws Now in Force in the Territory of Orleans*), enactment of which in 1808 enables us to call Louisiana America's "'civil law" state'.³⁶ Cairns argues that the *Commentaries* appealed to the code's compilers not for their adumbration of English common law but because they belonged 'to the European genre of institutional writing'. Blackstone 'had composed an institutional work, heavily influenced by natural law'.³⁷ That said, Cairns finds that Blackstone was particularly useful when it came to Louisiana slavery because of his attention to the 'rights and duties [of persons] in private oeconomical relations'³⁸ in English law. The code's compilers — following institutional tradition — desired to assimilate slavery to the law of persons, but could not use the French *Code civil* for this purpose because the *Code* ignored slavery. Blackstone's title 'Of Master and Servant' solved their problem. Blackstone's title, says Cairns, 'discussed slavery relatively extensively'. Even though in its original substance the relevant passage declaimed against slavery, the title itself 'fitted into the first book of the *Digest*, with some of [Blackstone's] text adapted to fit the second chapter of the title'.³⁹

³³ Michael Hoeflich, 'American Blackstones' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 171, 181.

³⁴ John Emerson, 'Did Blackstone get the Gallic Shrug?' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 185, 193.

³⁵ Horst Dippel, 'Blackstone in Germany' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 199, 209–10.

³⁶ John W Cairns, 'Blackstone in the Bayous: Inscribing Slavery in the *Louisiana Digest* of 1808' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 73, 74.

³⁷ Ibid 94.

³⁸ Blackstone, above n 2, vol I, 410.

³⁹ Cairns, above n 34, 93. For the passage in question see Blackstone, above n 2, vol I, 411–13.

In a commentary on Cairns' essay, Stephen Sheppard finds Cairns' argument 'state of the art', and adds information on the rising incidence of citation of Blackstone in antebellum Louisiana reported opinions.⁴⁰ How does one reconcile this with the Francophile claim of Louisiana's civilian exceptionalism from the rest of the common law United States? The claim, Sheppard concludes, overstates its case — the civilian claim has camouflaged legal-cultural reality, 'which is one of quiet common law integration'.⁴¹

Michael Morin's essay on 'Blackstone and the Birth of Quebec's Distinct Legal Culture 1765–1867' finds in Quebec something of the same civil law/common law admixture on display in Louisiana, albeit one that emerged out of different circumstances and that has retained a distinct expression. Notwithstanding disavowal of 'the Laws and usages established for this country' in favour of Crown supremacy in the terms of capitulation of New France to the English in 1760, French private law continued in practical effect alongside English criminal law, surviving even the terms of the royal proclamation of 1763 creating the province of Quebec under English law.⁴² After ten years of debate over the implementation of the royal proclamation, the *Quebec Act 1774* (Imp) 14 Geo III c 83 formally 'reinstated the rules relating to property and civil rights applied in New France', while also providing for the continuation of English criminal law. The *Quebec Act* also safeguarded Catholic civil and religious rights, subject to an oath of allegiance intended to preserve the supremacy of the Crown. Morin points to this overall outcome — 'freedom of belief and worship for Catholics' alongside royal supremacy over spiritual and temporal affairs — as in accordance with Blackstone's ideas; an acknowledgement, in effect, of the familiar contention that 'in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God'.⁴³ Quebec's subsequent history through Confederation in 1867 and beyond shows consistent adherence to a hybrid legal culture — the civil law tradition in private law and the common in administrative and criminal law. Morin argues on the basis of bibliographic evidence that in the development of the hybrid the *Commentaries* became, even before translation, 'a very useful tool ... a standard reference work on the political system of England and its criminal laws'.⁴⁴ But Blackstone, says Morin, was mobilised even in the initial debates over the royal proclamation and 'may well have influenced the final drafting of the Quebec Act'.⁴⁵

⁴⁰ Stephen M Sheppard, 'Legal Jambalaya' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 95.

⁴¹ *Ibid* 96, 102.

⁴² Michael Morin, 'Blackstone and the Birth of Quebec's Distinct Legal Culture 1765–1867', in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 105, 106.

⁴³ *Ibid* 106–7.

⁴⁴ *Ibid* 108.

⁴⁵ *Ibid* 123.

Thus, he concludes, Quebec's hybrid was nurtured from the outset 'by an unexpected and strategic use of the *Commentaries* and their luminous prose'.⁴⁶

John Orth's essay, 'Blackstone's Ghost: Law and Legal Education in North Carolina', returns us to the familiar reaches of the common law Atlantic, where it traces the *Commentaries*' place in the education and practice of lawyers in one American state. Orth's examination of North Carolina confirms the conventional wisdom that during much of the 19th century the *Commentaries* were accorded near reverential status by both bar and bench in the United States when it came to learning the law. Other texts slowly appeared in North Carolina, as elsewhere, such as the anonymously authored (and beautifully illustrated)⁴⁷ *Tree of Legal Knowledge, Designed as an Assistant to Students, in the Study of Law*, published in 1838 by the Raleigh N.C. booksellers Turner and Hughes. But as the *Tree*'s subtitle proclaims — *in which the Admirable System as Laid down by Blackstone in his Commentaries is Preserved* — it was intended as an exposition of the *Commentaries* rather than a replacement. Blackstone began to fade from the world of pupillage at the end of the century, but only because pupillage was itself fading before the comparatively newer world of the law school classroom. Law students tutored on the *Commentaries* and their local derivatives continued to populate the North Carolina bar and bench throughout the 20th century. Orth finds that they can still be detected turning to Blackstone as an authority on the state's largely uncoded criminal law. Whether mediated educationally by North Carolina law professors and the derivative texts they produced, or doctrinally 'through a daisy chain of prior cases', Blackstone's 'ghostly influence on North Carolina law and legal education continues' to the present.⁴⁸

Wilfrid Prest himself contributes the final essay in part two, entitled simply 'Antipodean Blackstone'. One might imagine that the 'British Pacific' would manifest the same 19th century attachment to Blackstone as the British Atlantic, but Prest finds this is not the case. Physical encounters with Blackstone in the Antipodes vary according to which side of the Tasman one inhabits: the man has a visible commemorative presence in 19th and 20th century Australian legal iconography that has no parallel in Aotearoa/New Zealand. The iconographic proves a reasonable guide to incidents of usage. Newspaper advertisements and announcements attest to the presence of the *Commentaries* in early New South Wales; references to the *Commentaries* pepper early colonial case law. As 19th century English and imperial circumstance departed from the 18th century *Commentaries*, the text was not abandoned. Rather (as in the United States) derivative editions retrofitting the original became common. Henry John Stephen's *New Commentaries on the Laws of England (Partly Founded on Blackstone)* published in 1841 by Butterworth, for example, 'became the standard examination text for admission to legal practice', and was increasingly preferred to

⁴⁶ Ibid 124.

⁴⁷ See John V Orth, 'Blackstone's Ghost: Law and Legal Education in North Carolina' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 125, 132 (Figure 2), 136 (Figure 3).

⁴⁸ Ibid 138.

the original by university law lecturers.⁴⁹ Prest can tell us far less about Blackstone in New Zealand in good part because Blackstone's spoor is so much fainter, whether in legal education or in recorded citation. But he also observes that whichever may be one's side of the Tasman, Blackstone simply does not have the same resonance in Antipodean legal culture as in North America, either in legal education or in practice. 'Australasian judges, lawyers, and legal academics may not have been mere passive recipients of English law, [but] until at least the middle of the twentieth century they were more influenced by British than American modes of legal education and theory'.⁵⁰ The result is that Bentham and Austin likely played a more important role in Antipodean legal culture than they did in North America. Prest recognises that Blackstone appears to enjoy some resonance in Australia and New Zealand as a sort of common law cultural monument — 'an authoritative source of constitutional and legal assumptions, conventions, definitions, and principles, scarcely less accessible to the general public than to practicing lawyers'.⁵¹ Thus, he concludes, 'we still await Blackstone's antipodean demise'.⁵² But his essay seems clearly to show that — except in one singular aspect, to be explored further below — Blackstone's antipodean shadow is substantially shorter than appears to be the case in his North American redoubts, where, as Thomas Cooley put it in his 1871 edition of the *Commentaries*, the original text of the *Commentaries* is taken to represent 'the law in something near the condition in which our ancestors brought it to America, leaving us to trace in our statutes and decisions its subsequent changes here' uncluttered by irrelevant later English reforms — 'parliamentary legislation which in no way concerns us'.⁵³

IV LAW AND POLITICS

Just how much Blackstone continues to reign in North America — or rather, to be fair to Canada, in the United States — is the focus of the four essays comprising the third and final part of *Re-Interpreting Blackstone's Commentaries*. Entitled 'Law and Politics', part three is the volume's final gesture to the theme of 'beyond ...' in that it focuses on the distinctly contemporary phenomenon of American constitutional originalism.

⁴⁹ Wilfrid Prest, 'Antipodean Blackstone' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 145, 153, 154, 155–7. On the United States, see, in addition to Hoeflich, above n 33, Kunal M Parker, 'Historicising Blackstone's *Commentaries on the Laws of England*: Difference and Sameness in Historical Time' in Angela Fernandez and Markus Dubber (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart Publishing, 2012) 22–42.

⁵⁰ Prest, 'Antipodean Blackstone', above n 49, 160.

⁵¹ Ibid 165.

⁵² Ibid 161.

⁵³ Thomas M Cooley (ed), *William Blackstone, Commentaries on the Laws of England* (Callaghan & Cockcroft, 1871) vi.

In 'Blackstone's *Commentaries* and the Origins of Modern Constitutionalism', Horst Dippel addresses the extent to which Blackstone's ghost was a (benign) presence at Philadelphia's feast of creation. Dippel reminds us of the considerable attention given the *Commentaries* during the epoch of the American Revolution, attention won at least as much by the *Commentaries* as an artefact of constitutional as of common law thinking. To separate the one from the other would be as artificial as it would be anachronistic: Americans who studied the *Commentaries* 'took Blackstone as an undifferentiated whole',⁵⁴ his work acquiring in the provinces a subversive quality less obvious in the imperial metropolis (though remarked upon by Edmund Burke)⁵⁵ with which the provinces were locked in conflict. It does not do to forget that Revolutionary America was very much a common law culture and the *United States Constitution* a common law constitution.⁵⁶ 'Blackstone was as much an authority on constitutional matters' at the Philadelphia convention and during the subsequent state ratification debates 'as he had been in the years of outright conflict with Britain'.⁵⁷ Dippel's conclusion explicitly echoes Daniel Boorstin's, reached 75 years earlier: 'In the history of American institutions, no other book — except the Bible — has played so great a role as Blackstone's *Commentaries on the Laws of England*'.⁵⁸

⁵⁴ Horst Dippel, 'Blackstone's *Commentaries* and the Origins of Modern Constitutionalism' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 199, 200.

⁵⁵ Edmund Burke, 'Speech on Conciliation with the Colonies' (22 March 1775), in Philip B Kurland and Ralph Lerner (eds) *The Founders' Constitution* (University of Chicago Press) vol 1, ch 1 <press-pubs.uchicago.edu/founders/documents/v1ch1s2.html>.

⁵⁶ On which see the many works of John Phillip Reid: see, eg John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Law* (University of Wisconsin Press, 1993), and John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (Northern Illinois University Press, 2005). See also Christopher L Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993) 32–4, 70–3.

⁵⁷ Of course he had his detractors. Thomas Jefferson 'would uncanonise Blackstone, whose book, altho' the most elegant & best digested of our law catalogue, has been perverted more than all others to the degeneracy of legal science': Letter from Thomas Jefferson to John Tyler, 17 June 1812, <founders.archives.gov/documents/Jefferson/03-05-02-0112>. James Wilson observed, more judiciously (as was his wont),

'I cannot consider him as a zealous friend of republicanism. One of his survivors or successors in office has characterized him by the appellation of an antirepublican lawyer. On the subject of government, I think I can plainly discover his jealousies and his attachments ... As author of the *Commentaries*, he possessed uncommon merit ... He deserves to be much admired; but he ought not to be implicitly followed'.

James Wilson, *Lectures on Law, Delivered in the College of Philadelphia* (1790–91), part 1 chapter 1, in Kermit L Hall and Mark David Hall (eds) *Collected Works of James Wilson* (Liberty Fund, 2007) 443–4.

⁵⁸ Dippel, 'Blackstone's *Commentaries*', above n 54, 214. Daniel J Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (University of Chicago Press, first published 1941, 1973 ed) iii.

If Dippel's point is that Blackstone was 'also there at the creation',⁵⁹ Jessie Allen's 'Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone' is an attempt to account for Americans' enduring juridical fascination with the *Commentaries* that, in the process, cautions the reader against too generous an acceptance of Dippel's arguments. Reporting citation rates in US Supreme Court cases unparalleled since the early 19th century, Allen associates the Court's current crush on Blackstone with Justice Antonin Scalia's originalist jurisprudence.⁶⁰ Supreme Court justices had become accustomed to treating Blackstone as 'the preeminent authority on English law for the founding generation'⁶¹ long before Scalia, but Allen distinguishes between two juridical uses made of the *Commentaries* — the factual, in which Blackstone is employed as a primary source for statements about the law prevailing in England at the time of the rupture in the British Atlantic empire (or 'then'), and the mythical, in which justices treat the *Commentaries* as eternally valid, proceeding 'as if the United States' founders understood the Constitution to silently enact Blackstone's *Commentaries* in between or underneath the constitutional text'.⁶² It is the latter use, in which 'then' continuously and seamlessly becomes 'now', that is so marked a characteristic of current constitutional exposition.

Allen reads the Court's slippages from contextualised factual narrative to 'timeless legal principle' through Claude Levi-Strauss's commentary on myth in *Structural Anthropology*.⁶³ Mythic narratives merge two temporal registers: they reference events that have taken place long before the moment of narration, but use them to explain not just the past but also the present and the future. 'What gives the myth an operational value is that the specific pattern described is timeless'.⁶⁴ But just as important as the mythic narrative itself in Levi-Strauss's analysis is the way its acceptance is deployed by the modern observer, who attributes unquestioning belief in what is in modern eyes obviously mythic to the credulous primitive. When the modern Supreme Court presents the *Commentaries* as conclusive authority in the minds of American founders, it is in effect presenting the founders as credulous primitives whose uncritical acceptance of Blackstone as oracle cemented the *Commentaries* into the *United States Constitution* as the lens through which all the constitution's

⁵⁹ Gary B Nash, 'Also There at the Creation: Going Beyond Gordon S Wood' (1987) 44 *William & Mary Quarterly* 602.

⁶⁰ Allen quotes Justice Scalia's 'rather startling assertion of the creative powers of Blackstone's text', namely his claim (see *Rogers v Tennessee*, 532 US 451, 477 (2001)) that 'the Framers ... were formed by Blackstone'. Jessie Allen, 'Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 215, 225.

⁶¹ Allen, above n 60, 225, quoting *Alden v Maine*, 527 US 706 (1999). And see, eg, *Schick v United States*, 195 US 65, 69 (1904).

⁶² Allen, above n 60, 215.

⁶³ Claude Lévi-Strauss, *Structural Anthropology* (Claire Jacobson and Brooke Gundfest trans, Anchor Books, 1967).

⁶⁴ Allen, above n 60, 215.

relevant parts should be read. By presenting Blackstone's text 'as authoritative through the eyes of the "founding generation"', the contemporary Court bolsters its originalist certainties while avoiding 'the accusations of legal primitivism that would undoubtedly accompany avowals that the current justices themselves viewed Blackstone's text as *the* definitive source of all common law structures implicitly incorporated in the Constitution'.⁶⁵

Even usage of the *Commentaries* as an empirical sourcebook of the law as it was 'then', Allen argues, is controversial. After all, Blackstone's were quite literally 'commentaries' on the laws of England rather than reproductions. In the process of organising and synthesising he engaged, quite busily, in the creation of legal and historical mythology.⁶⁶ Even if Blackstone were a preeminent authority for lawyers and judges during the era of the Revolution and the Early Republic (and of course he was not treated as such by all, by any means),⁶⁷ that cannot be taken to signify their universal, uncritical acceptance of his text as 'an objective, politically neutral description of the common law of their time'.⁶⁸ And of course one may take the matter of the factual still further, for the legal culture of the early United States was formed by the quotidian habits and customs of the crowd at least as much as by the imaginings and practices of the comparatively tiny establishment of legal elites.⁶⁹ The *Commentaries* may have helped to convey Roscoe Pound's 'taught legal tradition' from one side of the ocean to the other, but one must be deeply sceptical of any attempt to represent a work entitled '*Commentaries on the Laws of England*' as empirically authoritative when it comes to the inestimably plural legal cultures of Revolutionary and Early Republican America.⁷⁰

The distinction drawn in Jessie Allen's essay between myth and fact points not to a divergence between representation and reality, words and things, but rather to two distinct realities both created by text. After all, in the *Commentaries* both 'the factual' and 'the mythical' are facets of textual representation. Historians usually invoke context to distinguish between a text's truth content and its mythic content,

⁶⁵ Ibid 229.

⁶⁶ Ibid 227, 231–2.

⁶⁷ See above n 57. For generalised antagonism to the reception of English common law in the Early Republic, see Tomlins, *Law, Labor, and Ideology*, above n 56, 101–2, 133–40, 191–2.

⁶⁸ Allen, above n 60, 226.

⁶⁹ See, variously, Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (Cambridge University Press, 2010); Laura F Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (University of North Carolina Press, 2009); Christopher Tomlins, 'Republican Law', in Edward G Gray and Jane Kamensky (eds), *The Oxford Handbook of the American Revolution* (Oxford University Press, 2013) 540–59.

⁷⁰ Compare Roscoe Pound, *The Formative Era of American Law* (Little, Brown and Co, 1938) with James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (University of Wisconsin Press, 1956).

but context does not assist us in distinguishing the oracular Blackstone from the rapporteur in situations in which — as in the genealogy of originalism — the text is treated as an authoritative guide to its context (English common law culture) rather than vice versa. Paul Halliday notes the quandary in his essay, 'Blackstone's King'. For over 200 years, he says, we have treated the *Commentaries* like 'some kind of jurisprudential inkblot'⁷¹ into which virtually anything can be read precisely because the *Commentaries* are self-authorising. Halliday does not respond by attempting to contextualise the *Commentaries*. Rather, his approach is to treat them as what they are — a text created by an author who, 'ever the poet, attentive to the plasticity of words', was actively engaged in the making of meaning.⁷²

Halliday's muse in the exercise is what the *Commentaries* had to say about the king. He argues that Blackstone's poetics of kingship are self-consciously ironic, invoking Hayden White's description of irony as 'catachresis (literally "misuse"), the manifestly absurd Metaphor designed to inspire Ironic second thoughts about the nature of the thing characterized' that presupposes 'the reader or auditor already knows, or is capable of recognizing, the absurdity of the characterization'.⁷³ One pauses to wonder whether Temple's dysfluent Blackstone would have risked irony in lecture — irony is often lost on a live audience — but Halliday's focus here is on the text of the *Commentaries*, susceptible to repeated readings. His particular focus is the *Commentaries*' trope of the king's sacredness. His argument is that Blackstone knowingly cast before his readers a figuration of the king that was 'not a description of the centre of their legal-political world' but rather a means by which claims about that centre could be criticised and its realities understood. 'Blackstone presented a sacred king only to disembody him, reducing him to acting through a metonym of himself: through a "crown" that had entirely absorbed those attributes once associated with the "king"'.⁷⁴ How was this reduction undertaken? By law. It was the law that ascribed sacredness to the king, that invested in the king 'supreme executive power' with all the rights and prerogatives of sovereignty, and to which the king in performance of his duties to care for and protect the community was subservient. Halliday's point is that Sir Edward Coke's king, whose natural body was that to which natural subjects were bound in allegiance, had been entirely absorbed into his immortal body politic, 'framed by the policy of man', renamed 'the crown', and bound by law.⁷⁵

⁷¹ Paul D Halliday, 'Blackstone's King', in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 169.

⁷² Ibid 170.

⁷³ Ibid 171; Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins University Press, 1973) 37.

⁷⁴ Halliday, above n 71, 172.

⁷⁵ Ibid 172, 173. See *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377. See, generally, Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1997).

If law was what bound, words (text) were law's signifying force. Blackstone's argument 'was not simply that the prerogative, in his own age, had "limits" and that those might be discussed. Rather, he understood that acts of discussion, including his own, constituted those limits. His pen drew the bounds around the king'.⁷⁶ So doing, Blackstone gave the controlling law textual body. As the King's natural body evaporated into 'the crown', words reshaped the crown into the 18th century constitutional mixture of legislative and executive: the ministry sitting in parliament, office-holders and bureaucracy, army: 'the political-legal order in its entirety', or in other words the state, the collective 'being through which law now thought, felt, and acted'.⁷⁷ Halliday detects a certain anxiety in the 'republican' Blackstone that in absorbing the king, and in the process becoming the fountain of the law that had evaporated the king, the crown had corrupted itself, that it would not care for the community as the unbound king had done.⁷⁸ Was Blackstone's lost king a patriot king? Halliday does not say, at least not directly.⁷⁹ What he *does* say is that the king of the *Commentaries* is Blackstone's creation, a product not of any context described as such, but of 'Blackstone's poetics'. His challenge lies in this assertion, and in its underlying claim that 'all political-legal arguments, like historical arguments, are at bottom imaginative constructions, bodied forth in words'.⁸⁰

The final essay in part three is a commentary on Paul Halliday's essay, but really it is a coda to the entire group — Dippel and Allen as well as Halliday. In 'Modern Blackstone: the King's Two Bodies, the Supreme Court and the President', Ruth Paley offers a distinctly disenchanted response to the phenomenon of the American reception of Blackstone. Paley's position is resolutely historicist.⁸¹ Consequently, she is deeply sceptical of Halliday's attempt to write about text outside context. Her rejoinder is to point to Halliday's footnotes, where he does battle with the attempt of John Yoo and other current American constitutional theorists to enlist 'the supreme executive power' of Blackstone's English monarch to unbind the 21st century

⁷⁶ Halliday, above n 71, 177. This is not per se an innovation. Common lawyers had been drawing bounds around the king for hundreds of years. See, for example, J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975) 9–19 (discussing Sir John Fortescue's *De Laudibus Legem Angliae*); Donald W Hanson, *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought* (Harvard University Press, 1970).

⁷⁷ Halliday, above n 71, 181, 187.

⁷⁸ Ibid 183–4, 185.

⁷⁹ See, however, ibid 178 (note 45). See also Henry Saint John, 1st Viscount Bolingbroke, *The Idea of a Patriot King* (1738).

⁸⁰ Halliday, above n 71, 170, 187.

⁸¹ By historicist, I mean a position dedicated to the proposition that 'a social practice or a document is a product of the preoccupations of its own time and place'. The definition is Robert Gordon's: see Robert W Gordon "'Critical Legal Histories Revisited": A Response' (2012) 37 *Law & Social Inquiry* 200, 200. I discuss historicism in 'After Critical Legal History', above n 14.

presidency from constitutional convention.⁸² Here, Paley says, is a context for Halliday's ostensibly contextless essay. But Paley's larger target is Blackstone's 'honorary member[ship]' in the American pantheon of godlike founders.⁸³ Nowhere else in the Anglophone common law world, she avers, is Blackstone so profoundly mythologised. And for no good reason: for the *Commentaries* were not written 'to enlighten legal practitioners'. They are nothing more than 'an undergraduate text', a work of synthesis by an author whose claim to fame lay in his ability 'to organise and categorise what had once seemed a rambling edifice of arcane knowledge'.⁸⁴ Paley is bluntly incredulous that

in the United States senior, highly-trained jurists of the Supreme Court and political theorists discussing the powers and role of the president are deeply — perhaps increasingly — influenced by their perceptions of what Blackstone wrote for undergraduates 250 years ago.⁸⁵

The *Commentaries* are 'a text designed to help gentlemen understand an important part of their society and fit them for a role in life that might require them to serve as unpaid officers of the law, perhaps as a justice of the peace or a jurymen'.⁸⁶ They were not written to train lawyers 'still less to serve as a reference work for judges'. Blackstone wrote to educate amateurs. Is it not, then 'both extraordinary and intellectually lazy' that the elite American legal establishment should treat this 'introductory guide ... to eighteenth-century English law and constitutional thought' as an immemorial monument to the legal culture of the Atlantic world at the moment of the American founding?⁸⁷

Ruth Paley's incredulity is a memorable English commentary on an American legal-constitutional preoccupation. Yet what survives her amazement at those who 'use an undergraduate text as adequate evidence to back up their assertions', who 'cherry-pick' the *Commentaries* 'for sentences and phrases that seem to support a particular point of view',⁸⁸ is the sheer fact that in current American constitutional jurisprudence the *Commentaries* are being used, and no doubt will continue to be used (if we are to treat Jessie Allen's citation counts as good evidence of trends)⁸⁹ in precisely the fashion she deprecates. In other words, Paley's context-driven, impeccably historicist, impeccably professional critique of the profoundly erroneous, utterly amateurish uses made of Blackstone's *Commentaries* by 'senior,

⁸² Halliday, 'Blackstone's King', above n 71, 169 n 3, 170 n 4, 172 nn 14 and 15, 185 n 78.

⁸³ Ruth Paley, 'Modern Blackstone: the King's Two Bodies, the Supreme Court and the President' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 188.

⁸⁴ Ibid 192, 194.

⁸⁵ Ibid 194.

⁸⁶ Ibid.

⁸⁷ Ibid 194, 197.

⁸⁸ Ibid.

⁸⁹ Allen, above n 60, 216–20.

highly-trained jurists' will have zero impact on that use.⁹⁰ Lawyers — or at any rate these lawyers — are not historicists in the way they think about law. Their conception of what law was, or is, or will be, owes little or nothing to the historicist's context. In this, indeed, they are like Blackstone himself, whose 'didactic loyalty to precedent [and] to text' as judge forbade yielding "'the variation of a single letter'" to context lest he expose the realisation of a larger legal harmony to "'a hundred altercations'".⁹¹ It follows that historicism cannot grant us much in the way of purchase on the ways lawyers — these lawyers — think about history.

V USE BEYOND HISTORY

If historicism cannot help us, what can? The question returns us, by way of conclusion, to Prest's essay in the most recent collection and also to Thalia Anthony's essay, 'Blackstone's *Commentaries* on Colonialism: Australian Judicial Interpretations', published in the preceding volume, *Blackstone and his Commentaries*.⁹²

Both Prest and Anthony remark on the rising incidence of resort to Blackstone in the closing decades of the 20th century in Australian High Court opinions, notably in native title cases. Blackstone was, of course, used as authority in early New South Wales for claims to a legal basis for English colonising on the grounds that his dictum that land 'desart and uncultivated' was open to appropriation ('occupancy') by a coloniser ('peopling them from the mother country') referred to the condition of the land itself rather than to the question whether or not it was already inhabited.⁹³ Absence of the appearance of cultivation or settled habitation meant, therefore, that indigenous inhabitation went unrecognised. Colonial courts adhered to this convenient interpretation of Blackstone's text in order to justify retrospectively Crown claims of sovereignty and possession, to validate land tenures and titles, and to apply criminal (also family and tax) law.⁹⁴ But they also noted independently that in fact Crown appropriation of New South Wales and the resulting dispossession of its inhabitants had been a matter not of law but of 'history'.⁹⁵ This would become an

⁹⁰ For the inspiring suggestion that amateurism is a constituent element of contemporary American legal culture I am indebted to Annelise Riles.

⁹¹ Temple, above n 25, 17, 13-16 (citing positions taken by Blackstone as judge in *Onslow v Horne* (1770)). See also Emily Kadens, 'Justice Blackstone's Common Law Orthodoxy' (2009) 103 *Northwestern University Law Review* 1553.

⁹² See Prest, 'Antipodean Blackstone', above n 49; Thalia Anthony, 'Blackstone's *Commentaries* on Colonialism: Australian Judicial Interpretations' in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 129.

⁹³ Blackstone, above n 2, vol I, 104.

⁹⁴ Anthony, above n 92, 131-41.

⁹⁵ 'It is a matter of history that New South Wales was taken possession of, in the name of the King of Great Britain, about fifty-five years ago': *R v Steel* (1834) 1 Legge 65, 68 (Forbes CJ).

important point of distinction — between, as it were, text and reality — during the era of reconsideration of indigenous land claims beginning in 1971.

In the first of these cases, *Milirrpum v Nabalco*,⁹⁶ the court's opinion restated what had become the conventional wisdom since the 1820s: the law had been settled by 1788, and to all intents and purposes since the original publication of the first volume of the *Commentaries* in 1765. First, a distinction obtained 'between settled colonies, where the land, being desert [sic] and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies'.⁹⁷ And second, Blackstone's words 'desert [sic] and uncultivated' had 'always been taken to include territory in which live uncivilized inhabitants in a primitive state of society'.⁹⁸ By the time of *Mabo v Queensland [No 2]*, the High Court, in Justice Gummow's pithy summation four years afterward, was ready to acknowledge 'that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown then to have been false'.⁹⁹ But what were those assumptions of historical fact now shown then to have been false? They did not extend to the original assumption of Crown sovereignty. Notoriously, in *Mabo [No 2]* the High Court had refused to countenance any challenge 'in an Australian municipal court' to '[t]he Crown's acquisition of sovereignty over the several parts of Australia'.¹⁰⁰ The acquisition of sovereignty over foreign territory, said the High Court, was 'a prerogative act ... of State the validity of which is not justiciable in the municipal courts'.¹⁰¹ Rather, what was now shown then to have been false was the conventional wisdom used retrospectively in colonial New South Wales to validate settler tenures and titles — that by 'desert and uncultivated' Blackstone had meant uninhabited by a settled and civilised population.¹⁰² The cruel distortion of the legal text discarded, the High Court stood ready to grant the text a new truth — that the common law had become 'the common law of *all* subjects within the Colony who were equally entitled to the law's protection as subjects of the Crown', colonist and indigene alike. Hence it stood ready to grant 'recognition by our common law of the rights and interests in

⁹⁶ (1971) 17 FLR 141.

⁹⁷ Blackstone, above n 2, vol I, 104.

⁹⁸ *Milirrpum v Nabalco* (1971) 17 FLR 141, 201 (emphasis added).

⁹⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1, 181.

¹⁰⁰ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 69 (Brennan J).

¹⁰¹ *Ibid* 30.

¹⁰² Blackstone's original text had endorsed:

the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants ... so long as it was confined to the stocking and cultivation of desert uninhabited countries' as 'within the limits of the law of nature'. But, he had there continued, 'how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

Blackstone, above n 2, vol II, 7.

land of the indigenous inhabitants of a settled colony', namely Australia.¹⁰³ But not so far as would 'fracture the skeleton of principle which gives the body of our law its shape and internal consistency', namely common law reception itself.¹⁰⁴ What stood in the Court's way was the obstinate reality of the 'history' of which 'our law is the prisoner', or in other words the reality of the crown's original extinguishing claim to beneficial ownership, and all the consequences that had flowed therefrom.¹⁰⁵ That formative reality the Court would not venture to question,¹⁰⁶ or compromise.¹⁰⁷ Thus exposed, history has proven to possess a 'tide' against which the High Court is disinclined to swim.¹⁰⁸

¹⁰³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 39–42.

¹⁰⁴ Ibid 43. To discard falsity while avoiding fracture, the High Court was necessarily driven toward metaphysics: criticising the unjust implication of prior case law that 'the interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest', that 'the common law itself took from indigenous inhabitants any right to occupy their traditional land', the Court determined to remedy the injustice and shelter the common law from accusation by finding that in fact the common law had extended to all, settlers and indigenous alike, from first settlement. Injustice hence lay not in any common law taking of the land but rather in past failures to realise that indigenous inhabitants enjoyed 'native title' rights and interests at common law: at 29.

¹⁰⁵ Ibid 29. See also Penny Pether, 'Principles or Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation' (1998) 4 *Law Text Culture* 115, 116–18. On Pether's constitutional jurisprudence and criticism see Christopher Tomlins, 'Fierce and Critical Faith: A Remembrance of Penny Pether' (2015) 60 *Villanova Law Review* 667.

¹⁰⁶ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 152, 154–63. For a 'colloquial' summary of where *Mabo [No 2]* left Aboriginal Australians, see Noel Pearson, 'The High Court's Abandonment of "The Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (2003) 7 *Newcastle Law Review* 1, 3.

¹⁰⁷ *Wik Peoples v Queensland* (1996) 187 CLR 1. For a 'colloquial' summary of where *Wik* left Aboriginal Australians, see Pearson, 'Abandonment', above n 106, 3.

¹⁰⁸ In *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998), the Federal Court (at [129]) vacated the plaintiffs' native title claim on the grounds that

[t]he evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously

Unlike the US Supreme Court's encounters with Blackstone, in which the oracle has been pressed into a supremely conservative role, in the Australian High Court's encounters Blackstone has proven subversive. By clearing him of complicity in the seizure of the continent, Australian municipal courts stripped themselves of a crucial legitimating fig leaf. This is the reason they have perforce retreated from the exposed position of *Mabo [No 2]*'s faltering attempts at compromise to the stockade of non-negotiable Crown prerogative and its latterday embodiment in judicial construction of s 223(1) of the *Native Title Act 1993* (Cth). As the High Court put it in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002), it would not do to give 'undue emphasis' to what it had said in *Mabo [No 2]* 'at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act*'.¹⁰⁹ Under cover of interpreting s 223(1) of the Act the Court then expunged recognition of native title from the Australian common law that ten years earlier had belatedly acknowledged the rights and interests in land of indigenous Australians:

To speak of the 'common law requirements' of native title is to invite fundamental error. Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today. Native title, *for present purposes*, is what is defined and described in s 223(1) of the *Native Title Act*. *Mabo [No 2]* decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was this native title that was then 'recognised, and protected' in accordance with the *Native Title Act* and which, thereafter, was not able to be extinguished contrary to that Act.¹¹⁰

Meantime, Blackstone has been pressed into service by indigenous activists and their allies.¹¹¹ As Prest notes, in 1993 Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson concluded the introduction to his first report with an 'iconic' quotation from *Commentaries* (volume II) which presciently illuminates what in 2002 would become the High Court's naked *raison d'état* like a deer caught in the headlights:

occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.

In all, the expression 'the tide of history' was repeated four times in the course of the judgment. The High Court affirmed the Federal Court ruling in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹⁰⁹ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 441 [38] (emphasis in original). For a 'colloquial' summary of where *Yorta Yorta* left Aboriginal Australians, see Pearson, 'Abandonment', above n 106, 4.

¹¹⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 453 [75].

¹¹¹ See, for example, Henry Reynolds, *The Law of the Land* (Ringwood 1987), 34–5.

There is nothing which so generally engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.¹¹²

Noel Pearson has effectively seconded Dodson's post-*Mabo* [No 2] attempt to underline indigenous Australians' rights in native title cases to a common law process of 'examining the reason or authority upon which those laws have been built' in trenchant critiques of the High Court's prejudicial termination of common law development in favour of peremptory statutory construction:

By treating native title as defined by section 223(1) the High Court is ruling on important questions and principles on the basis of bare assertion, rather than through what McLachlin J called 'the time-honoured methodology of the common law' whereby cases are ruled upon according to the established and developing precedents.¹¹³

Acknowledging that native title is not a common law title as such, Pearson's position is that Australian native title jurisprudence can nevertheless take advantage of the very substantial body of native title jurisprudence that the Anglophone common law world has produced.¹¹⁴ Pearson's ultimate objective is to have native title treated as a 'recognition concept', existing as such neither in common law nor in Aboriginal law but as 'the space between the two systems', where they meet and where common law recognises title under Aboriginal law.¹¹⁵ Here, he argues, lies the true meaning of the words of s 223(1) of the *Native Title Act 1993* (Cth).¹¹⁶ Thalia Anthony agrees. 'Given widespread agreement that Indigenous laws predated colonization, and in some instances currently co-exist with Anglo-Australian legal rights, there should be greater capacity for recognition of Indigenous laws', extending both to rights

¹¹² Prest, 'Antipodean Blackstone', above n 49, 164; Blackstone, above n 2, vol II, 2.

¹¹³ Pearson, 'Abandonment', above n 106, 12. Pearson here refers to the dissenting opinion of Justice Beverley McLachlin in *R v Van der Peet* (1996) 137 DLR (4th) 289, 377.

¹¹⁴ Pearson, 'Abandonment', above n 106, 13.

¹¹⁵ Noel Pearson, 'The Concept of Native Title at Common Law' (1997) *Australian Humanities Review*, <<http://www.australianhumanitiesreview.org/archive/Issue-March-1997/pearson.html>>.

¹¹⁶ *Ibid*; Pearson, 'Abandonment', above n 106, 13–14. See also Shaun McVeigh, 'Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law' (2014) 4 *UC Irvine Law Review* 471; Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) 107–11.

and interests in regard to land and waters, and beyond. And once more Blackstone becomes subversive.

Blackstone wrote that the application of English law is qualified by the “condition of the infant colony”. Where Indigenous laws still operate as a surviving aspect of the “condition of the infant colony”, Blackstone’s qualification challenges the Parliament (if not the courts) to provide a workable coexistence of Indigenous laws and Anglo-Australian law.¹¹⁷

One might find reason to believe that even the High Court accepts native title as a ‘recognition concept’. After all, *Yorta Yorta* held that the *Native Title Act 1993* did not create new rights or interests in relation to land or waters which it named ‘native title’. Rather ‘the Act has as one of its main objects “to provide for the *recognition* and *protection* of native title”, which is to say those rights and interests in relation to land or waters with which the Act deals, but which are rights and interests finding their origin in traditional law and custom, not the Act’.¹¹⁸ The problem lies, however, in the nature of the High Court’s concept of recognition, versus Pearson’s. And in this it remains quite consistent with its earlier self. *Mabo [No 2]* had found ‘that the establishment of British colonial sovereignty in Australia only brought with it radical title to the lands of the colony [and] that some further disposition had to take place before an absolute beneficial ownership of such lands was ... brought into existence’, extinguishing native title, such as a ‘dealing with the land inconsistent with the existence of native title’.¹¹⁹ *Mabo [No 2]* thus rewrote Australian common law ‘to recognise a law predating it and persisting alongside it’. But simultaneously it declared that other law to be its inferior, ‘always subject to subordination’ and indeed to irrevocable extinguishment by it. The judgment’s schizophrenia lay in its refusal to fracture skeletal principle and address Crown sovereignty.¹²⁰ That refusal has persisted.

¹¹⁷ Anthony, above n 92, 149–50.

¹¹⁸ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 453 [76] (emphasis added).

¹¹⁹ Pether, ‘Principles or Skeletons’, above n 105, 117.

¹²⁰ Ibid 117, 118. See also Stewart Motha, ‘As If: Law, History, Ontology’ (2015) 5 *UC Irvine Law Review* 327; Christopher Tomlins, ‘Foreword: “Law As . . .” III – *Glossolalia*: Toward a Minor (Historical) Jurisprudence’ (2015) 5 *UC Irvine Law Review* 239, 247–51. As Blackshield and Williams put it:

In *Mabo* ... the High Court did not accord [the diverse patterns of belief and power expressed through the traditions and practices of Indigenous peoples] any legal force of its own. Through recognition by the common law, this older tradition was acknowledged as an embodiment of inherent and judicially cognizable bonds between Indigenous peoples and their ancestral lands. However, by formulating it as “native title” depending on common law recognition, the Court avoided any suggestion of Indigenous “sovereignty”. [Rather], the High Court took care to avoid undermining the formal constituent structures of Australian governance. The Court recognized the customary laws and entitlements of Indigenous people only to the extent that they saw this as consistent with existing constitutional norms.

Blackshield and Williams, above n 106, 152.

On both sides of the Australian debate, ‘history’ escapes context. On the side of the High Court, ‘history’ does not mean the dispossession that occurred, but the crown claim that cannot be denied. On the side of its critics, the ‘history’ in which for 200 years Blackstone was a foe to be hated has in the last 20 years been enlivened by the recreation of him as an ally to be welcomed. Historicists may stand amazed but history in the hands of law is simply not stable.

Nor, I think, should it be. Prest desires to stabilise Blackstone the man by restoring him to his own time — putting history ‘beyond use,’ as it were¹²¹ — but the meaning of the *Commentaries*, the introductory text that has become holy writ, cannot be so easily controlled. We have seen that lawyers do not think that way; rather than scold them for their refusal of historicism, one might see in their refusal a different philosophy of history. One might seize hold of the sentences published in 1766 that Mick Dodson found so useful in 1993, complete them in 2015 with words that Dodson omitted, and use them to furnish the beginnings of a historical common law jurisprudence that can advance into the space between two systems, where it can engage Noel Pearson’s call to make ‘recognition’ a dynamic and continuing ideal:

We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.¹²²

Why should ‘words upon parchment’ convey dominion over land? Why should an ancestor’s success in excluding others ‘from a determinate spot of ground’ empower the descendant to continue to do so? Why should one unable any longer to maintain possession ‘of a particular field or of a jewel’ be entitled to tell ‘the rest of the world’ who might or might not have the enjoyment of it thereafter. These cannot be improper questions, if law is indeed ‘a rational science’ (and even more so if it is not). Why bury Blackstone in the 18th century just at the point when he is becoming useful to *both* sides in the argument in the 21st?

¹²¹ Prest, *William Blackstone*, above n 2, 10. On ‘beyond use’ see the Good Friday Agreement (Belfast Agreement) of 10 April 1998, decommissioning of weapons.

¹²² Blackstone, above n 2, vol II, 2.

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In preparing manuscripts for submission, authors should be guided by the following points:

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