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Articles should be between 8,000 and 10,000 words in length, while shorter papers between 4,000 and 6,000 words may also be published. Case notes, reports on recent developments and book reviews should be approximately 1,500 – 2,000 words in length. References and footnotes are not included in the above word counts. All articles and shorter papers submitted for consideration are subject to a formal process of peer review by at least two academic referees with expertise in the relevant field.

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EDITOR’S NOTE

Volume 12 of the *Macquarie Law Journal* is a general publication which has attracted some high quality submissions that highlight the great variety of research topics currently being undertaken by Australian law academics. We are pleased to present seven articles that in their own ways contribute to a better understanding of a range of issues traversing international law, legal history, refugee law, human rights law and comparative jurisprudence.

This volume starts with the 2013 Annual Tony Blackshield Lecture, which was presented recently at our law school by Professor George Williams. His incisive commentary on the spate of laws enacted in various Australian jurisdictions in response to the threat of international terrorism was very well received by the large audience present. Professor Williams’ comprehensive presentation covers the initial justification for the anti-terror laws, but also critically considers their development, their real and potential effect on human rights in contemporary Australia and the prospects for reform. He also took the opportunity to reflect personally on his experiences as Tony Blackshield’s student and colleague, a reflection that we publish as a short postscript.

Professor David Clark’s article on a neglected aspect of Australian judicial history makes a significant contribution that builds on previous research about individual judges in the 19th century Australian context. However, his exhaustively researched piece has raised the bar for its thoroughness and scope in relation to existing secondary literature as well as primary sources. It has done a great service to future scholars in this area. The article also elevates this complex aspect of our colonial history, highlighting the strained relationship between the judiciary and the colonial executive, to more abstract issues that help us also interpret our constitutional law in historical context.

Professor Holly Cullen has prepared an interesting and topical description and evaluation of the Kimberley Process Certification Scheme, a relatively unnoticed example of international soft law. In her insightful evaluation of the scheme to date, Professor Cullen focuses on three sovereign states, each of which has had a unique experience of blood diamonds and the scheme designed to prevent their trade. Each heralds different lessons for its future. Her article also exposes the inherent difficulties underscoring such experiments in international law. It draws attention to the limitations of contemporary international consensus-based decision-making insofar as it aims to secure compliance with voluntary undertakings by sovereign states.

We are delighted also to publish an article from a recent Macquarie Law School graduate, Lauren Hirsh, whose scrupulously prepared argument for the adoption of Australian gun laws in the United States deserves commendation. Lauren’s contribution is in some ways a pioneering work which, based on an astute doctrinal analysis of two pivotal superior US court decisions, explores the constitutional and cultural barriers to the possibilities for more comprehensive gun control in America on the Australian model.
Kate Ogg has delivered a very valuable review and critique of recent developments in the field of refugee law. She analyses and contrasts two recent and important cases to mount an argument about the relationship between refugee law and human rights law in determining the criteria for the ‘effective protection’ of persons seeking asylum from persecution or human rights abuse. The first decision, in the politically charged atmosphere of an impending federal election, saw the High Court of Australia look to the Refugee Convention to set a high standard as to what amounts to ‘effective protection’. The second, from the European Court of Justice, drew on principles of human rights law and, perhaps paradoxically, set a lower threshold for states wishing to send asylum seekers to a third state for processing. Ms Ogg’s article exposes the tension between the Refugee Convention and the European Union’s human rights jurisprudence.

The long dormant phenomenon of piracy has become topical again in recent times. Tamsin Paige has presented a valuable and informative article in which she argues that the crime of piracy is one of concurrent municipal jurisdiction rather than universal jurisdiction. Using extensive historical and contemporary research, Ms Paige reinforces the view that, in the context of the increasing challenge of piracy for international legal frameworks, there is a renewed urgency to clarify the legal definition of piracy to achieve greater consistency in counteraction and prosecution.

Dr Asmi Wood’s contribution to this volume advances current knowledge about Islamic approaches to the welfare of animals. His article, replete with informative material for researchers in the field, is based on some key contentions. Despite diverging specifications for the lawful or ‘halal’ slaughter of animals, Dr Wood argues that a close reading of the primary sources of Islam reveals they are primarily directed at minimising distress and pain. Further, the current standard for halal certification in Australia does not in all instances meet the specifications decreed by shari’ā specifications. The article also explores how shari’ā principles may be used to promote more humane treatment of animals in Australia and among our trading partners.

I thank all the contributors for their submissions to this edition of the Macquarie Law Journal and their cooperation with the editorial staff during the production phase. I would also like to express my gratitude to the student editors, whose commitment and perseverance made its publication possible. A Call for Papers for Volume 13 may be found at the end of this edition.

Ilija Vickovich

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THE LEGAL LEGACY OF THE ‘WAR ON TERROR’

GEORGE WILLIAMS*

(Annual Tony Blackshield Lecture delivered at Macquarie Law School,
Macquarie University, 10 October 2013)

Australia enacted an extraordinary number of anti-terror laws in the name of the ‘war on terror’ in the years after September 11. This lecture asks whether Australia needed new anti-terror laws, and assesses the laws that were enacted. It also deals with recommendations made for reform, and the prospects that such changes might be realised. It reaches conclusions about Australia’s new anti-terror laws, and, more broadly, what the enactment of these laws suggests about the Australian legal system, and the protection it offers for fundamental human rights.

I INTRODUCTION: ANTI-TERROR LAWS IN THE SHADOW OF SEPTEMBER 11

I have decided to talk today on a subject that has occupied much of my time over the past 12 years — the enactment of Australia’s first national anti-terror laws. I became involved in this area because of Tony Blackshield. My undergraduate honours thesis for him on the Communist Party Case was written as an exercise in legal history, and I did not anticipate that similar issues of law and national security would arise again in Australia. When they did after the devastating attacks of 11 September, 2001 (September 11), I found myself quickly drawn in as nations responded in ways that raised a wide range of fundamental questions about public law and justice.

The American response to September 11, and in particular President George W Bush’s statement that ‘you’re either with us or against us’, reminded me of similar rhetoric in Australia in the late 1940s. It is one of many parallels between these two important eras.

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1 Australian Communist Party v Commonwealth (1951) 83 CLR 1.
Hence, the editorial in the *Sydney Morning Herald* on 7 November 1947 stated:

Communism is cold, harsh and ruthless, and it is building slowly and inexorably to the day when our democratic Government will be superseded by a Godless, tyrannical Communist dictatorship in Australia … Any Australian born in this country who embraces Communism is a traitor. There is no half way. There has to be a choice between good and evil, and people must be either loyal or disloyal.\(^4\)

*Sydney Morning Herald* editorials seem to have lost a little punch in the years since.

The High Court’s decision in the *Communist Party Case* stands as a beacon against the hysteria of the time. The decision to strike down federal legislation banning the Communist Party, in the face of overwhelming community support for the initiative, is the strongest indication yet seen in Australia of the High Court’s role in vindicating the rule of law. The decision also reminds us of important principles that I felt ought not to be forgotten in the frenzy of lawmaking that was to follow after September 11. In particular, Sir Owen Dixon talked in the *Communist Party Case* of the dangers of concentrating too much power in any one arm of government and in the executive in particular. He said

> 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.\(^5\)

This insight has driven much of my work in the years since September 11. We must not, in the name of protecting our democratic freedoms from terrorism, undermine those same freedoms.

### II  Australia Needed National Anti-Terror Laws

My undergraduate study of the late 1940s and early 1950s Australian battle against the communist ‘menace’ gives me a critical eye when it comes to extraordinary measures to protect national security. That time does not, however, suggest that there is no role for the law when it comes to protecting the community from internal and external threats. Indeed, I have always been of the view that Australia needed to enact anti-terror laws after September 11.

Australia has a short history of enacting laws specifically aimed at the prevention of terrorism. In fact, before September 11, only the Northern Territory had such a law,\(^6\) and in all other Australian jurisdictions politically motivated violence was instead dealt with under the traditional criminal law.

The absence of national anti-terror laws in Australia prior to September 11 was not


\(^5\) Ibid.

surprising. Apart from isolated incidents such as the 1978 bombing attack on the Commonwealth Heads of Government Regional Meeting at the Sydney Hilton Hotel, Australia had little direct experience of terrorism. However, the rarity of such attacks was not itself a justification for the lack of law. Anti-terror laws should ideally be in place as a precursor to a possible attack, rather than enacted in haste after the event. Indeed, the worst possible time for enacting anti-terror laws can be in the aftermath of a devastating terrorist attack. The fear and grief that such an event produces is hardly conducive to rational debate about the appropriate scope of such laws.

The attacks of September 11 provided the catalyst for Australia’s first national anti-terror laws. It has been argued that such laws were not needed, primarily on the basis that terrorism can be dealt with by the existing criminal law. However, I do not see that position is sustainable. Laws were needed to deal with specific aspects of threat posed by terrorism. For example, the nation needed a statutory framework directed to preventing the financing of terrorist acts overseas so as to ensure that Australians do not enable such attacks.

More broadly, the criminal law in place in 2001 was not sufficient for the task of preventing terrorist attacks. It failed to adequately deal with matters such as terrorist organisations and was not sufficiently directed to the problem of prevention. It is not appropriate in the context of terrorism, as is often the case for other types of crime, to primarily apply the force of law once an act has been committed so as to bring the perpetrator to justice. Instead, given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack. Such prevention can be seen as an act of political pragmatism given the pressing need for Australian governments to take action to protect the community from terrorism. It can also be seen as a measure designed to respect fundamental human rights, including the right to life and to live free of fear.

Anti-terror laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that may give rise to a terrorist attack. It is arguable that the laws as actually enacted give rise to lengthy jail sentences for preparatory acts too far removed from the actual commission of an act of terrorism. However, this is not a persuasive argument against the existence of anti-terror laws per se, but for their recalibration so as to ensure that they criminalise actions that can be more realistically described as preparation for committing a terrorist act. On the other hand, the argument for appropriate anti-terror laws is not a case for departing from well-accepted principles of criminal law aimed at ensuring outcomes such as the right to a fair trial. Anti-terror laws must be framed in light of such values.

An effective prevention strategy also required laws to confer powers on agencies such as the Australian Federal Police and Australian Security Intelligence Organisation (ASIO). These organisations required legal authorisation to collect information to head off an attack and the power to target not only individuals that might engage in terrorism but also groups or cells of potential terrorists. Again, the issue here is not so much one of justification, but of proportionality. Australia’s law enforcement and intelligence agencies should have sufficient powers to dismantle and prevent threats to the community, but those powers should be
carefully tailored to the level of the threat. They should also be subject to strict and transparent safeguards enforced by independent agencies.

Apart from the inadequacy of its existing national laws, Australia was justified in enacting new anti-terror laws after September 11 in fulfilment of its obligations as a member of the international community. For example, Resolution 1373 of the United Nations Security Council, adopted on 28 September 2001, determined that States shall ‘take the necessary steps to prevent the commission of terrorist acts’ by ensuring that ‘terrorist acts are established as serious criminal offences in domestic laws and regulations’. This gave rise to a clear obligation on the part of Australia to enact laws directed at this problem. While Australia had laws in place that could have been used to prosecute individuals for acts of terrorism, it was unsustainable for Australia to argue that it already had sufficient laws in place directed at the prevention of terrorism.

Finally, Australia’s anti-terror laws can be seen as having an important moral dimension. In an era punctuated by terrorist attacks starting with New York and Washington and followed by Bali, Madrid, London, Mumbai, Jakarta and elsewhere, it was appropriate that Australia outlawed such forms of political violence. Enacting a specific crime of terrorism signalled that, as a society, Australia rejects the use of violence in the pursuit of a political, religious or ideological goal.

Governments and parliaments deserve credit for recognising that Australia required a body of law directed towards protecting the community from the threat of terrorism. These institutions were correct in their assessment that such laws ought to be directed particularly to the prevention of such acts. In hindsight, our legal system prior to 9/11 reflected complacency about the potential for political violence in Australia and the region.

III THE LAWS THAT AUSTRALIA GOT

The problem arising from Australia’s anti-terror laws is not that they exist, but the extraordinary and far reaching form in which they were enacted. Australia’s response to September 11 was similar to that of many other countries. It emphasised the need to deviate from the ordinary criminal law — with its emphasis on punishment of individuals after the fact — by preventing terrorist acts from occurring in the first place. The result was a bout of lawmaking that continues to challenge long-held assumptions as to the proper limits of the law, and criminal law in particular, and also accepted understandings of the respective roles of the executive, parliament and the judiciary.

One remarkable feature of Australia’s response to terrorism is the sheer volume of lawmaking. In the 12 years since September 11, Australia’s Federal Parliament, and so not

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7 SC Res 1373, UN SCOR, 56th sess, 4385th mtg. UN Doc S/RES/1373 (28 September 2001), preamble and art 2(e).
including the laws of the States and Territories, has enacted 61 anti-terror laws. This can be divided into two periods. Across the 6 years of the Rudd, Gillard and Rudd governments, the Federal Parliament enacted 13 of these laws, an average of one new law every six months or so. By contrast, during the high point of the so-called ‘war on terror’, from 11 September 2001 to the fall of Prime Minister Howard’s Coalition government in 2007, the Federal Parliament enacted 48 anti-terror laws, an average of a new anti-terror statute every 6.7 weeks. The statistics are eye-catching and, indeed, Australia’s output of anti-terror laws greatly exceeds that of nations facing a higher threat level. In a comparative analysis of the anti-terror laws passed in a range of democratic nations, Kent Roach has described Australia’s response as being one of ‘hyper-legislation’ as a result of Australia getting ‘caught up in the 9/11 effect’. He found:

Australia has exceeded the United Kingdom, the United States, and Canada in the sheer number of new antiterrorism laws that it has enacted since 9/11 ... this degree of legislative activism is striking compared even to the United Kingdom’s active agenda and much greater than the pace of legislation in the United States or Canada. Australia’s hyper-legislation strained the ability of the parliamentary opposition and civil society to keep up, let alone provide effective opposition to, the relentless legislative output.

Australia’s national anti-terror laws are striking not just in their volume, but in their reach. As a result of these laws, powers and sanctions once thought to lie outside the rules of a liberal democracy except during wartime have now become part of the Australian legal system. Examples of these powers and sanctions are as follows:

i. Australia’s new anti-terror laws define a ‘terrorist act’ as conduct engaged in or threats made for the purpose of advancing a ‘political, religious or ideological cause’. The conduct or threat must be designed to coerce a government, influence a government by intimidation, or intimidate a section of the public. The conduct or threat must also cause any of a number of harms, ranging from death and serious bodily harm to endangering a person’s life, seriously interfering with electronic systems, or creating a ‘serious risk to the health or safety of … a section of the public’. The definition excludes advocacy, protest, dissent or industrial action so long as there is no intention to cause things such as serious physical harm, death or a serious risk to the health or safety of

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9 This figures is based upon the 54 anti-terror statutes I identified had been enacted in the decade after September 11 in George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35 Melbourne University Law Review 1136, 1144. Since that tally, the following further seven anti-terror laws have been enacted, with such statutes identified according to the methodology set out in that article: Combating the Financing of People Smuggling and Other Measures Act 2011 (Cth); Aviation Transport Security Amendment (Air Cargo) Act 2011 (Cth); Nuclear Terrorism Legislation Amendment Act 2012 (Cth); Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth); Aviation Transport Security Amendment (Screening) Act 2012 (Cth); Customs Amendment (Military End-Use) Act 2012 (Cth); Aviation Transport Security Amendment (Inbound Cargo Security Enhancement) Act 2013 (Cth).


12 Ibid, 310.

13 Criminal Code Act 1995 (Cth) Sch 1 (‘Criminal Code’) s 100.1(1) (definition of ‘terrorist act’, para (b)).

14 Ibid s 100.1(2)(e).
the public. The definition is more carefully tailored than others in some nations, but still encompasses liberation movements, such as the struggle of Nelson Mandela against apartheid, the armed resistance in East Timor or those currently seeking to bring down the Syrian government.

ii. The laws create a range of new offences, including that of committing a ‘terrorist act’. Other provisions create a wide range of offences for conduct preparatory to a terrorist act. These include: providing or receiving training connected with terrorist acts; possessing ‘things’ connected with terrorist acts; and collecting or making documents likely to facilitate terrorist acts. The penalties are severe. For example, a maximum penalty of life imprisonment is imposed where a person provides or collects funds and is reckless as to whether those funds will be used to facilitate or engage in a terrorist act, or, more generally, where the person does ‘any act in preparation for, or planning, a terrorist act’. These offences can be combined with the ‘inchoate’ offences that apply to other Commonwealth crimes, such as that for attempt or conspiracy. These offences are also committed even if a terrorist act does not occur or the training/thing/document/act is not connected to a specific terrorist act. The offences thus render individuals liable to serious penalties even before there is what would ordinarily be regarded as the formation of criminal intent. It is this predictive approach, exemplified in the doubly pre-emptive offence of ‘conspiracy to do an act in preparation for a terrorist act’, which gives the offences such an extraordinary reach.

iii. The new laws contain remodelled sedition offences whereby it an offence punishable by seven years’ imprisonment to urge the overthrow of the Constitution or government by force or violence, or to urge interference in parliamentary elections. It is also an offence to urge violence against a group or an individual on the basis of their race, religion or political opinion.

iv. The laws enable warrantless searches whereby police officers may enter premises without a warrant in order to prevent a thing from being used in connection with a terrorism offence, or where there is a serious and imminent threat to a person’s life, health or safety. While on the premises, police officers have the power to seize any

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16 Criminal Code s 100.1(1) (definition of ‘terrorist act’).
17 Ibid s 101.2.
18 Ibid s 101.4.
19 Ibid s 101.5.
20 Ibid ss 103.1(1) (general offence), 103.2(1) (where the funds are collected for or on behalf of a specific person).
21 Ibid, s 101.6.
22 See ibid ss 101.2(3), 101.4(3), 101.5(3), 101.6(2).
23 Ibid ss 80.2A–80.2B. These offences were first introduced as ‘sedition’ offences by the Anti-Terrorism Act (No 2) 2005 (Cth) sch 7 item 12. They were amended to their current form by the National Security Legislation Amendment Act 2010 (Cth) pt 2.
24 Crimes Act 1914 (Cth) s 3UEA.
other ‘thing’ if they suspect on reasonable grounds that doing so is necessary to protect someone’s health or safety, or because the circumstances are ‘serious or urgent’.  

v. The Australian laws provide a longer investigation period for terrorism offences (24 hours) compared to non-terrorism offences (12 hours). In the case of a terrorism offence, the investigating authorities may also apply to a magistrate for up to seven days of ‘dead time’ if they need to suspend or delay questioning the suspect (for example, while making overseas inquiries in a different time zone).

vi. The laws enable the proscription, or banning, of organisations by government decree. The Attorney-General can make a written declaration that an organisation is a ‘terrorist organisation’. Once a declaration is made, a range of offences apply to individuals who are linked to that organisation, including: directing the activities of a terrorist organisation; intentionally being a member of a terrorist organisation; recruiting for a terrorist organisation; receiving funds from or giving funds to a terrorist organisation; providing ‘support’ to a terrorist organisation; and associating with a terrorist organisation.

vii. Included in the laws is a ‘preventative detention order’ regime in which individuals may be taken into custody, without charge or trial, and detained for a maximum period of 48 hours where this is reasonably necessary to prevent an ‘imminent’ terrorist act from occurring or to preserve evidence relating to a recent terrorist act. An extended period of detention is then possible under State law up to a maximum of 14 days.

viii. The laws also include a ‘control order’ regime, in which individuals not suspected of any criminal offence may be subject to a wide range of restrictions that can regulate almost every aspect of their life, ranging from where they work or live, to whom they can talk, where those restrictions are ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.’ A person can even be subject to house arrest. All this can occur without a trial, and indeed control orders ignore the concept of guilt and innocence altogether.

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25 Ibid (Cth) s 3UEA(5).
26 Compare ss 23DB–23DF (terrorism offences) with ss 23C–23DA (non-terrorism offences).
27 Ibid s 23DB(11).
28 In order to make such a declaration, the Attorney-General must be satisfied that the organisation ‘is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’ or ‘advocates the doing of a terrorist act’: Criminal Code s 102.1(2)(a)–(b).
29 Ibid s 102.2.
30 Ibid s 102.3.
31 Ibid s 102.4.
32 Ibid s 102.6.
33 Ibid s 102.7.
34 Ibid s 102.8.
36 See, eg, Terrorism (Police Powers) Act 2002 (NSW) s 26K(2).
37 Criminal Code s 104.4(1)(d).
ix. The anti-terror laws provide extraordinary new powers to ASIO whereby the Director-General of ASIO can apply to the Attorney-General for questioning and detention warrants. A person may be questioned in eight hour blocks up to a maximum of 24 hours where this would ‘substantially assist the collection of intelligence that is important in relation to a terrorism offence’. In addition, a person may be detained for up to a week for questioning where there are reasonable grounds to believe that he or she will alert another person involved in a terrorism offence, not appear before ASIO for questioning, or destroy a record or thing that may be requested under the warrant. It is an offence punishable by five years’ imprisonment to refuse to answer ASIO’s questions, or to give false or misleading information. These warrants may be issued against non-suspects, including family members, journalists, children between the ages of 16 and 18 and innocent bystanders. It is an offence, while a warrant is in effect and for two years afterwards, to disclose ‘operational information’ (including ‘information that [ASIO] has or had’) that a person has as a direct or indirect result of the issue or execution of the warrant.

x. The laws include new powers of electronic surveillance, not only for terrorist suspects, but also for those who the authorities believe are ‘likely to communicate’ with the person under investigation.

xi. They also grant additional powers to the Attorney General to close down a courtroom from public view where sensitive national security information is likely to be disclosed. That information may then be led against a defendant in summary or redacted form. Decisions as to whether the evidence will be admitted are decided in a closed hearing from which the defendant and even his or her legal representative may be excluded. When deciding whether and in what form to admit the evidence, the judge or magistrate is directed to give ‘greatest weight’ to the interests of national security over other considerations.

xii. The laws require that publications, films or computer games that ‘advocate’ the doing of a terrorist act must be classified as ‘Refused Classification’. This includes where the publication, film or computer game ‘directly praises the doing of a terrorist act in circumstances where there is a risk that such a praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the Criminal Code) that the person might suffer) to engage in a terrorist act’.

38 Australian Security Intelligence Organisation Act 1979 (Cth), Part III Div III.
39 Ibid ss 34D–34G, 34R–34S.
40 See the ‘special rules for young people’ in ibid s 34ZE.
43 Ibid s 29(3).
44 Ibid ss 31(7)(a), (8), 38L(7)(a), (8).
45 Classification (Publications, Films and Computer Games) Act 1995 (Cth), s 9A.
46 Ibid s 9A(b).
IV DISPROPORTIONATE LAWS

Australia needed new anti-terror laws, but the laws actually enacted reflect major problems of process and political judgment. To a significant degree, this was a result of many of the laws being enacted in haste as a reaction to catastrophic attacks overseas, especially those on September 11 and in London in 2005, both of which provoked considerable anger, fear and grief in the community.

It is not surprising that at such times people look to their political leaders for a strong response, including action that may actually prove to be disproportionate to the threat due to its impact on democratic liberties. This dynamic is well known, and was well stated by Alexander Hamilton in *The Federalist* (No 8) in the late 18th century:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual efforts and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

This dynamic might be countered by strong human rights protection. However, Australia is now the only democratic nation in the world without a national human rights law such as a human rights act or Bill of Rights.

Legally-protected human rights standards can provide a yardstick against which to assess the making of new anti-terror laws. Even then, they may prove to be only of limited benefit in the face of what can be overwhelming political and community pressure, in the aftermath of a terrorist attack, for ‘tough laws’ that ‘do whatever it takes’ to stop a future terrorist attack. A more significant benefit of human rights protection may therefore be that it can provide a trigger and mechanism for post-enactment analysis. This is a means by which overbreadth in anti-terror laws in other democratic nations is now being reassessed, and on occasion remedied. Such a winding back may occur as a result of judicial decisions or through a fresh assessment by a government recognising the value and importance of protecting democratic freedoms.

Such a call was taken up in the lead-up to the 2010 United Kingdom general election. Counter-terrorism reform was identified as a priority by the Liberal Democrats and the Conservative Party and then formed part of the Coalition agreement between them. In 2011, the new Coalition Government announced a comprehensive review of the UK’s anti-terror

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and security powers. Home Secretary Theresa May declared the government was ‘committed to reversing the substantial erosion of civil liberties’ produced by the UK’s terrorism laws:

I want a counter-terrorism regime that is proportionate, focused and transparent. We must ensure that in protecting public safety, the powers which we need to deal with terrorism are in keeping with Britain’s traditions of freedom and fairness.50

The results of this review were published in 2011. It was found that some of the UK’s counter-terrorism measures were ‘neither proportionate nor necessary’.51 As a result, the government announced a suite of proposals designed to ‘liberalise’ its counter-terrorism laws to ‘correct the imbalance … between the State’s security powers and civil liberties’ and make those powers more targeted.52 A key component of this reform was the abolition of control orders.53 Australia has gone through no like process of political recalculation and review, despite the fact that our control order regime, which remains in place, is based upon the now-repealed UK regime.54

The result in Australia is a body of anti-terror laws that in key respects undermines democratic freedoms to a greater extent than the laws of other comparable nations, including nations facing a more severe terrorist threat. For example, it would be unthinkable, if not constitutionally impossible, in nations such as the United States and Canada to restrict freedom of speech in the manner achieved by Australia’s 2005 sedition laws. It would also not be possible to confer a power upon a secret intelligence agency, like that conferred on ASIO, that could be used to detain and question non-suspect citizens.

A central challenge in enacting anti-terror laws is how best to ensure the security of the nation while also respecting the liberty of its people. In democratic nations, the answer is usually grounded in legal protections for human rights. In Australia, the answer is provided almost completely by the extent to which political leaders are willing to exercise good judgment and self-restraint in the enactment of new laws. This is not a check or balance that has proved effective in Australia when it comes to the enactment of anti-terror laws.

V WHAT NOW?

For many people, the debate over anti-terror laws is a thing of the past. Indeed, I often encounter surprise from people when I mention that the laws passed in the wake of September 11 remain on the statute book. Many people, including experienced lawyers, assume that the laws were the subject of sunset or other clauses and so have departed the statute books now that the immediate emergency is over. This indeed was the experience of the like laws enacted during World War I and World War II, but, unlike those conflicts, the

52 Ibid, 3.
53 Ibid, 5.
‘war on terror’, like the war on drugs, is a misnamed conflict without a conceivable end. As a result, with rare exceptions where sunset clauses may yet expire sometime in the future, Australia’s new anti-terror laws will operate in perpetuity unless action is taken.

The problem is not necessarily one of the misuse of anti-terror laws. Indeed, some laws, such as ASIO’s detention power have never been, and may never be, used. In such cases, the problem lies in how such extraordinary powers are becoming seen as normal, and so applied elsewhere. An example is the extension of the control order regime from our national anti-terror legislation to so-called anti-bikie laws.55 In South Australia, former Premier Mike Rann justified this by saying: “We’re allowing similar legislation to that applying to terrorists, because [bikie groups] are terrorists within our community.”56 Laws of this kind are now spreading throughout the country, and are also encouraging the revival of offences for guilt by association and consorting. The danger is that the exceptional powers granted to combat terrorism will increasingly be used by State governments to prosecute the law and order debate. They are becoming part of the State legislators’ toolbox for demonstrating to the community how they are tough on crime.

While there has been very little political backing for revising Australia’s anti-terror laws, there is no shortage of analysis and official reports on the subject.57 Earlier in 2013, two long-awaited, independent reports commissioned by the Commonwealth were released that deal with major parts of the laws, and recommend very significant change.

One report was convened by the Council of Australian Governments (COAG) to review a long list of powers and offences.58 The committee was led by Anthony Whealy QC, a retired judge from the NSW Court of Appeal, and included senior state and federal police officers.59 The other report was prepared by a leading member of the New South Wales bar, Bret Walker SC.60 He was appointed in 2011 as the first independent monitor of Australia’s anti-terror laws, and as such is charged generally with reviewing the operation, effectiveness and implications of these laws.61

Walker had significant advantages in preparing his report. The COAG Review was rushed for time, whereas Walker’s conclusions are the culmination of more than a year and a half of discussion and analysis. The Federal Parliament has also given Walker special powers.62 He can question agencies such as the Australian Federal Police and ASIO, and has access to classified information such as their case files.

55 For example, Serious and Organised Crime (Control) Act 2008 (SA).
59 The membership of the review committee can be found here: <http://www.coagctrreview.gov.au/committee/Pages/default.aspx>.
The reports recognise the real danger posed to the community by terrorism. Walker identifies ‘investigation and particularly surveillance’ as ‘by far the most effective powers’ to meet this threat. The problem is that the Federal Parliament has granted the police and ASIO powers that go considerably beyond this.

Both the COAG and Walker reports come to the same conclusion: in many respects, Australia’s anti-terror laws are unnecessary, go too far and lack appropriate safeguards. It is clear from these reports that many of these laws need urgent repair or even repeal.

The reports have a lot in common. Both undertake a careful, forensic analysis of some of Australia’s most contentious laws, and find aspects of them wanting. For example, the reports recommend the abolition of preventative detention orders, by which a person can be held without charge for up to 14 days.

The COAG Review also examines offences directed at terrorism. It finds that many apply far too widely, such as one that permits a person to be jailed for up to 15 years for ‘possessing a thing’ connected with a terrorist act. It finds that offences such as this should be tightened, and in other cases it recommends repeal, such as for the broad-ranging offence of associating with a terrorist organisation.

Walker finds that the control order regime is ‘not effective, not appropriate and not necessary’. He recommends that it be abolished, or at least rewritten to apply only to people convicted of a terrorism offence who remain a danger to the community. By contrast, the COAG Review recommends that the control orders be retained, but only with a range of significant new safeguards.

The controversial law that grants ASIO an extraordinary power to question and detain in secret for up to a week Australian citizens not suspected of any crime also receives attention. Walker recommends that ASIO retain the power to gather intelligence by questioning people about their knowledge and links to terrorism. However, he finds that the agency should lose its power to detain.

Walker’s report and the COAG Review strip away any pretence that Australia has the right laws in place to protect the community from terrorism. The reports reveal that many of these laws are ineffective or unnecessary. Some are also dangerous in how they undermine important democratic values, such as freedom of speech, the right to a fair trial and the presumption of innocence.

It is clear that the Federal Parliament has much work to do to fix Australia’s anti-terror laws. The manner in which the COAG and Walker reports were released was not a promising start. They were released to the public at 5pm on federal budget day in May 2013. This also happened to be the last possible day allowed for releasing the Walker report, which the government had received in late 2012. Releasing the reports in this way meant that they and their recommendations were buried under the analysis and media attention bestowed on the

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64 Ibid 4.
budget. Leaving the release to the last minute also meant there was no chance that they could be acted on prior to the 2013 federal election.

It might have been thought that the election period would at least provide an opportunity for the major parties to indicate how they would respond to these reports in the next term of Parliament. However, rather than do so, both did everything they could to avoid providing a concrete answer. When pressed to do so by the Law Council of Australia, the Labor Party stated that ‘a re-elected federal Labor Government will carefully consider the reports before reaching a final position on the substance of the recommendations’, while the Coalition said that it would ‘carefully consider’ the recommendations in Walker’s report, but otherwise had ‘no plans to make material alterations to the anti-terrorism legislation introduced under the former coalition Government following the September 11, 2001 attacks’. Such responses hardly amount to clarion calls for reform, or even a preparedness to acknowledge the major deficiencies in Australia’s anti-terror laws identified by the Commonwealth’s own independent inquiries.

VI CONCLUSION

Australia was right to enact new anti-terror laws in the wake of the September 11 attacks. Such laws were needed to ensure that the legal system offered protection to the community by preventing terrorist attacks from occurring. Passing new anti-terror laws also enabled Australia to live up to its international obligations and signalled that as a nation Australia rejects such forms of political violence.

In the years since September 11, the Federal Parliament has enacted 61 anti-terror laws. This has given rise to a large and remarkable new body of legislation providing for powers and sanctions that were unthinkable prior to the 2001 attacks. Indeed, the rhetoric of a ‘war on terror’ reflects the nature and severity of the laws enacted in response to the threat. While these laws were often cast as a transient response to an exceptional set of events, it is now clear that the greater body of this law will remain on the Australian statute books for the foreseeable future.

This poses a long-term challenge for the Australian legal system and Australian democracy. While new anti-terror laws were needed, the laws actually enacted diverge in too many respects from the laws that Australia should have achieved. The result is a body of enactments that is creating new understandings of the normal limits of the law in Australia. This is broadening the extent to which it is considered acceptable for Australian law to sanction extraordinary powers or outcomes, such as detention without charge or the silencing of speech.

Australia’s new anti-terror laws expose structural problems with Australia’s system of law. That system is dependent upon an effective parliamentary process and a culture of respect among political leaders when it comes to democratic values, rule of law principles and human

66 Ibid.
rights. Anti-terror laws reveal how many of the bedrock principles of Australian democracy are actually only assumptions and conventions within the political system rather than hard legal rules that demand compliance. The laws reveal the capacity of politicians and parliaments to contravene these values and, in doing so, to create new and problematic precedents for the making of other laws. The result in Australia is the legal legacy of the ‘war on terror’.

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POSTSCRIPT: TONY BLACKSHIELD AS A TEACHER AND AUTHOR

GEORGE WILLIAMS

It is an honour to return to Macquarie Law School to give a lecture in Tony Blackshield’s name, and also to follow in the giant footsteps of Michael Kirby, who delivered such an eloquent inaugural lecture last year.¹

I was a student of Tony’s in 1989, some 24 years ago, in my third year at Macquarie University. He taught me Australian Government I and II, which were then the names of the compulsory constitutional law subjects. Tony’s teaching remains firmly entrenched in my memory. Put simply, he was brilliant in the way that he combined an encyclopaedic knowledge of the Constitution with a rich repertoire of anecdotes and stories about the High Court.

He was also a hard task master. Each week we would receive a bundle of new material. It was clear that Tony was determined to include as much as he could, and so tens of pages were presented with the text flush to the margin and in a tiny font. It was an intimidating, if highly rewarding, course.

Tony was renowned for his feedback. I still have some of my assignments from his courses, and my essays show that Tony was not shy in making use of his red pen. As I flick through the pages I can see my feeble efforts at constitutional analysis covered by swathes of Tony’s careful responses. Indeed, I wondered at the time why students were subject to a word limit, when the marker was not.

One comment of Tony’s that pleased me at the time was his response to a paragraph I had written on the Engineers Case.² Tony wrote: ‘Very thoughtful and balanced – Coperesque!’ On rereading my paragraph, I think that Tony was more than a little kind to me, and far less so to Michael Coper.

I must admit though that I remember less about the content of the thick bundles of reading he assigned to us each week, than his stories. I still use these in my own teaching. I can recall Tony talking about how Justice Lionel Murphy kept a copy of the Constitution by his bedside as a cure for insomnia, and how Justice Edward McTiernan broke his hip, while chasing a cricket in his hotel room, and had no choice but to resign when Sir Garfield Barwick refused to install a wheelchair ramp at the Court.

Tony was an exceptional teacher because he combined intellectual rigour with the life and colour of the law and the people who inhabited it. He imbued what could be a dry subject with its necessary, human side. Indeed, the greatest impact his teaching had on me was not in conveying the basic rules of our Constitution, but in helping me to understand for the first

² Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.
time how legal rules can be dependent on the vagaries of circumstance and personality. More broadly, Tony awakened in me a sense of the connections, actual and potential, between the Constitution and social justice.

I have been very fortunate that my relationship and association with Tony deepened after he taught me in 1989. He supervised my legal honours project two years later and, consistent with his own approach to word limits, permitted me to hand in a monstrous 40 000 word thesis. Its subject was the significance of the High Court’s 1951 decision in the Communist Party Case. In particular, I was determined to unpick the extent to which the decision was a consequence of the people and personalities involved, and how the case had shaped, and had been shaped by, the politics of the time.

Tony’s support of me did not cease when I finished my undergraduate studies. He wrote the reference that enabled me to spend a year at the High Court as an associate to Justice Michael McHugh. I was fortunate to arrive in 1992, and so had the opportunity to work on decisions such as Mabo and the free speech cases. Tony also wrote a reference that turned me away from a full time career at the bar, in that it enabled me to win a junior position as an academic at the Australian National University.

My first act as an academic was to approach Tony with a view to translating his reams of course materials into a text on Australian constitutional law. He displayed an enormous, and generous, degree of trust in agreeing to undertake the project with me, a 25-year-old newly minted constitutional lawyer. That book, Australian Constitutional Law and Theory, has now been published in five editions by Federation Press and has sold over 55 000 copies. The sixth edition will appear in just a few months, sadly, for the first time, without Tony as co-author, as he has now finally taken the step into retirement. Working on this book has been the greatest joy of my academic career and the result has been the publication of which I am most proud.

The book once again displays Tony’s relaxed attitude to word length. It extends to nearly 1500 pages and has been nicknamed ‘the brick’ by law students, no doubt with affection. Despite its size, words are squeezed onto every page, thereby keeping faith with its origins. The book also bears all the hallmarks of Tony’s great intellect, which is one reason why it has been one of the most successful Australian legal books of recent decades, and why it has been prescribed as the text in a majority of Australian law schools.

Working with Tony on this book has certainly expanded my intellectual horizons. It has formed the bedrock of my knowledge of the field, and through him I have come to know much more than I had expected, or I suspect wanted, about subjects such as the year books of mediaeval England or the proper use of the ellipsis.

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There is much more that I could say about Tony and his teaching, ranging from the time he fell asleep mid-class through to the lengthy digressions and good humour involved in our weekly sessions on the *Oxford Companion to the High Court of Australia.* I will say though that some things are beyond even him. He has taught me many things, but never to sing about the High Court and its cases.

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THE STRUGGLE FOR JUDICIAL INDEPENDENCE:
THE AMOTION AND SUSPENSION OF SUPREME COURT JUDGES IN 19th
CENTURY AUSTRALIA

DAVID CLARK*

While judicial independence was sought by the Australian public in the 19th century, and formally written into colonial constitutions after 1850, the colonies remained subject to Imperial law. That law removed from the local parliaments the power to dismiss judges and placed the power to suspend or remove judges in the hands of the local executive and the Privy Council. The conflict between Imperial law and local law on judicial tenure came to a head in two major incidents in South Australia and Western Australia, in which Imperial law and policy prevailed over local sentiment. The paper shows how popular opinion favoured judicial independence as part of the shift towards responsible government as a means of both loosening Imperial control and asserting more local control over the judiciary. The other finding of the paper is that the decoupling of the judiciary from legislative and executive functions after 1860, as the result of the institutional changes following the introduction of responsible government, did as much as formal legal changes to enhance the independence of the judiciary and to reduce conflicts between the courts and the executive.

I INTRODUCTION

It is now taken for granted that the independence of the judiciary from the executive is an essential element of the rule of law, secured by the holding of office during good behaviour and by the requirement that judges can only be removed by an address of the legislature. This was proposed at least three times in the 17th century in England, beginning in 1642 and established by the Act of Settlement in 1701, before being extended by the Demise of the

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1 See, eg, Constitutional Reform Act 2005 (UK) ss 3, 33; United States Constitution art III § 1; Constitution Act 1867 (Imp) 30 & 31 Vict, c 3, s 99; Constitution Act 1986 (NZ) s 23; Australian Constitution s 72(ii).
3 12 & 13 Will 3, c 2 (‘Act of Settlement’).
Crown Act 1760. In large measure, these arrangements have succeeded, for the removal of a judge is now rare. The last British instance of judicial amotion was in 1830, though there have been some recent cases in Commonwealth countries. In contrast, British colonial law and practice, until the onset of responsible government in the 1840s and 1850s, did not fully respect the concept of an independent judiciary. This situation arose from certain practices that tied the judges to the executive. In the smaller colonies, the concentration of power and the deep involvement of the judges in the legislative and executive branches of government were usual rather than exceptional. At the same time, the judges had a power, denied to the bench in England, to invalidate local legislation if it should be repugnant to the laws of England. These two functions might conflict when, for instance, a judge certified an Act as not repugnant to English law, but held otherwise when the legislation was challenged in an actual case. As we shall see, during the Crown Colony period judges were regarded as part of the public service and were not accorded security of tenure until the 1850s.

British policy on the removal of colonial judges was based on two considerations. On the one hand there was limited recognition of the importance of judicial independence and the need for legality and, on the other hand, it was colonial policy to insulate judges from local 4

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4 1 Geo 3, c 23, s 2. This Act provided that judicial salaries would not be lowered during the tenure of the judge.
5 See the discussion of the removal of Judge Jonah Barrington where the judge was allowed to appear before the House of Commons with counsel. See also United Kingdom, Parliamentary Debates, House of Commons, 22 May 1830, cols 965–79; W P M Kennedy, ‘Removal and Tenure of Judges’ (1947) 6 University of Toronto Law Journal 463, 465.
7 See United Kingdom, Parliamentary Debates, House of Commons, 13 May 1825, cols 586–9; United Kingdom, Parliamentary Debates, House of Commons, 12 July 1849, col 256 also reported in ‘Colonial Judges Not Independent’, Sydney Morning Herald (Sydney), 8 December 1849, 2. But later in the 19th century the concept was applicable even in Crown Colonies. See Duke of Buckingham and Chandos, Correspondence Respecting the Removal and Suspension of Colonial Judges C 139 (1870) 3. By the late 1940s the concept was fully applied to the colonial judiciary: United Kingdom, Parliamentary Debates, House of Commons, 16 November 1949, col 2020: ‘[t]he independent status of Colonial judges in relation to the executive is fully established and is well understood by Colonial governors’. For a late colonial example see Hong Kong Letters Patent 1917 art XVIA, later amended by Laws of Hong Kong 1976 vol 21 app 1.
8 See Newspaper Act Opinion [1827] NSWSupC 23; ‘Symons v Morgan’, The Courier (Hobart), 2 February 1848, 34; ‘Hutchinson v Leeworthy’, The South Australian Advertiser (Adelaide), 29 May 1860, 3; ‘Driffield v The Registrar-General’, The South Australian Register (Adelaide), 17 December 1862, 3; Rusden v Weeks (1861) 2 Legge 1406, 1413–6. See also South Australia, Functions of Supreme Court, Parl Paper No 143 (1861) in which the duty of judges to decide on the validity of local legislation is defended in a letter written on Boothby J’s behalf by the associate to the judges.
9 See, eg, Duke of Newcastle to Daly, No 25, 24 April 1862 in South Australia, Despatch on Addresses For Removal of Judge Boothby, Parl Paper No 68 (1862) 2 where he wrote, ‘I hold the practical independence of the Superior Courts of a Colony to be… among the links that bind together the Colonial Empire of Great Britain,’ and later, ‘[i]t is of vital importance…that these Courts should exercise their functions in entire independence not only from the Local Executive but of the popular feelings which are from time to time reflected in the Legislature’.
political pressures. In short, the independence of the judiciary in the colonies meant, to the British, independence from the legislature not the executive. This was in keeping with a wariness in London towards the local legislatures, which was manifested in 1844 when a Select Committee of the New South Wales Legislative Council, on general grievances, argued strongly for judicial independence on the English model, and sought to shift the power to dismiss judges from the executive to the legislature. The British refused to allow this because local parliaments could not be trusted, since the supposed lack of an informed public and local passions might affect the situation. As a result, in the 1840s the British refused to relinquish executive control over the removal or suspension of judges in Australia.

As a matter of practice, in the early days of the Australian colonies the executive did interfere with judicial decisions, though the judges were quick to assert their independence. Prior to the creation of the Supreme Court of New South Wales, Governor Lachlan Macquarie had no qualms about interfering with the decisions of the judge-advocate. This attitude flowed in part from the status of the judge-advocates, a military title, who were regarded by the executive as subordinate to a Governor with military rank. The Governor’s intervention in an admiralty case in 1818 was the subject of a complaint about the system of justice to the Bigge Commission in 1821. Matters improved somewhat after the creation of the Supreme Court in 1823, though old attitudes persisted. A major dispute developed in New South Wales when Forbes CJ refused to certify legislation to regulate the press in conformity with the laws of England. The judge, who was also a member of the legislature, was obliged to certify legislation. However, after considering the matter he concluded that it was repugnant to the laws of England. He was clearly uncomfortable in dealing with what he called ‘a nude matter’, i.e. a legal question without the benefit of full legal argument in a court of law. The potential for clashes with the executive was enhanced by the assumption made by the Governor that the judge would do his bidding. The clash between the Chief Justice and the Governor has been the subject of important legal scholarship and shows that the placing of the judges in the dual roles of certifying legislation before the matter came before a fully argued submission in a legal case brought the bench into conflict with the executive.
In an important dispatch by Forbes CJ to London in March 1827,\textsuperscript{17} the judge wrote that under the constitution the King had delegated his judicial powers to his judges in both England and in New South Wales. Chief Justice Forbes asserted that, just as in England the judges were independent of the ministerial authorities, so they were in New South Wales. He pointed out that the instructions to the Governor gave him no power over the judges. While judges may be removed:

\begin{quote}
[The judicial office itself stands uncontrolled and independent, and bowing to no power but the supremacy of the law. This is a lawyer’s view of the Supreme Court, but I rather suspect that the Governor looks upon it in the light of a court martial, the proceedings of which are subject to the revision of the commander-in-chief.\textsuperscript{18}
\end{quote}

The Chief Justice then proposed an admonition be sent from London to remind the Governor of the proper relationship between the two branches of government.

II THE LEGAL FRAMEWORK

Colonial governors were issued with two prerogative legislative instruments setting out the powers of their office: the Letters Patent and the Royal Instructions. Typically, these powers included the appointment of all public officers as well as a power to suspend such officers if necessary.\textsuperscript{19} The suspension power required a hearing and a report to England setting out the record of the hearing and the grounds for the decision. Neither of these instruments provided for dismissal but they did include a power to act immediately in an emergency by permitting the Governor to interdict a public officer.\textsuperscript{20} All public officers in the colonies, including the judges, were appointed at pleasure.\textsuperscript{21} This meant that the Governor could dismiss a public officer without notice, without a hearing, and without giving reasons. The holding of office at

\textsuperscript{17} Historical Records of Australia, series IV, vol 1, 703, 716–27 (‘HRA’).

\textsuperscript{18} Ibid 726. See also Re Byrne [1827] NSWSupC 9 where the Governor wrote to Stephen J asking about his judgment as reported in the press, an action the judge thought improper.

\textsuperscript{19} See Letters Patent Constituting the Office of Governor and Commander-in-Chief of the Colony of Western Australia, 17 November 1882 in Western Australia, Royal Instructions Under Which the Government of the Colony of Western Australia is Administered, Parl Paper No A1 (1885) 5 where cl V deals with the appointment of judges, and cl VII with the power to suspend commissioned officers. This was a common provision: see Arthur Mills, Colonial Constitutions (John Murray, 1856) 25.

\textsuperscript{20} Western Australia, Instructions to the Governor and Commander-in-Chief of the Colony of Western Australia, Parl Paper No A1 (1885) 11, cl 23 conferred a power to interdict officers. For an interdiction of the Attorney-General see The West Australian (Perth), 4 May 1886, 3; The West Australian (Perth), 8 May 1886, 8.

\textsuperscript{21} For appeals from Western Australia and New South Wales, respectively, that set out this common law rule see: Shenton v Smith [1895] AC 229, 234–5; Gould v Stuart [1896] AC 575, 577, unless, as pointed out in Gould, an enactment made an exception to this rule. For other examples of colonial judges appointed at pleasure see Administration of Justice (West Indies) Act 1836 (Imp) 6 & 7 Will 4, c 17, s 5; East India (High Court of Judicature) Act 1861 (Imp) 24 & 25 Vict, c 104, s 4. In the Ionian Islands local judges were appointed for a fixed term because they were sometimes subject to corrupt motives and had to be removed quickly; ‘Colonial Judges’, South Australian Register (Adelaide), 25 July 1863, 5. For an affirmation of this position during the Crown Colony period in Australia see Meymott v Piddington [1877] Knox 306, 312.
pleasure was subject to any legislation to the contrary, and in some cases, legislation confirmed this starting point. The *Australian Courts Act 1828,* for example, provided in section one that judges, in what was then New South Wales and Van Diemen’s Land, held office at pleasure, being removable ‘as occasion shall require’. However, this legislation did not apply to either South Australia or Western Australia as these colonies were created independently of eastern Australia. Nevertheless, the early statutory provisions on judicial tenure made it plain that the power to appoint was ‘until the pleasure of Her Majesty be known’.

The problem for Australia was that the *Act of Settlement,* which protected judges in England, did not apply to the colonies in the 19th century. There were two reasons for this. First, the procedure in the *Act of Settlement* required addresses of the houses of Parliament in Britain before a judge could be removed, and this could hardly have been intended to apply to the removal of judges in the colonies. Subsequent British legislation designed to replace section three of the *Act of Settlement* was in terms applicable only to British judges, not to those in the colonies. Second, where an Imperial Act was made specifically for the colonies, that legislation displaced any other British legislation on the same subject. The English position in the 19th century was that the governing Imperial statute on the amotion of judges, as it was called, was the *Colonial Leave of Absence Act 1782.* As the preamble to the Act shows, it was initially intended to root out some of the worst aspects of public office

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22 For a rare example see ‘The Opinion of the Attorney and Solicitor, Ryder and Murray, on the Commission Granted to De Lancey, the Chief Justice of New York’, 25 July 1753 in George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence: Chieflly Concerning the Colonies, Fisheries and Commerce of Great Britain – Collected and Digested from the Originals in the Board of Trade and Other Depositories* (Reed and Hunter, 1814) vol 1, 177–8. For other laws in colonial America that sought to provide security of judicial tenure but which were disallowed in London see Leonard W Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (Frederick Ungar Publishing, 2nd ed, 1964) 388–400.

23 (Imp) 9 Geo 4, c 83.

24 See White v McLean (1890) 24 SALR 97, 99; United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1867, col 1494; R v De Baun (1901) 3 WALR 1, 14.

25 *Supreme Court Act 1840* (NSW) s 1; *Supreme Court Act 1852* (Vic) s 3; *Supreme Court Ordinance 1861* (WA) s 11.


28 See Terrell v Secretary of State for the Colonies (1953) 2 QB 482, 492–3.


30 22 Geo 3, c 75, s 2 (‘Burke’s Act’). Possibly a false name as the *Civil List and Secret Service Money Act 1782*, 22 Geo 3, c 82 was also known by that name; see Arthur Mills, *Colonial Constitutions* (John Murray, 1856) 10. Nevertheless, the *Colonial Leave of Absence Act 1782* was called Burke’s Act in official documents in 1862: see ‘Law Officers to Newcastle’, 12 April 1862 in South Australia, *Despatch on Addresses For Removal of Judge Boothby*, Parl Paper No 68 (1862) 3; ‘Memorandum by Sir Frederick Rogers: The Removal of Colonial Judges’ in United Kingdom, *Correspondence on the Removal and Suspension of Colonial Judges*, C 139 (1870) 4. For the application of this Act to the colonies see United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1867, col 1495.
The Act was well known in 19th century Australia and was reprinted in several 19th and early 20th century collections of Imperial Acts that applied in the Australian colonies. Section two of the Act provided that colonial officials appointed by Patent could only be removed from office for three causes: (1) persistent absence from the colony without leave; (2) neglect of duty; or (3) other misbehavior in office. The Act also required a hearing to be held prior to removal and the person removed had the right to appeal to London ‘whereupon such amotion shall finally be judged by His Majesty in Council’. In two Australian appeals in the late 1840s the Judicial Committee held that Burke’s Act did apply to colonial judges, even though judges were not specifically mentioned in the Act. The Act applied to all public officers and this shows that judges were then regarded as public servants, not as a special class of public officer. One matter of practice that emerged in the late 1840s was that the complaints from the colony about a judge had to be brought in a timely fashion. If the dispute in the colony arose many years before the complaint was made, the Judicial Committee might decide not to act on the matter. The Act was amended in 1814 to add strict reporting requirements, whereby governors were to notify the House of Commons whenever an officer was granted leave. In a case on the Act from New South Wales involving the Commissioner for Crown Lands, the Judicial Committee held that offices held at pleasure did not come within the Act, though by the 1870s a wider view was taken and the Act was applied to offices held both at pleasure and on good behavior. The power under Burke’s Act was personal to the Governor-in-Council in the colony concerned and could not be delegated to a commission.

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31 See H B Bignold (ed), Imperial Statutes in Force in New South Wales (Lawbook, 1914) vol 2; F A Cooper (ed), Statutes in Force in the Colony of Queensland (1881) vol 2, 1282–3. The full text was reproduced in The South Australian Register (Adelaide), 27 June 1867, 3.


33 John Walpole Willis v Sir George Gipps, Knt (1846) 5 Moo PC 379; 13 ER 536; Algernon Montagu v Lieutenant Governor, and Executive Council, of Van Diemen’s Land (1849) 6 Moo PC 489; 13 ER 773; followed in Re Squier (1882) 46 UCQB 474, 483–5.

34 ‘Rights and Privileges of the Judges’, The Argus (Melbourne), 15 December 1864, 1; ‘Judges and Their Tenure’, Western Mail (Perth), 17 September 1887, 20, 22.

35 See In the Matter of the Representatives of the Island of Grenada and the Honorable John Sanderson, Chief Justice (1847) 6 Moo PC 38, 42, 13 ER 596, 598. The complaints concerned activities in 1839, but the hearing before the Judicial Committee only took place in 1847. Some of the earlier matters were canvassed in In re John Wells (1840) 3 Moo PC 216; 13 ER 92.

36 Public Officers in Colonies Act 1814 (Imp) 54 Geo 3, c 61.

37 Ex parte Robertson (1857–8) 11 Moo PC 288, 295; 14 ER 704, 705; cf ‘Memorandum by Sir Frederick Rogers: The Removal of Colonial Judges’ in United Kingdom, Correspondence on the Removal and Suspension of Colonial Judges, C 139 (1870) 4.

38 Re Squier (1882) 46 UCQB 474, 486.
The requirement of a fair hearing under *Burke’s Act* was applied in *John Walpole Willis v Sir George Gipps, Kn*t* when Willis J was amoved following a petition of 573 persons in Melbourne asserting that the community had lost confidence in the judge.\(^{39}\) The judge, who was a member of the New South Wales Supreme Court, which had at that time jurisdiction over the Port Philip district, had been transferred to Melbourne in March 1841 after a falling out with Dowling CJ.\(^{41}\) Unfortunately, his arrival in Melbourne did not improve the situation and his intemperate outbursts provoked powerful figures in the community. He had a dispute with the editor of the *Port Phillip Patriot* and in one case Willis J awarded damages against the editor for a libel on himself. The damages were remitted by the executive as the judge had acted in his own cause.\(^{42}\) He also committed the Melbourne merchant and Justice of the Peace, J B Were, to six months’ imprisonment because Were could not remember certain evidence at a trial. The matter was then sent to Governor Gipps who summarily amoved the judge on 24 June 1843.\(^{43}\)

Justice Willis had had some experience in these matters, for he had been amoved in Upper Canada in 1829.\(^{44}\) In 1843 the judge appealed to London on the ground that he had been removed without any sort of hearing at all. The Judicial Committee agreed with him, stressing that he was entitled to a hearing under *Burke’s Act*.\(^{45}\) In a twist, Willis J then tried to resign, but the authorities held that the initial failure to give him a hearing had been cured by the hearing in the Privy Council and thus it was decided to advise the Queen in August 1846 to revoke his appointment.\(^{46}\) As a result, Willis J was paid all arrears of salary, given that his

\(^{39}\) (1846) 5 Moo PC 379; 13 ER 536.

\(^{40}\) See H F Behan, *Mr Justice J W Willis: With Particular Reference to His Period as First Resident Judge in Port Phillip, 1841–1843* (Glen Iris, 1979) 281–96.


amotion had initially been illegal, but was not given another judicial post. One of the oddest features of the case was that the British refused to explain why Willis J was amoved, despite repeated letters by him for the details. The inference to be drawn from the published decision of the Privy Council is that it was persuaded by the memorial from the inhabitants of Port Philip complaining about his conduct on the bench. The second case in the 1840s occurred in Van Diemen’s Land in 1847 when Montagu J was amoved under section two of Burke’s Act. The official reason for the amotion was that the judge had manipulated the legal process to prevent a creditor from bringing proceedings against him in the courts of the colony to recover a debt from the judge. When the action for debt came on before the court, the Chief Justice, Sir John Pedder, set aside the writ of summons for illegality. Under the law of Van Diemen’s Land at that time, both judges were integral parts of the Supreme Court and this meant that no judgment could be obtained against Montagu J so long as he remained a judge of the Court. Initially, Governor Denison proposed to suspend the judge and the matter proceeded on that footing, but eventually a decision was taken to amove Montagu J. In reality, the main reason for the amotion was that the judge had participated in the Dogs Act decision that had invalidated legislation imposing a tax. That decision was made on 29 November 1847. Justice Montagu was then amoved at the end of December 1847. The judge initially resisted his removal by arguing in a criminal

47 HRA, series I, vol 25, 203–12. The cost to the government of this was the enormous sum of £6000, or four years’ salary: see H G Turner, A History of the Colony of Victoria: From its Discovery to its Absorption into the Commonwealth of Australia (1904) vol 1, 258–61. 48 See South Australia, Removal of Mr Justice Willis, Parl Paper No 186 (1867) 4. 49 Ibid 2 where this is specifically referred to, though not explained in detail. 50 Algernon Montagu v Lieutenant Governor, and Executive Council, of Van Diemen’s Land (1849) 6 Moo PC 489; 13 ER 773. For secondary literature see B A Keon-Cohen, ‘Mad Judge Montagu: A Misnomer?’ (1975) 2 Monash University Law Review 50, 67–78; R W Baker, ‘The Early Judges in Tasmania’ (1960) 8 Tasmanian Historical Research Association Paper and Proceedings 71, 71–80; P A Howell, ‘The Van Diemen’s Land Judge Storm’ (1965) 2 University of Tasmania Law Review 253, 253–69; Kathleen Fitzpatrick, Sir John Franklin in Tasmania 1837–1843 (Melbourne University Press, 1949) ch 9; Dorothy O’Shea, ‘The Supreme Court of Van Diemen’s Land (1824–1856)’ (2003) 11 Australian Law Librarian 222, 229–31; Stefan Petrov, ‘Moving in an Eccentric Orbit: The Independence of Judge Algernon Sidney Montagu in Van Diemen’s Land, 1833–47’ in Hamar Foster et al (eds), The Grand Experiment: Law and Legal Culture in British Settler Societies (University of British Columbia Press, 2008) 156–75. 51 Denison to Grey, 17 January 1848 in Despatches Relating to the Government and Affairs of the Colony, (1847–8) vol 10, 279–85. For other instances of removals of court officials for insolvency see ‘Mr Registrar Manning’s Insolvency and Removal’ in New South Wales, Legislative Council, Votes and Proceedings, 1843, 313–6; P V Loewenthal, ‘Judicial Inability on Misbehaviour’ (1972–4) 8 University of Queensland Law Journal 151, 151–7 on the removal of W Hirst, District Court Judge in 1878. See also the dictum in In re James Minchin (1847) 6 Moo PC 43, 44; 13 ER 599, 600 where a Master of the Supreme Court of Madras was cleared of financial wrongdoing. 52 This rule was changed in later legislation. See Judges Removal of Doubts Act 1854 (VDL) 17 Vic, No 19; Supreme Court Act 1856 (Tas) 19 Vic, No 23, s 1. Section 2 specifically provided that a judge may be sued either at law or in equity. 53 Symons v Morgan, The Courier (Hobart), 2 February 1848, 3, 4. For the background to the case see Peter Bolger, ‘Lieutenant John Morgan: The Dog Tax Martyr’ (1969) 55 Journal of the Royal Australian Historical Society 272, 272–81. 54 See ‘Government Gazette Notice No 1’, The Courier (Hobart), 5 January 1848, 2. The notice stated that Montagu J was amoved on 31 December 1847.
case that his successor, Horne J, had not been validly appointed because he, Montagu J, had not been legally amoved. After Pedder CJ rejected this argument, Montagu J challenged the decision to amove him on appeal in London on various grounds, including that he thought that the matter involved suspension, not amotion. The Judicial Committee upheld the amotion saying that the judge was not prejudiced by the eventual decision and they also agreed that severe financial embarrassment was a ground for dismissal. The matter was also the subject of a question in the House of Commons, where the government in a revealing comment stated that:

The relations also between the Governments of the Colonies and the judges was essentially different from those which existed between the Government and the judges at home, for the independence of the judges did not exist in the colonies.

III CONSTITUTIONAL PROTECTION OF JUDICIAL INDEPENDENCE

When the eastern Australian colonies wrote their own constitutions in the 1850s they adopted one of two courses towards judicial independence. In three cases they wrote Act of Settlement procedures into their Constitution Acts, while in three jurisdictions they passed specific legislation to achieve the same result. On the face of it, the colonial judges were then in the same position as judges in the United Kingdom, but this proved to be an illusion because the 1782 Imperial Act, Burke’s Act, still held sway. In any case, the protections written into these Acts followed the British model and restricted the executive to removal of judges for lack of good behavior, though this was a rather oblique position. All judges held their commissions during good behavior but the Crown could remove a judge for any grounds upon addresses of the local legislature. The removal provisions did not state grounds for removal and there is an argument that the Act of Settlement allowed Parliament to remove a judge for any reason at all, while the Crown could only remove a judge for misbehavior. There were variations on this model. The Tasmanian legislation also forbade the Governor from even suspending a judge unless there was an address of both houses, but still did not specify the grounds for either suspension or amotion. Later in the century, provisions became more explicit as in the County Court Judges Tenure of Office Act 1884 (Vic), which permitted their removal by

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55 Justice Horne had been the Attorney-General who had introduced the Dogs Act legislation that had been struck down in Symons v Morgan. He was appointed to the bench by ‘Government Notice No 2’, The Courier (Hobart), 5 January 1848, 2. He was also in considerable debt: see Petrow, above n 50.
56 ‘R v Glazebrook’, The Courier (Hobart), 2 February 1848, 2, 3.
57 Algernon Montagu v Lieutenant Governor, and Executive Council, of Van Diemen’s Land (1849) 6 Moo PC 489, 499; 13 ER 773, 777.
58 United Kingdom, Parliamentary Debates, House of Commons, 12 July 1849, col 125.
59 Constitution Act 1855 (NSW) ss 38–9; Additional Judges Act 1865 (NSW) s 3; Constitution Act 1855 (Vic) s 38; Constitution Act 1856 (SA) ss 30–1.
60 The Independence of the Judges Act 1857 (Tas); Supreme Court Judges Act 1858 (NZ) ss 3–4; Supreme Court Act 1867 (Qld) s 9.
61 McCawley v The King (1918) 26 CLR 9, 58–9 (Isaacs and Rich JJ). Alfred Stephen came to the same conclusion in a letter entitled ‘Independence of the Judges’, Sydney Morning Herald (Sydney), 1 August 1881, 5. All newspapers cited, unless otherwise indicated, were accessed on the National Library of Australia Digital Newspaper Collection via the Trove portal.
62 The Independence of the Judges Act 1857 (Tas).
the Governor on the grounds of wilful absence without reasonable cause, or for neglect of
duty, or, without grounds upon the address of both houses of the legislature: section three.\textsuperscript{63} The \textit{Australian Constitution}, in contrast, specifically restricts the parliamentary addresses to
‘proved misbehavior or incapacity’. In other words, the Governor-General-in-Council cannot
remove a federal judge unless there is an address from both houses of the Commonwealth
Parliament in the same session based on one or both of the two constitutionally approved
grounds.\textsuperscript{64}

Salaries were provided by parliamentary appropriations and were deemed to continue ‘so
long as his Patent or Commission continues in force’.\textsuperscript{65} Periodically, special legislation was
passed to increase judicial salaries,\textsuperscript{66} but little noticed was legislation to reduce judicial
salaries during the great depression of the 1890s. In the Victorian case, the reduction only
applied to future appointees to the bench,\textsuperscript{67} while South Australian legislation passed in 1893
to reduce public salaries was expressly stated not to apply to the judges.\textsuperscript{68}

\textbf{IV \hspace{0.5cm} AUSTRALIAN AWARENESS OF JUDICIAL INDEPENDENCE}

An impressive feature of press coverage of questions of judicial independence in the 19\textsuperscript{th}
century was a clear understanding of English constitutional history. References to leading
constitutional treatises, cases and statutes were common in the press and, of course, legal
cases and parliamentary proceedings, including the full text of dispatches, were reported
verbatim in many newspapers.\textsuperscript{69} At least amongst the reading public, which in a newspaper
age was considerable, awareness of political and constitutional (and therefore legal) history
was well entrenched. School history curricula, for example, were heavily biased towards a
knowledge of constitutional landmarks,\textsuperscript{70} though occasionally the students wrote answers
with hilarious results.\textsuperscript{71} There were, in consequence, frequent references to the differences

\textsuperscript{63} See also the \textit{District Courts Act 1858 (NSW) s 29} which also required notice of at least 21 days of
the intention to remove the judge and the opportunity to be heard in his defence.
\textsuperscript{64} \textit{Australian Constitution} s 72(ii).
\textsuperscript{65} \textit{Constitution Act 1889 (WA) s 56; Constitution Act 1854 (Vic) s 46;}
\textsuperscript{66} \textit{Judge’s Salaries Act 1872 (Vic) s 1; Supreme Court Act 1873 (SA) s 1.}
\textsuperscript{67} \textit{Judge’s Salaries Act 1895 (Vic) s 2.}
\textsuperscript{68} \textit{Public Salaries Act 1893 (SA) s 2, sch.}
\textsuperscript{69} During the Montagu affair in Van Diemen’s Land in 1848 the press published the law on the
January 1848, 2, 3.
\textsuperscript{70} See also the references to \textit{Magna Carta; the Habeas Corpus Act 1679; opposition to arbitrary
taxation by John Hampden, ‘The Tasmanian Struggle’, \textit{The Register} (Adelaide), 25 September 1855, 2;
\textit{Colonial Times} (Hobart), 8 October 1855, 2; \textit{Colonial Times} (Hobart), 8 October 1855, 2; the letter to the
editor citing a schoolbook on \textit{Magna Carta} in \textit{The Mercury} (Hobart), 28 October 1874, 3.
\textsuperscript{71} See the schoolboy howlers drawn from history examination answers in ‘Errors in Examination
Papers’, \textit{Western Mail} (Perth), 29 November 1902, 42. For many years, one of the scholarships endowed
by the Victorian MP and philanthropist J D Wyselaskie (1818–83) was for the subject ‘English
Constitutional History’. A knowledge of English constitutional history was one of the subjects tested for
admission to the legal profession: see ‘By-laws, Rules and Regulations of the University of Sydney’ in
New South Wales, Legislative Assembly, \textit{Votes and Proceedings} of the Legislative Assembly 1857, vol
2, r 70; ‘Regulae Generales’ in Queensland, Legislative Assembly, \textit{Votes and Proceedings}, 1880, 490, r
42; South Australia, \textit{General Rules and Orders of Supreme Court}, Parl Paper No 39 (1877) 2, r 17.
between the tenure of English and colonial judges in the newspapers.72 These comparisons were not always favourable because 19th century Australian settlers pressed for the protection of the independence of the judges in learned letters to the press, resolutions passed at public meetings and in petitions to the Governor.73 In one case, legislators asked that the new constitution to bring in responsible government also include a provision that judges should hold office during good behavior and ‘only be liable to removal by Her Majesty, upon the address of both Chambers of the Legislature’.74

Two themes stand out. First, there was a recognition that the liberty of the people depended upon the independence of the judges from executive control. There was considerable resentment towards those governors who were seen to infringe upon judicial independence and this was in the political context of the demand for responsible government. It was thought that responsible government would lead to greater security for the judges, though in practice, as we shall see, this was not always the case. Many colonists entertained a strong prejudice against the executive, with one writer describing the Governor as ‘in a conspiracy against the Judges’.75 Second, conflicts between the executive and the judges were often exacerbated because British appointed Governors, often with experience of smaller colonies where they enjoyed considerable power, did not fully appreciate the temper of the Australian population, which was politically more demanding than in Crown Colonies generally. Judges, especially if they were appointed from the local bar as many were from the middle of the 19th century on, were seen as members of the local community and as a bulwark against gubernatorial authoritarian attitudes.

The judges were also anxious to preserve their independence, though their protests often failed.76 In 1866 the Victorian judges opposed proposed legislation that would permit their suspension by the executive. This followed an earlier debate on the independence of the judges and whether they were entitled to communicate directly with the Governor of Victoria in matters connected with their personal rights and privileges.77 The judges argued that the Supreme Court Law Consolidation Bill 1866 (Vic) would undermine their independence by


74 South Australia, Amendment of the Constitution, Parl Paper No (1852) cl 18. However, the provision was not adopted, but it does show that legislators were aware of the British position. Note: before 1856, parliamentary papers in South Australia were not numbered.

75 ‘Crown Judges in the Colonies’, The South Australian Register (Adelaide), 14 September 1868, 2.


77 Victoria, Independence of the Judges, Parl Paper No (1865) vol 1, 834, 1169. For other judicial protests about infringements of judicial independence see Alfred Lutwyche J in The Moreton Bay Courier (Brisbane), 2 February 1861, 5, 6; Sydney Morning Herald (Sydney), 1 August 1881, 5; Hickman Molesworth in The Argus (Melbourne), 18 May 1895, 7; Victoria, Parliamentary Debates, Legislative Council, 19 June 1895, 370–80.
making them subservient to the legislature or the executive.\textsuperscript{78} In fact, legislation passed in 1852\textsuperscript{79} had provided the Governor of Victoria with a power to suspend a judge on the advice of the Executive Council if willfully absent from the colony or because the judge was incapable, had neglected the office of judge or for misbehavior.\textsuperscript{80} The local administration through the Attorney-General, George Higginbotham, disagreed with this analysis\textsuperscript{81} and the matter was referred to the law officers in London.\textsuperscript{82} They concluded that the opinion given by them on a reference in 1862 from Queensland applied to the situation in Victoria, namely, that \textit{Burke’s Act} was still in force in Australia.\textsuperscript{83} Importantly, they concluded that the proposed local legislation was valid and that it did permit the suspension of the judges. Although the judges then sought aid from the Judicial Committee, that body refused to act on the grounds that the matter was as yet hypothetical, as no judge had been suspended under the local Act nor had the powers under \textit{Burke’s Act} been invoked against any of them.\textsuperscript{84}

In 1870 the South Australian judges objected to proposed legislation on the ground that it was ‘a direct attack upon the independence of the Judicial Bench’\textsuperscript{85} because it would empower the Governor to select one of their number as the Primary Judge in Equity.\textsuperscript{86} The appointment of such a judge was permitted by section nine of the \textit{Equity Act 1867} (SA) (‘\textit{Equity Act}’), but that Act made no provision for a replacement if the judge should suddenly resign. The \textit{Equity Act} was passed by the Parliament despite these objections and was intended to overcome the insistence of Gwynne J, who had heard equity matters, that he be relieved of hearing all other matters except matrimonial and testamentary causes.\textsuperscript{87} Section one of the \textit{Equity Act} was actually designed to prevent a judge from resigning as the Primary Judge in Equity until the Governor, on the advice and consent of the Executive Council, should accept the resignation.\textsuperscript{88} The judge had tendered his resignation as the Primary Judge in Equity, but not from his other post as Second Judge, in protest against the lack of the necessary staff and court room facilities.\textsuperscript{89} The government conceded the point about appropriate facilities and staff and appointments were quickly made.\textsuperscript{90} It had expected the judges to assign the various judicial matters amongst themselves, but when this failed they brought in the Equity Bill

\begin{footnotes}
\item[78] \textit{Petition by the Judges}, Annexure V in Victoria, \textit{The Judges}, Parl Paper No C 8 (1866) 571.
\item[79] \textit{Supreme Court Act 1852} (Vic).
\item[80] \textit{Supreme Court (Administration) Act 1852} (Vic) 15 Vict, No 10, s 5.
\item[81] \textit{Petition by the Judges}, above n 78, 574–5 citing \textit{Burke’s Act}.
\item[82] Ibid, 580.
\item[83] This was the official position in Britain. See United Kingdom, \textit{Parliamentary Debates}, House of Commons, 3 June 1867, cols 494–5. A Victorian court in \textit{R v Rogers: Ex parte Lewis} (1878) 4 VLR 334, 341–2 held that \textit{Burke’s Act} was not precedent there. Judges did seek, and were granted, leave of absence in accordance with the Act. See Victoria, \textit{Judges’ Absence}, Parl Paper No C 21 (1877–8); South Australia, \textit{South Australian Government Gazette}, No 7, 12 February 1857. Others were denied leave: \textit{Sydney Morning Herald} (Sydney), 10 November 1859, 2.
\item[84] \textit{Petition by the Judges}, above n 78, 579. For the Queensland opinion see ‘Despatch Relative to Mr Justice Lutwyche’, \textit{The Courier} (Brisbane), 2 May 1862, 2. For brief comments on the Victorian dispute see Enid Campbell, ‘Suspension of Judges from Office’ (1999) 18 \textit{Australian Bar Review} 63, 65.
\item[85] South Australia, \textit{Primary Judge in Equity Act}, Parl Paper No 163 (1870).
\item[86] For the papers see South Australia, Parl Paper No 68, 68A, 68B, 163 (1870).
\item[87] South Australia, \textit{Parliamentary Debates}, Legislative Assembly, 15 November 1870, cols 1336–7 for the second reading speech on the Equity Bill 1870 (SA).
\item[88] \textit{Equity Act 1870} (SA) 33 & 34 Vict, No 23.
\item[89] South Australia, \textit{South Australian Government Gazette}, No 42, 15 September 1870, 1216.
\item[90] South Australia, \textit{South Australian Government Gazette} No 29, 16 June 1870, 719.
\end{footnotes}
1870 (SA). The Bill provided that where the Judge in Equity resigned or was otherwise unavailable due to illness or absence, the other judges could act in his place. The government thought that merely imposing extra duties on the judges did not impair their independence and cited British examples of legislation giving new judicial duties to the judges. The press also thought that the claims of the judges were misconceived, pointing out that merely changing the jurisdiction of the court was a routine matter and happened nearly every year. If the Parliament could not make amendments to court legislation then the legal system could not develop. The Bill proceeded despite the threat by the Chief Justice to appeal to the Governor to ask him to refuse his assent to the Bill, and failing that, the judge warned that an address would be made to the Queen as the ‘guardian of their rights’. In the end, the Bill passed and was reserved for the royal assent, which was duly given. The opinion of the law officers in both Adelaide and London was that it was unnecessary to reserve the Bill, but this was done after the judges warned that it was necessary. No doubt with the Boothby affair fresh in their minds, the government took this step to avoid the possible invalidation of the legislation on the grounds that it violated the procedure laid down in the Constitution Act 1856 (SA). With the passage of the Act, Gwynne J was persuaded to return as the Primary Judge in Equity.

Salary disputes occurred before and after federation. In a case of a judge of the New South Wales District Court, an attempt was made by the executive to reduce his salary on the ground of neglect of his office. But the governing legislation did not permit this and the only measure that could be taken was dismissal though, in that case, not by the legislature. In the course of his judgment in Meymott v Piddington, Martin CJ noted that he could imagine a situation whereby the executive so overloaded the judge with duties that he could not perform them all and thus might attempt to accuse the judge of negligence and thereby justify reducing the salary for negligence. In the same case, the point was made that the protection of judicial salaries was a support for the independence of the judges because it reduced the dependence of the judges on the goodwill of the legislature, and prevented the legislature from punishing a judge by reducing their salary. The judges, on the other hand, could proceed fearlessly without having to worry about their livelihood being undermined by a disapproving legislature.

91 Ferguson to Colonial Secretary in South Australia, Primary Judge in Equity Act, Parl Paper No 54 (1871) 1–2.
92 ‘The Primary Judgeship in Equity’, The South Australian Register (Adelaide), 6 December 1870, 2.
93 South Australia, Parliamentary Debates, Legislative Assembly, 15 November 1870, col 1337; South Australia, Parl Paper No 163 (1870).
94 The Act was proclaimed in South Australia, South Australian Government Gazette, No 29, 6 July 1871, 982. See also the dispatch from Kimberley to Ferguson in The South Australian Register (Adelaide), 16 August 1871, 5.
95 The opinions were published in South Australia, Primary Judge in Equity Act, Parl Paper No 54 (1871) 2, 3.
96 The Governor alluded in para 7 of his dispatch to the Secretary of State, 16 January 1871 to the Boothby affair. Primary Judge in Equity Act, Parl Paper No 54 (1871) 2, 2; this was that any alteration of the Act required reservation of the royal assent.
97 South Australia, South Australian Government Gazette, No 33, 27 July 1871, 1108.
Complaints were also made about the adequacy of a judicial salary in two instances, with satisfaction in one case and disappointment in the other. Justice Lutwyche of Queensland complained that when he transferred from the Supreme Court of New South Wales to the Supreme Court of Queensland his salary was lower as a result. In the end the same salary was granted to him, but the colonial secretary made it clear that the payments of salaries to future judges of the Queensland Supreme Court were a matter for the Parliament of the colony. Justice Bundey complained in the 1890s that one consequence of the appointment of Sir Samuel Way CJ as the Lieutenant-Governor of South Australia was to throw virtually the entire criminal caseload of the Supreme Court onto his shoulders and he thought that the increased workload required an increase in his salary.

In 1907 Cooper CJ of Queensland was asked to pay income tax on his judicial salary. He initially refused and was also given a penalty for late payment, though he later paid under protest. He argued that as a judge he was not liable to pay the tax and the Full Court of the Supreme Court of Queensland affirmed the decision of the District Court judge who had held that section 17 of the *Constitution Act 1867* (Qld) (‘*Constitution Act*’) prevented a reduction in judicial salaries during the term of office of the judge. The court also held that since the income tax legislation did not in terms amend the *Constitution Act* it was ultra vires the 1867 legislation. On appeal, the High Court upheld the decisions below on the ground that the procedure for amending the *Constitution Act* had not been complied with. However, the Court distinguished between a reduction in a judicial salary at source, which was prohibited, and the imposition of a tax in common with all other tax payers. The latter was allowable. Justice Higgins noted that the full salary was paid to the judge and that is all that the *Constitution Act* required. What happens after payment, such as when a demand to pay income tax was made, was a different matter. It followed that the tax could not be deducted before payment of the full salary, for that would be a constitutionally impermissible reduction. But when a demand was later presented, the judge had to pay the tax. Of course, a judge could be asked to accept a voluntary reduction in salary. In 1931 the judges of the High Court were asked to accept a 20% reduction in salary by paying back a sum after the full salary had been paid to the judge, and three justices agreed to a reduction of their travelling allowances and part of their pay. The judge in the Federal Court of Bankruptcy refused to pay any money to the Commonwealth, while two judges of the Commonwealth Court of Arbitration and Conciliation agreed to repay 25% of their salaries for a period of two years.

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99 *Supreme Court Constitution Amendment Act 1861* (Qld).
100 ‘Despatch from the Colonial Secretary to the Governor’, *The Courier* (Brisbane), 2 May 1862, 2.
101 South Australia, *Correspondence Re Appointment of Chief Justice as Acting Governor*, Parl Paper No 71 (1893); *The Advertiser* (Adelaide), 28 July 1893, 6.
102 *In re the Income Tax (Consolidated) Act 1902–1904* [1907] St R Qd 110. The judgment of the District Court appears as a note to this law report and in *The Brisbane Courier* (Brisbane), 14 February 1907, 7.
103 *Cooper v Commissioner of Income Tax for the State of Queensland* (1907) 4 CLR 1304.
104 Ibid 1316 (Griffith CJ), 1320 (Barton J), 1325–6 (O’Connor J).
105 Ibid 1332, 1334 (Higgins J).
V THE SOCIAL AND PROFESSIONAL CONTEXT

In most jurisdictions a single judge was appointed and in some cases the sole judge operated alone for a considerable time. This placed the judge in an especially isolated situation, for there were no fellow judges with whom to discuss matters. They were also hampered by the lack of local law reports and an up-to-date legal library. The other problem was that the institutional arrangements for a colonial Supreme Court meant that the Court combined all of the jurisdiction and powers of the superior courts of justice at Westminster. Whereas English training meant that English lawyers and judges had a background in one or a few of the superior courts of justice, colonial judges had to be able to deal with the full range of judicial matters including admiralty law. Little wonder then that Sir Francis Forbes, who was about to become the first Chief Justice of New South Wales, should comment in February 1823 that colonial judges had to possess a wider range of knowledge than their counterparts in Britain. If all of this were not enough, colonial judges were expected to take on duties in the lower courts in order to save money. This usually entailed going on circuit, which, given the slow modes of transport in 19th century Australia, involved long absences from the capital city. Early judges were also expected to advise the executive on whether legislation was repugnant to the laws of England, a task they did not relish. In one instance from Van Diemen’s Land, after certifying that the legislation was not repugnant, the judges changed their mind and invalidated a local statute after hearing argument in a case.

VI BENJAMIN BOOTHBY IN SOUTH AUSTRALIA 1861 AND 1867

Arguably the most controversial and best remembered instance of judicial amotion in 19th century Australia occurred in 1867 when Benjamin Boothby J, once described in the local

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107 South Australia, for example, had a single judge from 1837 until 1850 while Western Australia had a single judge, the Chief Justice, from 1861 to 1883.
109 New South Wales Act 1823 (Imp) 4 Geo 4, c 96, s 2; Supreme Court Act 1844 (VDL) preamble; Supreme Court Ordinance 1861 (WA) s 4; Supreme Court Ordinance 1837 (SA) s 7; Supreme Court Procedure Act 1866 (SA) s 1. This was an arrangement launched in colonial America in the late 17th century with the creation of the Supreme Court of New York (1691) and the Superior Court of Judicature of Massachusetts (1692). The exception was Canada where before the 1860s separate superior courts existed. See Canada Act 1840 (Imp) 3 & 4 Vict, c 35, s 44.
111 See the acknowledgment of this in the preamble to the Supreme Court Ordinance 1845 (SA).
112 See Van Dieman’s Land, A Letter from Mr Justice Horne to HE the Lt-Governor Certifying Against the Brown’s River Road Act, Parl Paper No 21 (1848).
113 ‘Symons v Morgan’, The Courier (Hobart), 2 February 1848, 3–4.
114 There is no adequate study of his judicial career but helpful works include: John Williams, ‘Judge Boothby: The Disaster That Happened’ in George Winterton (ed), State Constitutional Landmarks (Federation Press, 2006) 21, 21–51; Peter Howell, The Boothby Case (MA Thesis, University of Tasmania, 1965); Alex C Castles, An Australian Legal History (Lawbook, 1982) 407–11; Alex C
Adelaide press as a monomaniac,\textsuperscript{116} was amoved. Often portrayed as a pig-headed wrecker on the bench,\textsuperscript{117} Boothby J was called to the English Bar in 1841 after a career in manufacturing and as an election agent. He later occupied the post of recorder and judge of the court at Pontefract in 1845.\textsuperscript{118} He also published two books on the law, one of which went to a second edition.\textsuperscript{119} He was appointed the Second Judge in 1853 on the death of Crawford J to assist Cooper CJ\textsuperscript{120} and survived a first attempt to remove him in 1861.\textsuperscript{121} His decisions on the bench, his behaviour towards his fellow judges on and off the bench, as well as towards members of the legal profession, so aroused the local Parliament that it voted 20 to 15 in the lower house in 1861 to petition the Crown to amove him.\textsuperscript{122} The British decided not to accede to the plea in the petition because of the narrowness of the majority, the fact that certain eminent South Australians, such as Henry Ayers, were not in favor of his removal,\textsuperscript{123} and also because the inquiry by the Parliament had not offered the judge a prior hearing before coming to a conclusion. The official advice from London was that since Boothby J, along with the other judges, had been right about the invalidity of the \textit{Constitution Act 1856}\textsuperscript{124}
(SA) (‘Constitution Act’) and the Electoral Act 1856 (SA) (‘Electoral Act’), a Parliament resulting from such suspect legal documents could not move for Boothby’s J removal.

It was also thought by some qualified observers that his decisions on validity matters were allowable, since it was the duty of the judges to decide such matters. One defender of the judge argued that he had not misbehaved himself while on the bench and that mere disagreement with his decisions was not a basis for removing him. It should be noted that Boothby J did not invent the doctrine of repugnancy, which appears in English statutes as early as 1541. The repugnancy doctrine also plagued the North American colonies in the 18th century and was applied in the other Australian colonies from an early date. These difficulties were normally resolved by ad hoc legislation at the time. Some of his more radical claims, such as that all legislation made under the Constitution Act was invalid, were not thought important in London, for, as the government pointed out to the House of Commons in 1864, the other two judges did not agree with him.

To place the Boothby affair in context, it is worth remembering that the British Parliament was obliged to deal with invalidity problems in other colonies where appointments were botched, resignations were mishandled, and in one case a judge in Bombay was discovered to lack the qualifications for appointment to the bench. Subsequent problems with the validity of local legislation, not all of which were Boothby’s J fault, for the other judges sometimes

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124 South Australia, Despatches on Constitution and Electoral Acts, 1856, Parl Paper No 164 (1861); Duke of Newcastle to Daly, No 25, 24 April 1862 in South Australia, Despatch on Addresses For Removal of Judge Boothby, Parl Paper No 68 (1862) 1.
125 See Law Officers to Newcastle, No 110, 12 April 1862 in South Australia, Despatch on Addresses For Removal of Judge Boothby, Parl Paper No 68 (1862) 4; D P O’Connell and Ann Riordan (eds), Opinions on Imperial Constitutional Law (Lawbook, 1971) 65.
126 See a pamphlet of eight pages by a member of the Irish Bar in State Records of South Australia, Observations on the Report of the House of Assembly, South Australia on Judge Boothby’s Case, GRG 36/60 (1862). This is a restricted file and I am grateful to Alan Clark, Deputy Registrar of the South Australian Supreme Court, for permission to see it.
127 Religion Act 1541, 32 Hen 8, c 26; Public Accounts Act 1695, 7 & 8 Will 3, c 22, s 8. The term was used in early colonial charters. See Charter of the Massachusetts Bay Company, 4 March 1629 cited in Merrill Jensen (ed), English Historical Documents: American Colonial Documents to 1776 (Eyre and Spottiswoode, 1964) vol 9, 78.
130 See Judges Doubts Removal Act 1848 (VDL) 11 Vict, No 1; Land Grants, New South Wales Act 1849 (Imp) 12 & 13 Vict, c 22.
131 United Kingdom, Parliamentary Debates, House of Commons, 4 March 1864, col 1457.
132 See Vice-Admiralty Court (Mauritius) Act 1854 (Imp) 17 & 18 Vict, c 37; Validation of the Acts of the Chief Justice of Bombay Act 1858 (Imp) 21 & 22 Vict, c 32; High Court at Bombay Act 1864 (Imp) 27 & 28 Vict, c 17.
agreed with him as did the law officers in London, were handled by the passage of ad hoc Imperial legislation, which rescued the Constitution Act and Electoral Act and also all legislation made by the parliaments constituted by those two Acts. At the time, though, the Colonial Secretary expressed disquiet with the situation in South Australia and warned in remarks directed at the legislature that further remedial legislation ought not to be expected.

Further problems with validity resulted from a majority decision of the Supreme Court in the case of Auld v Murray in December 1863. In this case the three judges of the Supreme Court sitting as a Full Court held by a majority that the Real Property Act 1857 (SA) was invalid insofar as it related to certain leases, and these in turn impinged on the right to vote under the Constitution Act, given that there was a property qualification for upper house electors. It was argued that alterations to the Constitution Act had to comply with manner and form requirements in that Act and be reserved for the assent in Britain. A month later, Hanson CJ wrote a letter to the Governor on the case and noted the ‘utterly indefinite nature of the restriction’ as to repugnancy. He then referred to the North American and West Indian colonies. Although he did not have the legislation to hand, he thought that the West Indian legislation imposed a restriction only as to Imperial legislation ‘made applicable to those colonies’. A subsequent opinion by the law officers in London in September 1864 took note of the Hanson view, but recommended that Imperial legislation similar to that in the Act

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133 See the comments in South Australia, Correspondence on Electoral Act 1861, Parl Paper No 129 (1863).
134 See Law Officers to Colonial Office, 25 March 1862 cited in D P O’Connell and Anne Riordan (eds), Opinions on Imperial Constitutional Law (Lawbook, 1971) 32–4 who agreed that the failure to reserve the Constitution Act 1856 (SA) meant that the Parliament elected under the Act and the statutes passed by it were invalid. Also note the letter by J H Fisher, the President of the Legislative Council, who first suggested that the electoral legislation might not be valid: South Australia, Electoral Act 1861, Parl Paper No 23 (1861).
135 The Australian Constitutions Act 1862 (Imp) 25 & 26 Vict, c 11; Colonial Acts Confirmation Act 1863 (Imp) 26 & 27 Vict c 84; South Australia, Parl Paper No 130 (1863); South Australia, Imperial Statutes Affecting the Government of South Australia, Parl Paper No 31 (1863) 22.
136 Newcastle to Daly, No 32, 25 July 1863 in South Australia, Confirmation of Acts of Colonial Legislatures, Parl Paper No 130, 135 (1863) 1: ‘It is not proper or desirable that the Statute Book of this country should be encumbered with enactments which are only required to extricate Colonial Governments and Legislatures from the consequences of their own irregularity or inadvertence, especially when this irregularity consists in an omission on the part of the Legislature to conform to rules of their own making’.
137 The South Australian Register (Adelaide), 17 December 1863, 3.
138 The other judges were Richard Davies Hanson CJ, appointed in 1861: South Australia, South Australian Government Gazette Extraordinary, No 49, 20 November 1861, 967; and Edward Castries Gwynne J, appointed as the third judge on 26 February 1859: South Australia, South Australian Government Gazette, No 9, 3 March 1859, 191, though his commission was not issued until 16 September 1862: South Australia, House of Assembly, Votes and Proceedings, No 64, 13 July 1865, 150 item 5; ‘Governmental Laches’, South Australian Advertiser (Adelaide), 26 September 1862, 3. Both were former Attorneys-General: South Australia, Statistical Record of the Legislature, Parl Paper No 49 (1900) 65, table R.
139 Constitution Act 1856 (SA) s 34.
140 See South Australia, Validity of South Australian Legislation, Parl Paper No 54 (1864) 3–4.
of Union 1840 be applied to all of the colonies. Section three of that Act allowed a legislative power to the Province of Canada and added:

[S]uch laws not being repugnant to this or such Parts of the said Act passed in the Thirty-First year of the Reign of His said late Majesty… which does or shall, by express Enactment or by necessary Intendment, extend to the Provinces of Upper or Lower Canada.

This in turn formed the basis for the Colonial Laws Validity Act 1865, which remained part of Australian law until 1986. The Colonial Laws Validity Act narrowed the test for repugnancy to English law. The old view, though somewhat disputed, was that any colonial law repugnant to the laws of England, whether or not the British Act applied to the colony, was invalid. It was thought that local legislation could not be repugnant to British Acts, any charter, Letters Patent or Order-in-Council issued to the colony, or to the laws of England (taken to mean the common law). At a time when colonies necessarily had to deal with situations that had not arisen in England, such conflicts were inevitable. The Colonial Laws Validity Act restricted the repugnancy test to conflicts between a colonial statute and an Imperial Act that either applied to the particular colony or to all colonies in general. Mere divergence from English common law, or statutes that did not apply as such to the colonies, were excluded from this narrowing of the repugnancy doctrine. In this sense the Colonial Laws Validity Act was seen in the 19th century as liberating for the colonies.

Though infamous as an invalidator of statutes, Boothby J’s views in particular cases were shared by others, and his decisions in this area were not the official basis for his removal in 1867. Indeed a month after the Colonial Laws Validity Act was passed, but before it was proclaimed in South Australia, the Full Court by a majority held that the Local Courts Act

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141 3 & 4 Vict, c 35.
142 Ibid, s 3. See Opinion by the UK Law Officers to Cardwell, 28 September 1864 in South Australia, Opinion on Judgment in Auld v Murray, Parl Paper No 108 (1866) 2[1].
144 Australia Act 1986 (Cth) s 3(1) removed the Colonial Laws Validity Act from state law prospectively.
145 See the recitals in the preamble to the Act to Remove Doubts Respecting the Validity and Legality of Acts of the Lieutenant-Governor and Legislative Council of Van Diemen’s Land 1848 (Imp) 11 Vict, No 1.
146 See Phillips v Eyre (1870) LR 6 QB 1, 20–1. For a full discussion see Memorandum on Sir Arthur Gordon’s Confidential Despatch, 23 February 1876, CO 881/4/54 /3–13.
149 The Act received the royal assent on 29 June 1865, but only became part of the law when it was proclaimed and published in South Australia, South Australian Government Gazette Extraordinary, No 39, 18 September 1865, 843–5.
1861 (SA) was invalid. In *Dawes v Quarrel*, Gwynne J agreed with Boothby J that local courts could not be constituted by South Australian legislation. One of his main reasons was that the judges of such courts did not enjoy the security of tenure afforded to Supreme Court judges by the *Constitution Act*. Justice Boothby’s argument, despite the fact that he had presided in such courts since 1854, was that local courts could only be erected by either the royal prerogative or by Imperial legislation, neither being within the powers of the local legislature. One effect of this decision was that upwards of 20,000 cases already heard in the local courts were put in jeopardy. Nevertheless, given that Boothby J was not always alone on validity matters it is not surprising that, though validity matters were mentioned in the charges against him, they were not the main focus of attention.

Justice Boothby’s subsequent difficulties in South Australia had more to do with his attitude towards the profession and his fellow judges. He had refused requests to forward his notes on the case of *Copeland v Wentzel* to the Court of Appeals on the ground that he did not recognise such a court. In March 1866 in *Murray v Ridpath* in a dissenting judgment, Boothby J had held that legislation constituting a local Court of Appeals was invalid. But of course, as a dissenting judgment it had no legal weight, though this was a point lost on the legislature, and a day after the decision the Court of Appeals proceeded to hear another appeal on the basis that it was validly constituted. Neither of these cases involved repugnancy arguments, but rather claims about the limits of colonial legislative power apart from the repugnancy limitation.

Matters came to a head in May 1866 when Boothby J refused to allow any indictments to be presented at the criminal sessions because he did not recognise the right of Randolf Stow QC to appear, as he did not think that the Governor of the colony had the power to create Queen’s Counsel. He demanded to see Stow’s licence from the Crown and threatened to subpoena

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150 [1865] Pelham I: South Australia, *Judgments in Dawes v Quarrel*, Parl Paper No 120 (1865). This did not deter a motion in the Legislative Council to ask for remedial action by Britain, though it failed. See South Australia, Legislative Council, *Minutes of the Proceedings*, No 27, 20 July 1865, 60.

151 *Dawes v Quarrel* [1865] Pelham 1, 5.

152 *The South Australian Register* (Adelaide), 5 January 1854, 3.

153 *Dawes v Quarrel* [Pelham] 1, 8–10. Section 5 of the *Colonial Laws Validity Act* made it clear that a colonial legislature had the power to erect courts of law.

154 Speech by the Governor in South Australia, Legislative Council, *Minutes of the Proceedings*, No 35, 4 August 1865, 82. The other effects were to transfer the caseload to the Supreme Court: South Australia, House of Assembly, *Votes and Proceedings*, No 35, 28 June 1865, 117 item 7 and to invalidate the *Third Judge and District Courts Act*; South Australia, House of Assembly, *Votes and Proceedings*, No 50, 25 July 1865, 184 item 9.

155 *The South Australian Register* (Adelaide), 22 December 1865, 4.

156 See South Australia, *Proceedings in Court of Appeals*, Parl Paper No 6 (1866) 1–2, where the associate to the judges, Lionel J Pelham, wrote on Boothby’s J behalf on 25 May 1866 to say that the lack of a formal seal and a lack of a decision of the Full Court prevented him from sending the documents.

157 In South Australia, *Proceedings in the Court of Appeals*, Parl Paper No 6 (1866) 4–6; *The South Australian Register* (Adelaide), 5 March 1866, 3.

158 ‘Walsh v Goodall’, *The South Australian Register* (Adelaide), 5 March 1866, 3.

159 Stow, Richard Andrew, a former Attorney-General and William Wearing, the Crown Solicitor,
Stow’s clerks to prove him guilty of falsehood. He also refused to allow the 31 indictments\(^{160}\) signed by the Attorney-General,\(^{161}\) James Penn Boucaut, to be presented on the ground that such an office did not legally exist in the colony.\(^{162}\) The chief law office had been called the Advocate-General at the outset of colonisation in 1836, in part because South Australia was designated a province rather than as a colony and provinces were initially seen as military in character.\(^{163}\) But after the inauguration of responsible government in 1856 the title of the chief law officer was changed to that of the Attorney-General.\(^{164}\) Justice Boothby’s refusal to allow the indictments to be presented caused consternation because the gaol could not be cleared and prisoners had to be held over until the next session in August.\(^{165}\) A report on the matter by counsel, including the Crown Solicitor, recommended that the only solution was to ask the South Australian Parliament to petition the Queen for Boothby J’s removal.\(^{166}\)

While the judge was not expected to preside at the sittings for the rest of 1866, a decision was made in 1867 to keep him off the bench. Under existing legislation, the Governor could, and did, issue special commissions nominating a judge to preside at the sittings of the Supreme Court in the south-eastern towns of Robe and Mount Gambier. Normally, the commission was issued to the third or most junior judge, in this case Gwynne J. At the beginning of 1867, legislation was passed to confer on the Governor a power to issue commissions for the Supreme Court in Adelaide as well as for regional centres.\(^{167}\) Despite the commissions issued to the Chief Justice and Gwynne J to cover both the criminal and civil sittings, Boothby J attended court at the criminal sittings in February 1867 and read a protest denouncing the commission as illegal before leaving the bench.\(^{168}\) Matters descended into a farce when he

\(^{160}\) See the list in South Australia, South Australian Government Gazette, No 18, 26 April 1866, 406.

\(^{161}\) Appointed in March 1866: South Australia, South Australian Government Gazette, No 13, 28 March 1866, 317.

\(^{162}\) The transcript of these exchanges was reproduced in South Australia, Proceedings in Supreme Court, Parl Paper No 4 (1866–7) 2–11. The point about Boucaut appears at page 5 and the point about Queen’s Counsel at pages 3–4.

\(^{163}\) Thus Richard Davies Hanson, later Chief Justice, was appointed Advocate-General in 1853: South Australia, South Australian Government Gazette, No 18, 5 May 1853, 294; Civil List Act 1853 (SA) sch A, pt 1.

\(^{164}\) In 1856 the name was changed in the Constitution Act 1855–6 (SA) sch A, pt 1 to the Attorney-General; South Australia, South Australian Government Gazette, No 47, 25 October 1856, 970. See also Supreme Court Procedure Act 1866 (SA) s 2.

\(^{165}\) By which time there were 57 criminal cases pending: South Australia, South Australian Government Gazette, No 33, 2 August 1866, 760.

\(^{166}\) Further opinion by W A Wearing and Rupert Ingelby, 6 June 1866 in South Australia, Proceedings of Mr Justice Boothby, Parl Paper No 5 (1866) 2.

\(^{167}\) Third Judge and District Courts Act 1866–67 (SA) s 1. See South Australia, South Australian Government Gazette, No 6, 7 February 1867, 115–6; South Australia, South Australian Government Gazette, No 21, 9 May 1867, 450; South Australia, South Australian Government Gazette, No 25, 6 June 1867, 518; South Australia, Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby, Parl Paper No 22 (1867). This source gives the verbatim transcript of the eight-day hearing of the Governor-in-Council, held over the period 24 June – 29 July 1867. The original legislation that applied to commissions for country districts only was the Third Judge and District Courts Act 1858 (SA) s 2.

\(^{168}\) The South Australian Register (Adelaide), 13 February 1867, 3.
later adjourned the *Moonta Mines* case to a date different to that of the other judges, and attended court on the due date to find that no one appeared before him. The special commissions did not involve interdiction or suspension, though in practice they had this effect. The Colonial Secretary disapproved of the legislation that created the special commission power as disproportionate to the emergency, arguing that the legislation should have been made temporary and should not have been extended to civil matters, as the problems had only involved criminal cases.

Momentum to hold an inquiry in order to remove Boothby J gathered pace in April 1867 when the other judges wrote a letter to the Governor complaining about Boothby J’s conduct towards them. Justice Boothby had claimed that he was the sole rightful judge, since he disputed the right of the Governor to appoint his fellow judges and refused to recognise the validity of his colleagues’ appointments, even though he had served with them for years and had never previously raised the point. In theory, if taken seriously, two of the three judges could not sit at all and the entire business of the court would devolve solely on Boothby J. The effect on the operation of the legal system would have been extremely serious, to say the least. Chief Justice Hansen and Gwynne J attempted to reason with Boothby J, but to no avail. The judges, in their letter, pleaded with the Governor to ‘adopt remedial measures,’ though they did not suggest what they might be.

Justice Boothby’s attitude towards the leading members of the profession and his behavior at the May 1866 criminal sittings resulted in another parliamentary inquiry and an address from the Legislative Council to the Queen to remove him. This time the focus was on his behavior in office, especially since 1865. The address to the Queen cited: (a) his persistent failure to administer local parliamentary Acts; (b) his refusal to give effect to the *Validating Act* (as the *Colonial Laws Validity Act* was commonly known at the time); (c) his impugning of the local Court of Appeals; (d) his departure from decisions of the Supreme Court; (e) his want of judicial propriety on the bench; and (f) that his judgments and dicta were not in accordance with the law. The main report by the House of Assembly concentrated on his conduct in office and was backed up by an opinion of barrister H W Parker, who reported to

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169 *The South Australian Register* (Adelaide), 28 June 1867, 5. The formal name of the case was *R v Hughes* (1867) 1 SALR 132 Appendix.

170 See Earl of Carnarvon to Daly, No 5, 1 April 1867 in South Australia, *Despatches On Third Judge and District Courts Act*, Parl Paper No 83 (1868–9) 1. In consequence the Act was repealed by the *Third Judge and District Courts Act* (1868–9) No 6, s 1. The practice of issuing special commissions to determine which judge sat on which class of case was subsequently condemned in the press as ‘an alarming invasion of the independence of the judges’: *The South Australian Register* (Adelaide), 12 November 1870, 4.

171 State Records of South Australia, GRG 24/63; South Australia, *Minutes of Proceedings Relating to Mr Justice Boothby*, Parl Paper No 22 (1867) v.

172 Though he did dispute the appointment of Hanson as the successor to Cooper CJ on the ground that only a qualified British barrister could be appointed to the post, which Hanson as a locally qualified lawyer was not, the Governor rejected this argument showing that there was no law imposing the British barrister requirement. See South Australia, *Despatches on Appointment of Chief Justice Hanson*, Parl Paper No 86 (1862) 2.

173 South Australia, Legislative Council, *Minutes of the Proceedings*, No 5, 3 July 1866, 9 item 5.

174 Ibid No 4, 27 June 1866, 7–8 item 4.
the Assembly that Burke’s Act and a recent English decision supported the view that an inquiry into the judge’s conduct must precede any amotion. Despite this advice, there was a brief attempt to remove the whole matter directly to the Judicial Committee, but the British authorities rejected this as novel and noted that Boothby J had not even been given a hearing in Adelaide to answer the charges against him. No case for urgency had been made out and the Colonial Secretary rejected what he called ‘an ex parte case’.

The view in Adelaide was that the addresses of the local houses of Parliament were sufficient and in late 1866 the Executive Council rejected London’s suggestion that the matter be handled by offering Boothby J retirement with a pension. The Executive Council objected to the financial implications of this and thought that it would reward the judge for what they regarded as bad behavior. When London rejected the amotion of Boothby J by the procedure prescribed in the Constitution Act, the Executive Council protested at being overridden. In a strongly worded minute, they noted that this was an affront to responsible government and warned that the high handedness in London would loosen the ties between South Australia and Britain. Despite these objections, the advice from London was that the judge could only be removed pursuant to the procedure laid down in Burke’s Act.

The government in Adelaide complied with the instruction from London and invoked section two of Burke’s Act, for it guaranteed a hearing to the judge, if he wanted it, before the Governor and the Executive Council. The government also assembled the papers used to amove Willis and Montagu JJ, as an aid in the process. There were, it was said, three methods for removing a judge in the 1860s. First, the Queen could remove a judge by an exercise of the royal prerogative if she or her predecessor had appointed the judge by issuing him with a commission. The power to issue a commission necessarily included a power to withdraw it. As Boothby J had been appointed by the Queen, not the Governor of South Australia, this was a possibility. The problem was that there would have to be a hearing and since all of the evidence and witnesses were in South Australia they would have to go to

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175 Ex parte Ramshay (1852) 18 QB 173, 118 ER 65, a case on the removal of a County Court judge by the Chancellor of the Duchy of Lancaster where it was held that a hearing into the charges must be accorded to the judge before his amotion.

176 See South Australia, House of Assembly, Votes and Proceedings, No 4, 22 June 1866, 10 item 5.

177 Carnarvon to Daly, No 9, 26 February 1867 in South Australia, Minutes of Proceedings Relating to Mr Justice Boothby, Parl Paper No 22 (1867) app vii.

178 Copy of a Minute of the Executive Council, 27 December 1866 in South Australian Records Office, GRG 24/63, 1. In any case, it seemed unlikely that Boothby J would have accepted this : Daly to Carnarvon, No 57, 26 December 1866 in South Australia, Legislative Council, Minutes of the Proceedings, No 35, 4 August 1865, 152, app xxxiv.

179 Copy of a Minute of the Executive Council, 25 February 1867 in South Australian Records Office, GRG 24/63.

180 See ‘The Address of the Governor’ in South Australia, Opening of Parliament, Parl Paper No 1 (1867) [2].

181 See South Australia, Bill of Costs, Re Amotion of Mr Justice Boothby, Parl Paper No 184 (1868–9) 1. The Willis J papers were published in South Australia: South Australia, Removal of Mr Justice Willis, Parl Paper No 186 (1867).

182 See the opening statement by H W Parker in South Australia, Minutes of Proceedings Relating to Mr Justice Boothby, Parl Paper No 22 (1867) 2–3. A summary was published in South Australian Advertiser (Adelaide), 29 August 1867, 3.

183 The South Australian Advertiser (Adelaide), 8 October 1861, 2.
London for this purpose. 184 Second, reliance could be had on the provisions of the Constitution Act, which provided for removal by the Governor upon an address of both houses of the South Australian Parliament. But that Act neither made provision for a hearing of the judge nor for the grounds of removal. In any case, it was subject to any overriding Imperial legislation and in the peculiar situation of the Boothby case the judge might have challenged the validity of the Constitution Act procedure notwithstanding Burke’s Act. After all, the requirements of section two of Burke’s Act might have been met in that there was both a colonial law (the Constitution Act) and an Imperial Act (Burke’s Act) and they applied to the same issue, in which case if there was repugnancy Burke’s Act would prevail. Burke’s Act had the advantage of both specifying grounds for removal and ensuring both a hearing in the colony and a later appeal to London. Whether the Constitution Act provisions were repugnant to Burke’s Act was never determined at the time. Certainly there were differences between the two Acts. Burke’s Act specified grounds, while the Constitution Act did not, and Burke’s Act provided for an appeal to the Judicial Committee, while a parliamentary address was silent on further proceedings. Nor was the question of whether Burke’s Act applied to a colony with responsible government resolved, though there was a view that it was applicable to such colonies. 185 However, later cases from Canada and Victoria did hold that Burke’s Act applied to colonies under responsible government. 186 The third option, adopted in Boothby J’s case, was to rely upon Burke’s Act. This process cut the local Parliament out of the question of amotion altogether, though it did involve ministers in the Parliament who were also members of the Executive Council. The central ground for the proceeding was misbehavior, under the Act.

Anxious to ensure that the judge was offered every opportunity to be heard, the proceedings before the Governor-in-Council commenced each day with a sworn statement by a police trooper that he had delivered a notice of the hearing to the judge’s home. 187 Despite this, the judge complained that he had been served with a 300 page printed foolscap document on 6 July and given merely seven days to prepare for the hearing, a notice period he described as ‘plainly insufficient’. 188 The Governor accepted Boothby J’s request for an extension of time until 29 July. Although the judge attended the hearing only four times, accompanied by his son Josiah, who happened to be the South Australian statistic (ie statistician), he refused to stay for the submissions or stay to hear the evidence of the witnesses.

On the first occasion, he read out a prepared statement challenging the proceedings and asked to be provided with certain documents, some of which he was denied. 189 The thrust of his

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184 This impracticability was recognised in 1870. See ‘Memorandum by Sir Frederick Rogers: The Removal of Colonial Judges’ in United Kingdom, Correspondence on the Removal and Suspension of Colonial Judges, C 139 (1870) 5.
185 For a view that it did apply see ‘Suspension of Judges’, South Australian Advertiser (Adelaide), 29 May 1866, 2.
186 Re Squier (1882) 46 UCQB 474, 491. See also R v Rogers; Ex parte Lewis (1876) 4 VLR 334, 341–2 which held that Burke’s Act applied to County Court judges in Victoria, in an incident after the introduction of responsible government.
187 See Document No 47 in South Australia, Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby, Parl Paper No 22 (1867) app ccxlv.
188 Ibid Document No 44, app ccxxxv.
189 Ibid Document No 45, app ccxxxvi.
argument was that the Governor did not have jurisdiction to proceed under Burke’s Act. Justice Boothby gave several reasons to support this conclusion. First, Burke’s Act assumed a different institutional arrangement not contemplated by the current law in South Australia. While somewhat convoluted, his argument was that the Act applied only to colonies with an appointed Legislative Council. As the South Australian Parliament was elected, it followed that the Act did not apply to his case. Second, the judge also challenged the hearing on natural justice grounds, pointing out that the tribunal conducting the hearing also included the parties presenting the evidence. There was considerable force in this claim, for at one point counsel putting the case against the judge took the witness stand to give evidence against Boothby J. The other point was that the Governor had already informed London a year earlier that ‘nothing short of his removal from the Bench can meet the requirements of the case’. In short, the tribunal before which Boothby J was to appear had already made up its mind about his removal before the hearing had even started.

The Governor-in-Council proceeded to hear five charges. These were prepared by the Attorney-General, James Penn Boucaut, and consisted of the following heads:

1. Conduct and language contumacious and disrespectful to the Court of Appeals and obstructive of the said Court in the performance of its duties;

2. A perverse refusal to recognise the authority of Parliament;

3. Expressions on the bench disparaging and insulting to the legislature, the government and the institutions of the province;

4. Language on the bench offensive and irritating to the other judges and a public denial of their authority; and

5. Showing private and personal feeling to interfere with the fair and impartial administration of justice.

These matters were then elaborated into 14 pages of particulars, and the Executive Council heard 20 witnesses over eight hearing days, including the other judges, senior lawyers and court officials. The thrust of the case against Boothby J stressed: (1) his bad relations with the other judges by denying the legality of their appointments and therefore their ability to hear

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190 Ibid Document No 46, app ccxxxvii, para 2.
191 Two of the three counsel who presented the case against Boothby J also appeared as witnesses.
192 Daly to Colonial Secretary, No 22, 28 May 1866 in South Australia, Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby, Parl Paper No 22 (1867) app xxx.
193 Chief Secretary’s letter in State Records of South Australia, GRG 24/63 (6 June 1867); South Australia, Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby, Parl Paper No 22 (1867) 2 app iii–iv; The South Australian Register (Adelaide), 17 June 1867, 2.
194 This was a reference to the fact that he was a member of the Full Court that heard the Moonta Mines case in which his son George was a shareholder in the company. See South Australia, Petitions, Correspondence and Documents Relating to the Moonta Mines, Parl Paper No 77 (1867) 9, 15.
195 Ayers to Boothby J, 6 June 1867 in State Records of South Australia, GRG 2/46 (6 June 1867). The same document includes a printed text of Burke’s Act.
cases (it followed from this that he regarded himself as the sole judge); (2) his disregard for the Court of Appeals despite the Colonial Laws Validity Act permitting local legislation on courts other than the Supreme Court; (3) his refusal to recognise locally appointed Queen’s Counsel or the existence of a local Attorney-General; and (4) his bias in the Moonta Mines case both because his son George was a party and because of his alleged bias towards Mr Elder. None of the allegations looked at his pre-1865 decisions on the validity of South Australian statutes.

The final decision did not include detailed reasons, though the official notice amoving Boothby J did say that he had ‘mishbehaved himself in his… office’. In the end, the Governor-in-Council amoved Boothby J on 29 July 1867 by revoking and recalling his appointment as a judge. Although Boothby J gave notice on the very day of his amotion that he would appeal to the Judicial Committee, a week later the Governor appointed Gwynne J as the Second Judge to fill the specific office once held by Boothby J. An attempt in the Legislative Council to ask the Governor to grant Boothby J leave so that he could go to London to prosecute his appeal was withdrawn. As Boothby J died in May 1868 before the appeal could be heard, no decision on his case was made by the Judicial Committee.

VII THE PRIVY COUNCIL MEMORANDUM OF 1870

In 1868 the Legislative Council of Singapore passed new legislation on the Supreme Court permitting the suspension of the judges by the Governor. The Chief Justice, who was a member of the Legislative Council, voted against the Bill to Amend the Supreme Court Ordinance 1868 (Singapore) as did the unofficial members, but the Governor and the official members commanding a majority in the Council prevailed and the Bill passed. A subsequent public meeting in June 1868 condemned the new legislation and a petition from the meeting was sent to London, condemning the new legislation and a petition from the meeting was sent to London. The Judicial Committee of the Privy Council responded by drawing up a memorandum in April 1870 to govern the removal of colonial judges in

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196 See Samuel Way in South Australia, Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby, Parl Paper No 22 (1867) 61-5.
197 South Australia, South Australian Government Gazette Extraordinary, No 33, 29 July 1867, 737–9.
198 South Australia, Legislative Council, Minutes of the Proceedings, No 18, 18 September 1867, 49 item 5.
199 South Australia, South Australian Government Gazette, No 35, 8 August 1867, 786. At the same time, a third judge, William Wearing, previously the Crown Solicitor, was appointed to Gwynne J’s post to complete a three-judge court: South Australia, South Australian Government Gazette, No 35, 8 August 1867, 786.
200 South Australia, Legislative Council, Minutes of the Proceedings, No 19, 19 September 1867, 51 item 2.
202 Sydney Morning Herald (Sydney), 10 July 1868, 3.
203 The arguments were summarised in ‘Mr Napier’s Pamphlet’, The Straits Times (Singapore), 22 January 1870, 1, available on the National Library of Singapore’s digital database. For the petition see United Kingdom, Parliamentary Debates, House of Lords, 20 May 1870, cols 1041–9. For a report of the meeting see The Mercury (Hobart), 18 August 1868, 3.
cases involving serious breaches with the community. The memorandum made it clear that it should be easier to dismiss colonial judges than those at home, though no reason was assigned for this view. Nevertheless, the memorandum emphasised the need to protect judges against party and personal feelings, ‘which sometimes sway colonial legislatures, and to ensure to the accused party a full and fair hearing before an impartial and elevated tribunal’. The presence of these feelings was said to be the reason why they thought that the addresses in South Australia in 1861 to remove Boothby J did not suffice as it would have done in England. A notable feature of the memorandum was that it included, as a ground of removal, a cumulative case of judicial perversity ‘tending to lower the dignity of the office, and perhaps to set the community aflame’.

The document was widely disseminated in the colonies and was invoked in Western Australia in 1889 when the Governor and the Executive Council wanted to hand to the Judicial Committee the issue of the suspension of the Chief Justice without holding a hearing themselves or even evincing an opinion on the matter as it was, they said, a purely legal issue. But the memorandum was not intended by London to be a substitute for Burke’s Act and the Colonial Secretary made it clear that he expected a hearing in Perth before the matter could be referred to the Judicial Committee. One effect of the memorandum was to modify the procedure by which colonial judges were removed by establishing the practice that no colonial judge could be dismissed by the executive in a colony without reference to the Secretary of State for the Colonies and the Judicial Committee of the Privy Council.

VIII ARTHUR ONSLOW IN WESTERN AUSTRALIA, 1887–1888

First appointed the Attorney-General in 1881 and quickly appointed the acting Chief Justice during the 10 month absence of Wrenfordsley CJ, Arthur Onslow became the Chief

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204 Memorandum of the Lords of the Council on the Removal of Colonial Judges, April 1870, reprinted in 6 Moo PC(NS) 9, app I; 16 ER 827; also published in The Straits Times (Singapore), 6 August 1870, 5; summarised in The Argus (Melbourne), 5 October 1870, 6 and The Mercury (Hobart), 10 October 1870, 2. For the few remaining British colonies the memorandum remains a key document. See Re Levers J [2010] 5 LRC 827, 844 [43].

205 Memorandum of the Lords of the Council on the Removal of Colonial Judges, April 1870, reprinted in 6 Moo PC (NS) 9, 10.

206 Memorandum of the Lords of the Council on the Removal of Colonial Judges, April 1870, 6 Moo PC 9app II; 16 ER 827, 828. For the correspondence see Western Australia, Administration of Justice in the Supreme Court: Petition from Messrs Harper and Hacket Respectingly His Honor the Chief Justice, Parl Paper No 4 (1889) A3–4. The Privy Council memorandum appears as an appendix to this document. The memorandum was also referred to in the debates on the affair in the Legislative Council. See Western Australia, Parliamentary Debates, Legislative Council, 16 April 1889, 315.

207 As explained in United Kingdom, Parliamentary Debates, House of Commons, 1 July 1953, col 383.

208 Western Australia, Government Gazette of Western Australia, No 1, 11 January 1881, 71. For secondary accounts of these events see Enid Russell, A History of the Law in Western Australia and Its Development from 1829 to 1979 (University of Western Australia Press, 1980) 209–11; L A Whitfield, Founders of the Law in Australia (Butterworths, 1971) 105–11; G Bolton and G Byrne, May It Please Your Honor: A History of the Supreme Court of Western Australia (Supreme Court of Western Australia,
Justice of Western Australia in July 1883, aged 41. Later that year a second judge, E A Stone, was appointed to the Supreme Court. There were three crises during the first decade of his Chief Justiceship, none of which terminated his appointment, and he survived until resigning in 1901. The first dispute occurred in 1886 when the judge became entangled in a political argument over the treatment of Aboriginals in the far north-west of the colony. The Reverend J B Gribble had exposed the maltreatment of Aboriginal prisoners, who he said were often tethered to trees for long periods awaiting the arrival of the police. He also argued that Aboriginals had been inveigled into signing employment contracts that they did not understand and that involved terms he likened to a species of slavery. In the subsequent furore, which saw opinion in the colony denounce Gribble, Onslow CJ unwisely took his side in a letter of support and by the payment of £2 to a newspaper sympathetic to Gribble.

None of this hurt the judge, though it did irritate the Canadian-born Governor Broome and set the scene for the next crisis, which had more severe consequences for Onslow CJ as it lasted eight months. The second dispute started as a rather petty matter, which quickly spiralled out of control. In his official capacity, Onslow CJ came into the possession of documents concerning five recently convicted prisoners. The judge had been asked to advise the executive on whether there were circumstances to warrant a remission of the sentences. Previous judges in Western Australia had carried out these duties, as did judges in other colonies. The Chief Justice refused to comment, arguing that an opinion was needed from London, and retained the papers. Chief Justice Onslow took the view that while he would give advice to the Governor as to whether or not a prisoner was guilty, any decisions involving the exercise of the prerogative of mercy were matters for the Governor alone.

After repeated requests to return the documents, he did so but leaked copies to the press,

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210 The Brisbane Courier (Brisbane), 18 March 1881, 2.
211 Western Australia, Government Gazette of Western Australia, No 32, 3 July 1883, 278.
212 See Broome to Derby, No 96, 20 September 1883 in Western Australia, Correspondence between HE The Governor and the Secretary of State for the Colonies, Parl Paper No 21 (1884) 65.
214 The letters were set out in Western Australia, Parliamentary Debates, 19 October 1888, 68.
216 See the interview with the Chief Justice, published in ‘The Governor and the Chief Justice’, The West Australian (Perth), 15 September 1887, 3.
217 On 7 September 1887. See Governor’s Despatches 22 September 1886–31 December 1889, in SROWA, WAA Consignment No 390, item 16, 198.
which promptly published them.\textsuperscript{218} The problem was that in one of the letters, Onslow CJ said the Governor had harassed him and acted in a way ‘calculated to lower and insult myself and my office and to degrade the administration of justice in this colony’.\textsuperscript{219} This made the dispute both public and personal since the judge virtually accused the Governor of deliberately undermining the judiciary. The Governor, on the very day the letters were published, issued a notice that with immediate effect the Chief Justice was interdicted from the powers and duties of his office.\textsuperscript{220} The reason assigned for this was that the judge was facing charges for releasing confidential information.\textsuperscript{221} Certainly there were specific rules in Western Australia covering these matters. By reg 105 of the \textit{Regulations for the Conduct of Official Business}\textsuperscript{222} government officers were enjoined from ‘disclosing official documents to any person to whom such communication shall not have been directed’. The judge took the view that the Governor’s charges were serious, unprecedented and illegal and also claimed that the Governor was harassing him.\textsuperscript{223} He also argued, in a letter to the Governor, that the charges were frivolous and that the interdiction was illegal.\textsuperscript{224} The Secretary of State for the Colonies sought to diffuse the situation and advised by telegram that ‘[i]f Onslow accept leave of absence half salary remove interdiction’.\textsuperscript{225} Although leave was offered to him, Onslow CJ refused to budge.

At the time, Western Australia was still a Crown Colony and judges there held office at pleasure.\textsuperscript{226} In the event of a vacancy, absence, resignation, death, or if the judge proved to be incapable, the Governor could appoint a replacement.\textsuperscript{227} The interdiction of Onslow CJ was followed by the appointment of a temporary replacement as Chief Justice, but the executive botched the appointment of George Leake QC, for there was doubt whether Onslow’s CJ interdiction created a vacancy. To remedy this situation, Leake was then issued with a commission appointing him to a puisne judgeship ‘at pleasure’.\textsuperscript{228} The other problem was that

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\textsuperscript{218} \textit{The West Australian} (Perth), 15 September 1887, 3. According to Broome, they were first published in the \textit{Inquirer and Commercial News} (Perth), 14 September 1887: see Broome to Colonial Secretary, in \textit{Governor’s Despatches} above n 217, 206.

\textsuperscript{219} Chief Justice Onslow to Broome, 7 September 1887 in \textit{Governor’s Despatches} above n 217.

\textsuperscript{220} \textit{Western Australia, Government Gazette of Western Australia}, No 47, 15 September 1887, 559; \textit{The West Australian} (Perth), 16 September 1887, 3.

\textsuperscript{221} \textit{Governor’s Despatches} above n 217, 23 September 1887, No 207, 196–8.

\textsuperscript{222} Perth, 1884, 19.

\textsuperscript{223} The Minutes of the Executive Council, 8 September 1887 in Western Australia, Executive Council Minutes, 4 June 1883–15 November 1887, WAA, Consignment No 1058, item 9. The minutes and volumes are un-paginated but are in chronological order.

\textsuperscript{224} The Minutes of the Executive Council, 22 September 1887 in Western Australia, Executive Council Minutes, 4 June 1883–15 November 1887, WAA, Consignment No 1058, item 9, includes the text of the letter by Onslow CJ.

\textsuperscript{225} \textit{The West Australian} (Perth), 20 September 1887, 3.

\textsuperscript{226} \textit{Instructions to the Governor and Commander-in-Chief of the Colony of Western Australia, 4 July 1878}, cl XXII in Western Australia, \textit{Royal Instructions Under Which the Government of the Colony of Western Australia is Administered}, Parl Paper No A1 (1885) 11.

\textsuperscript{227} \textit{Supreme Court Ordinance 1861 (WA)} s 11. For a discussion of the matter see ‘The Tenure of Judges’, \textit{The West Australian} (Perth), 24 September 1887, 30.

\textsuperscript{228} \textit{Western Australia, Government Gazette Extraordinary of Western Australia}, No 10, 26 February 1887, 127. Leake had previously been appointed acting Chief Justice in 1880 upon the death of Sir Archibald Burt CJ: \textit{The West Australian} (Perth), 9 January 1880, 2.
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interdiction, though allowed to the Governor by the royal instructions, fell short of a formal suspension. The advantage of interdiction was that it had immediate effect and did not entail a prior hearing of the judge before being imposed. However, suspension of the Chief Justice on half-pay did follow in December 1887. One legal consequence of suspension, unlike interdiction, was that the judge had to be given notice in writing and a hearing before the Governor-in-Council. Following the hearing, a report on the matter was to be sent to the Secretary of State for the Colonies who could either confirm or disallow the suspension. If the suspension was disallowed then the office holder was to receive their salary for the period of the suspension.

Governor Broome wrote to the Colonial Secretary to explain that the three charges against Onslow CJ were that he had: (1) refused to return the confidential papers; (2) untruthfully used the material to the prejudice of Her Majesty’s service in that he had accused the Governor of lowering and insulting the Chief Justice; and (3) libelled the Governor. The Chief Justice made his reply to the charges in early December 1887 and expressed the hope that the hearing would be conducted in public, a request the Governor refused.

The printed Judicial Committee papers on the matter show that the Lords were unhappy with the procedure adopted in Perth. As to the first charge of withholding papers, they thought this so flimsy that it ‘afforded no sufficient grounds for a formal charge’. The second charge arose, they said, from irritation produced by the first and noted that, had the letter of the Chief Justice not been published, there would have been no basis for the charge. The third charge involved language of great animosity towards the Governor, but was insufficient to justify further action.

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229 Instructions to the Governor and Commander-in-Chief of the Colony of Western Australia, above n 225.

230 Western Australia, Government Gazette of Western Australia (Perth), 8 December 1887, 738; Governor’s Despatches, 22 September 1886–31 December 1889, No 312, 17 December 1887, WAA, Consignment No 390, item 16, 263 with effect from 6 December. See also Minutes of the Executive Council, 9 December 1887, Executive Council Minutes, 23 November 1887–16 December 1891, SROWA, WAA, Consignment No 1058, item No 10, 7. The suspension power specifically invoked was in the Rules and Regulations of Her Majesty’s Colonial Service (1856) ch 4.

231 Rules and Regulations of Her Majesty’s Colonial Service (1856) 25–7, CO 78–8. These regulations were held to be directory and did not form part of a contract between a public servant and the Crown. See ‘Shenton v Smith’, Western Mail (Perth), 21 January 1893, 4, 6; on appeal [1895] AC 229, 235.

232 A principle affirmed in Cloete v R (1854) 8 Moo PC 484, 490; 14 ER 184, 187, a case on the suspension of the recorder of Natal, a judicial post equal to that of a judge.

233 Broome to Secretary of State for the Colonies, 28 December 1887, No 325 in Governor’s Despatches above n 217, 268–9.

234 Executive Council Minutes, 23 November 1887–16 December 1891 Minutes, 5 December 1887, WAA, Consignment No 1058, Item No 10, 1–3.

235 Governor’s Despatches above n 217, No 23, 11 May 1887, 5 where this printed Privy Council decision is inserted. The passage is on p 1 of the printed document. An extract was also published in Western Australia, Administration of Justice in the Supreme Court: Petition from Messrs. Harper and Hackett Respecting His Honor the Chief Justice, Parl Paper No 4 (1889) A29; and in United Kingdom, Parliamentary Debates, House of Commons, 21 June 1888, col 803; Western Mail (Perth), 23 June 1888, 6.

236 Privy Council decision in Governor’s Despatches above n 217, No 23, 11 May 1887, 2.
The Colonial Office thought that while the judge had acted unwisely this was not enough to justify his removal from office. The colonial secretary explained in May 1888 that in view of ‘the fact that no misconduct of a moral character or connected with judicial duties has been imputed to Onslow, their Lordships humbly recommend to Your Majesty that the suspension be removed’. In a warning to both parties, the Judicial Committee added that ‘the relations which have existed between the Governor and the Chief Justice must have been prejudicial to the Colony, and if continued, must lead to deplorable results’. The judge then resumed his seat on the Supreme Court on 15 May, a decision greeted by popular acclaim, for Onslow CJ enjoyed widespread public support, while Governor Broome was reviled by sections of the public for his attack on the judge. Throughout the crisis there had been a series of indignation meetings, as they were called in the 19th century, during one of which a wagon driven by two men in clown costumes brought an effigy of the Governor into the centre of Perth, where it was burned as a mark of public discontent. The Bar also passed resolutions of support for Onslow CJ and in so doing expressed their ‘indignation at the unwarrantable action of His Excellency the Governor and to protest against the gross insult levelled at the Supreme Court and the Administration of Justice’.

The third crisis was potentially more serious for Onslow CJ because it involved a conflict with powerful press and political figures in the Legislative Council. The matter grew out of a libel action in which Onslow CJ awarded the then huge sum of £6000 in damages against the West Australian newspaper. The proprietors of the newspaper, Charles Harper and John Hackett, happened to be members of the Legislative Council, as well as Justices of the Peace. They sent a petition to the Council asking for an inquiry into the judge’s conduct, alleging that he had been biased against them in several previous cases and that therefore they could not obtain justice in cases heard before him. Their principal demand was for the appointment of a third judge to break the stranglehold, as they saw it, of the Chief Justice on judicial decisions. The debate on the petition was led by Mr Parker who argued that the

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237 Governor’s Despatches above n 217, 341–2 noting that the Colonial Secretary had sent a telegram received in Perth at 6.30 pm on 11 May, reversing the suspension. The decision was formally published in Western Australia, Government Gazette of Western Australia (Perth), 14 June 1888, 304; Western Mail, 23 June 1888, 6. The decision in London included an order to pay his full salary for the period of the suspension: Governor’s Despatches above n 217, No 32, 11 May 1887, 3–4.

238 Governor’s Despatches above n 217, No 32, 11 May 1887, 3.


240 Governor’s Despatches above n 217, No 208, 23 September 1887, 210 where the Governor describes the demonstrators as ‘honest if hasty’. See also ‘The Governor and The Chief Justice: Grand Torchlight Procession’, The West Australian (Perth), 14 May 1888, 11. For more material showing the extent of Onslow’s CJ support see Western Australia, The Interdiction of the Chief Justice, a collection of press reports in Administration of Justice in the Supreme Court: Petition from Messrs. Harper and Hackett Respecting His Honor The Chief Justice, Parl Paper No 4 (1889) clxxxvi–cciii.

241 Western Mail (Perth), 24 September 1887, 10.


243 See Governor’s Despatches above n 217, No 296, 30 October 1888, 451–461; Western Australia, Petition by Charles Harper and John Winthrop Hackett, Parl Paper No A1 (1888). At para 3 they described the Chief Justice’s behavior towards them as ‘persecution’. The petition was presented to the Council on 15 October 1888: Western Australia, Legislative Council, Minutes of the Proceedings, No 3, 15 October 1888, 12.

244 Western Australia, Petition by Charles Harper and John Winthrop Hackett, Parl Paper No A1.
Governor should appoint a third judge, a common tactic in 19th century disputes with the judges to dilute the power of those already on the bench. The problem with a two judge bench was that if the judges disagreed, the opinion of the Chief Justice as the senior judge prevailed. If the trial had been conducted by the Chief Justice, an appeal to the Full Court entailed an appeal to the Chief Justice as a member of the Full Court. After the speaker ruled that the petition was in accordance with the Standing Orders, the Legislative Council voted by a vote of 19 to 4 to send a copy to the Chief Justice.

In their memorial to the Colonial Secretary the petitioners cited remarks made by Onslow CJ, who referred to the editor of the *West Australian* as ‘an utter quack and charlatan’. In the event, the Colonial Secretary directed that an inquiry on the petition be held in Perth. The inquiry ran for only two days (creating a transcript of 51 pages) but considered numerous printed documents mostly drawn from the press. The judge objected to the inquiry, describing it as novel and unconstitutional. As to the substantive charge, which alleged bias against the petitioners in libel cases, the judge pointed out that he had not insisted on taking the cases away from Stone J and that in the cases in question, liability for libel had been found by a special jury. In the main case, *Gribble v Harper and Hackett*, both judges had presided and agreed on a verdict for the defendants. Chief Justice Onslow also showed that in conversation with John Forrest, a member of the Executive Council, Hackett had expressed confidence in the Chief Justice, contrary to the claim in the petition. The judge also made bias claims of his own against Governor Broome and his main supporter in the colony, the *West Australian*.

At the end of the inquiry Onslow CJ sought leave, which was granted, while the Legislative Council moved an address to the Governor asking him to forward the papers to London. The Governor, in fact, had already done this and, without suspending the judge or expressing an opinion on the matter, he asked that the papers be sent to the Privy Council. The Colonial Secretary rejected this request, writing that the Executive Council should suspend the Chief Justice or acquit him. In the end, the government in Perth refused to suspend the judge or arrange for a petition from the Legislative Council in favour of his...
removal, and the matter lapsed. In his dispatch, Lord Knutsford promised to lessen the friction between the judge and others in Perth by agreeing to find Onslow CJ an appointment elsewhere.

While the inquiry did not remove Onslow CJ, it did accomplish the main demand of the petition. An amendment to the *Supreme Court Act 1861* (WA) was passed that authorised the appointment of a third judge and introduced a rule whereby in the event of a division of opinion the majority should prevail. Since this was the principal demand in the original petition, other efforts were made to replace him. He was offered a post in Gibraltar and for a time it seemed that the Chief Justice of Cyprus had agreed to take the post in Western Australia, before changing his mind. In his place, Sir Henry Wrenfordsley was appointed temporarily to the Chief Justiceship, though this was a highly unpopular move, and when Onslow CJ refused to go to Gibraltar he resumed his office. The personal irritation between the Chief Justice and the Governor was removed when Governor Broome left in October 1890 following the inauguration of responsible government. The new constitution brought in the usual protections for judicial tenure and thus brought Western Australian constitutional protection of judicial tenure into line with the other Australian colonies.

### IX THE INSTITUTIONAL CHANGES IN THE ROLE OF THE JUDGES

Aside from formal changes in the tenure of judges brought in by responsible government, other changes in the judicial function removed some of the duties that had tied the judges to the other branches of government. These changes show that the formal legal position set down in the Constitution Act does not fully explain the rise of judicial independence in the 19th century. In short, judicial independence has to be understood against a background of other institutional changes that occurred during this period. Some of the changes were a necessary consequence of the introduction of responsible government, while others arose from the legal and political environment of the time. However, not all of the changes reinforced judicial independence and some actually brought the judges into conflict with the executive.

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257 *Administration of Justice in the Supreme Court: Petition from Messrs Harper and Hackett Respecting His Honor the Chief Justice* above n 252, A4.
259 *Supreme Court Amendment Act 1889* (WA) s 2. There was support for the measure. See ‘A Third Judge’, *Western Mail* (Perth), 18 January 1890, 22. For the discussion in the Legislative Council see *Western Australia, Parliamentary Debates*, 27 November 1889, 229–30.
260 *The West Australian* (Perth), 10 February 1890, 3; *The Mercury* (Hobart), 17 February 1890, 3. Cf *The Inquirer and Commercial News* (Perth), 12 February 1890, 5 suggested a straight swap with the Chief Justice of Cyprus had been agreed to, but this fell through.
262 *Western Australia, The Inauguration of Responsible Government in Western Australia*, Parl Paper No 31 (1891) 3.
263 *Constitution Act 1889* (WA) ss 54–5.
A Judges Ceased to be Members of the Legislative Council

During the Crown Colony period the Governor could appoint anyone to the Legislative Council. It was common practice to appoint the Chief Justice to the Council as well as to the Executive Council. One reason for these appointments was to provide the Governor with expertise in what was in the beginning a very small administration. In early New South Wales, for example, the Chief Justice was a member of both the Legislative and Executive Councils. In South Australia, Edward Castries Gwynne J, an elected member of the Legislative Council since 9 March 1857, was appointed to the bench in 1859, but remained a member of the Council for three months after his judicial appointment, though he did not act as a councillor during that time. Remarkably, in the Tasmanian case Horne J was a member of the upper house, and special legislation was passed to anticipate his election as the president of the Legislative Council. It was only after petitions were submitted objecting to his membership of Parliament that he relinquished his parliamentary seat in 1860. This practice disappeared with the introduction of responsible government, as a number of Constitution Acts specifically made judges ineligible for election to Parliament and, with this, judges no longer sat in the legislature. Occasionally there were bungles, as in 1888 when legislation had to be passed by the Queensland Parliament to validate the appointment and decisions of Mein J after it was discovered, four years after his appointment, that he had held incompatible offices after his appointment to the bench. Justice Mein had had a distinguished career in Parliament and was, at the time of his appointment to the court, a Lieutenant-Colonel in the Land Defence Forces of Queensland, as well as a local director of the National Mutual Life Assurance Association Ltd. Section 12 of the Supreme Court Act 1861 (Qld) provided that where a judge held any other office of profit, the office of judge was to be avoided, i.e., deemed vacated.

265 South Australia, Minutes of the Proceedings of the Legislative Council, Parl Paper No 1 (1857) 2 item 5; South Australia, Members of Parliament Elected under Constitution Act, Parl Paper No 246 (1862) 1.
266 South Australia, South Australian Government Gazette, No 9, 3 March 1859, 191.
267 South Australia, Legislative Council, Minutes of the Proceedings, No 29, 26 August 1859, 83 item 1 and No 30, 30 August 1859, 85 item 2.
268 Supreme Court Act 1856–7 (Tas) 15 Vict, No 6.
269 See Tasmania, Parl Paper No 24, 38 (1859) inveighing against a judge being a member of the legislature.
270 Constitution Act 1856 (SA) s 36.
271 The Judges’ Validating Act 1888 (Qld) preamble.
272 See ‘The New Puisne Judge’, The Brisbane Courier (Brisbane), 11 April 1885, 5.
273 Supreme Court Act 1861 (Qld); see also Sydney Morning Herald (Sydney), 27 September 1888, 8.
274 The Brisbane Courier, 27 September 1888, 4, 5.
B  Judges Ceased to Have to Certify Draft Laws

The judges were also expected to examine proposed legislation and certify whether it conflicted with the laws of England.\(^{275}\) In one spectacular case, a serious crisis arose in Van Diemen’s Land in 1847 when the judges certified the *Act to Restrain the Increase of Dogs 1846*\(^{276}\) as not being repugnant to the laws of England. The *Dogs Act* imposed a tax on dogs, but the revenue was used for general purposes. When the matter came before the court, because a taxpayer refused to pay the tax on the grounds that it was illegal, the court held that the *Dogs Act* was invalid on the ground that it conflicted with the Letters Patent, which required that all taxes be applied for a particular purpose and not be used for general government purposes.\(^{277}\) This provoked a major financial crisis, since it was then discovered that many other acts of the colony that collectively provided a large proportion of the government’s revenue were also likely to be invalid on the same ground.\(^{278}\) The administration was furious and attacked both judges, leading to the amotion of Montagu J.\(^{279}\)

With responsible government, this function ceased and thereafter the local law officers provided advice on the legality of measures placed before the Parliament.

C  Judges Ceased to be Members of the Public Service

Judges were no longer treated as part of the public service, as they had been during the Crown Colony period before 1889 in Western Australia,\(^{280}\) with the emergence of public service legislation in the late 19\(^{th}\) century. By treating judges as ordinary members of the public service they were, in effect, no better off than the lowliest messenger. In 1900 the law governing the public service in Western Australia, for example, explicitly excluded judges from its operation.\(^{281}\) The adoption of these arrangements followed the precedents set in the eastern colonies that had, from the 1860s, only applied civil or public service legislation to public officers other than judges.\(^{282}\) The only exception to the separation of the judiciary from the executive was the case of the judge of the Supreme Court of the Northern Territory, who was also a Magistrate and the Coroner, as well as being a member of the executive as the Government Resident.\(^{283}\)

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\(^{275}\) For an example from New South Wales from the 1830s see *A-G v Eagar [1884]* SCR 234, 273–4.

\(^{276}\) 10 Vic No 5 (VDL) (*Dogs Act*).


\(^{278}\) For the full background see Despatches Relating to the Government and Affairs of the Colony 1847–1848, as 10 BPP (Australia) 275.

\(^{279}\) See above n 54.


\(^{281}\) *Public Service Act 1900* (WA) s 5(c).

\(^{282}\) *Civil Service Act 1862* (Vic) s 1; *Civil Service Amendment Act 1865–66* (SA) s 3; *Civil Service Act 1884* (NSW) s 2; *Civil Service Act 1900* (Tas) s 4.

D Judges Still Obliged to Advise the Executive on the Exercise of the Prerogative

Even when not performing executive functions, the judges would be expected to attend the Executive Council to advise on the grant of pardons and the remission of sentences, or at least to prepare reports for the executive on these matters.\(^{284}\) As we saw, this function was at the root of a major dispute in Western Australia in 1887.\(^{285}\) In a case in 1898, a Russian Finn named Andersen, along with another accused named Pedro, had been convicted of manslaughter in South Australia and sentenced to 10 years' imprisonment. The Russian consul in Melbourne took up their case and asked the Governor to remit their sentence. When he refused, pressure was put on the Governor by the Colonial Office, which was in turn responding to pressure from the Russian Foreign Ministry. The sentencing judge was asked for his opinion but did not recommend clemency,\(^{286}\) while the South Australian Parliament was bitterly opposed to any interference with the exercise of the prerogative of mercy by the British authorities. It was then decided to seek a second judicial opinion, this time from Way CJ, who came to a different conclusion than the trial judge and thought that the conviction of Andersen was wrong.\(^{287}\) The official excuse for the intervention of the Chief Justice, who had not presided at the trial, was that Bundey J was too ill to act.\(^{288}\) Chief Justice Way also asserted that Bundey J had agreed with this re-assessment of the matter, which conveniently coincided with the wishes of the Governor to release the prisoner and to get the Colonial Office off his back. Eventually all of this pressure prevailed and Andersen was released. It was thought at the time highly irregular to seek a second opinion, especially from a judge who had not conducted the original trial.\(^{289}\)

E Judges Still Advised on the Operation of Laws and Chaired Commissions on Legal Matters

From an early date the judges were asked to act as legal consultants to the executive.\(^{290}\) They were also expected to give evidence to parliamentary committees on the status and working of existing laws.\(^{291}\) As the century progressed, this function diminished with the increase in

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288 Justice Bundey fell ill in late 1898 and left the Bench on leave from 1 March 1899. He returned from leave on 6 March 1900.


290 See the letter from the judges to the governor of New South Wales, 8 August 1831 reprinted in *A-G v Eagar [1884]* SCR 234, 273–4.

291 Justice Boothby and the other judges gave evidence in the South Australia, *Report of the Select
the legal establishment and the enhanced role of the law officers of the Crown in each colony. Nevertheless, the appointment of judges to commissions of inquiry remains a feature of the state judicial function, though increasingly, the appointment is given to a retired judge rather than to a sitting judge, as was common in the 19th century.

F Judges Acquired a New Role as Acting Governor

When the British army was withdrawn from Australia after 1870, a new role for the judges emerged.292 Hitherto, whenever the Governor was absent, his place would be taken by the senior British army officer, a person usually of high rank.293 But with the running down of British military units, now under junior officers, it was decided that the Chief Justice or the most senior judge should act in the Governor’s place.294 The appointment of a judge during the absence of the Governor entailed the exercise of both judicial and executive functions and, in some cases, judges spent long periods in the gubernatorial role. Chief Justice Sir Samuel Way, for example, was formally appointed the Lieutenant-Governor of South Australia in 1891295 and served 23 times as Governor for a total of six years and 117 days,296 while Sir Arthur Onslow CJ of Western Australia acted as administrator to the government on four occasions in the 1890s.297 At the time of the appointment of Samuel Way CJ as the Lieutenant-Governor, objections were raised on constitutional grounds. Meanwhile, Bundey J claimed that the effect of appointing the Chief Justice as the Lieutenant-Governor of the colony was to throw a major burden on him and he entered into a dispute with the Crown about his salary.298 In theory, a judge might preside over a murder case and upon conviction sentence the accused to death and then, as acting Governor, be asked to exercise the royal prerogative of pardon. This constitutionally suspect situation so concerned the founders of Australia in the 1890s that they decided, after taking note of the practice in the Australia

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292 See South Australia, Withdrawal of Troops from Australia, Parl Paper No 58 (1870).
293 See, eg, Victoria, Brigadier-General Carey-Assumption of Office as Officer Administering the Government of Victoria, Parl Paper No B10 (1866).
294 See the dormant commission providing that the Chief Justice of Western Australia would act in the Governor’s place: Western Australia, Government Gazette of Western Australia, 23 January 1900, 7, also reprinted in The West Australian, 24 March 1900. For an early example see South Australia, Provisional Administration of the Government, Parl Paper No 139 (1860) for the text of a commission to Sir Charles Cooper CJ. For other Australian precedents see ‘Governor and Chief Justice’, The South Australian Register (Adelaide), 14 June 1877, 1.
295 South Australia, Commission of the Honorable Samuel James Way, Chief Justice, as Lieutenant-Governor of South Australia, Parl Paper No 37 (1891).
296 South Australia, Statistical Register of South Australia 1933–34, Parl Paper No 3 (1933–4) 3. A later Chief Justice in South Australia, Sir George Murray, served three years and 101 days as Lieutenant Governor: The Advertiser (Adelaide), 24 November 1932, 8.
297 Official Year Book of Western Australia 1957 (1958) 65.
298 See South Australia, Correspondence Re Appointment of Chief Justice as Acting Governor, Parl Paper No 71 (1893); The Advertiser (Adelaide), 28 July 1893, 6.
colonies, to ensure that it did not become part of the forthcoming *Australian Constitution*. The dual role of the judges was discussed in the Victorian Parliament in 1919 and it was decided that where the Chief Justice acted as the Governor, he would not hear criminal matters for the duration of the temporary commission. Despite these misgivings, the practice of appointing the Chief Justice or the Senior Puisne Judge as the acting Governor of an Australian state continued well into the late 20th century.

And what of *Burke’s Act* which overrode the Constitution Act process of judicial amotion in South Australia in 1867? The Act was later removed from the laws of the Australian Capital Territory, Queensland, New South Wales and Victoria by the passage of Imperial legislation. In the only instance of amotion in the 20th century, that of Vasta J in Queensland in 1986, *Burke’s Act* was not an issue because it had been removed from Queensland law in 1984. This is also the position in the rest of the country, for although no statutes in the other Australian jurisdictions, ie Tasmania, South Australia and Western Australia, have removed *Burke’s Act* from their law, it is arguable that since they are no longer colonies the Act cannot now apply to them. A second argument against the continued use of the Act would be that it contemplates a colonial constitutional system that simply does not exist in modern Australia. Specifically, as interpreted by the memorandum of 1870, under *Burke’s Act* there is allowance for an appeal to the Privy Council, but no such appeals are permitted from Australia since their final abolition by section 11 of the *Australia Act 1986* (Cth).

**X CONCLUSION**

The relationship between the judges and the other branches of Government in 19th century Australia was influenced by a mixture of colonial law, British policy and the emerging system of responsible government whereby the local legislature claimed a greater role in judicial complaints. At the beginning of the period, executive control over the judiciary was near absolute, with the local legislature reduced to making complaints to London in the absence of any power to amove a judge. Even after the introduction of responsible government, the British insisted that *Burke’s Act* applied to these matters. The Act provided grounds for removal, an improvement on the old position that equated the judges with civil servants who were removable at pleasure. But the Act still placed the power of removal in the hands of the local executive, which acted as both judge and jury in these matters. It was the colonial legislatures and the local population that sought to secure judicial independence by the adoption in the Australian colonies of the safeguards established in Britain at the

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299 See *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May 1897, 634 (Mr Symon).
301 By not being retained. See *Imperial Acts Application Act 1969* (NSW) s 8(1); *Imperial Acts Application Act 1980* (Vic); *Imperial Acts Application Act 1984* (Qld) s 7; *Legislation Act 2001* (ACT) s 17(2) and schedule 1, pt 1.1; Western Australia Law Reform Commission, *Report on United Kingdom Statutes in Force in Western Australia*, Project No 75 (1994) 73.
302 *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 392 (King CJ): ‘South Australia is no longer a British colony. It is part of an independent sovereign nation’.
303 See above n 204.
beginning of the 18th century. The motives for these changes were mixed. In part, there was a genuine belief in the importance of judicial independence, but there was also a view that, since the legislature paid for the judges, it should have the ability to amove them if need be. While some judges were amoved or suspended, and while colonial judges were removed for ‘setting the community aflame,’ this happened in rare and extreme cases (eg Willis, Montagu, and Boothby JJ) where the judge’s actions threatened to bring the legal system to a halt. Where the matter was trivial but blown out of proportion by touchy local personalities, the British usually imposed a restraining hand on colonial legislative excesses (as in South Australia in 1861 in the Boothby case), or to check the action by the executive (as in Western Australia in the Onslow affair in 1888).

Although British suspicions of the local legislatures were strongest in the first half of the 19th century, this ebbed, but did not completely disappear, with the onset of responsible government. Nevertheless, self-government brought in security of judicial tenure on the English model since it was written into local legislation. However, it did not have an immediate impact in the South Australian case because Burke’s Act still operated to override local constitutional protections. The keen awareness by the local population of the importance of judicial independence explains the fierce reaction by the public in favor of judges thought to have been bullied by Governors in Van Diemen’s Land in 1848 and Western Australia in 1888. As the century progressed, judges ceased to be members of the other branches of government and the question of the validity of local legislation, once a source of conflict, was clarified by 1865, though validity matters still arose but with less impact than in South Australia. These changes, along with a diminished power of the Governor over judges and a greater respect by Governors for the other branches of government, made conflicts with the judiciary less likely.

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304 Colonial Acts Confirmation Act 1894 (Imp) 56 & 57 Vict, c 72 as explained in South Australia, Parl Paper No 140 (1895), which validated a New South Wales electoral Act that had not been reserved for the royal assent in London. The first South Australian case where the issue was raised and decided a few months after Boothby J’s amotion upheld local legislation as not repugnant: In re William King (1867) 1 SALR 86, 89.

**IS THERE A FUTURE FOR THE KIMBERLEY PROCESS CERTIFICATION SCHEME FOR CONFLICT DIAMONDS?**

**HOLLY CULLEN***

The Kimberley Process is a system of international soft law intended to regulate the trade in conflict diamonds. It has been in operation since 2003, and involves states, industry bodies and civil society. States undertake to certify diamonds in trade as conflict-free and to have adequate internal controls over the production and trade in diamonds. While the Kimberley Process has been effective in reducing the trade in diamonds to fund armed rebellion against governments, it seems unable to meet recent challenges. Some states in the Process, notably Côte d’Ivoire, Venezuela and Zimbabwe, have not been compliant with their undertakings, yet the Process has been unable to achieve consensus for decisions to sanction non-compliant members. Consensus has also proved elusive in the effort to expand the definition of conflict diamonds to address the wide range of human rights abuses that may be associated with diamond mining. As new international regimes to address the problem of conflict minerals have been developed in recent years, it is now time to question whether the Kimberley Process has a future role.

**I INTRODUCTION**

During the 1990s, the exploitation of mineral resource wealth to finance armed conflict emerged as an issue of concern for international law.1 The United Nations Security Council has at various times targeted sanctions against states with a high incidence of such ‘conflict minerals’: Democratic Republic of the Congo, Sierra Leone and Liberia.2 The use of diamonds to finance the activities of armed rebel groups achieved a particularly high profile as a result of the activities of concerned civil society organisations. The Kimberley Process, in operation since 2003, establishes a certification system for rough diamonds to guarantee they have not been used to fund armed conflict.

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Corporations and civil society organisations such as Global Witness and Partnership Africa Canada have also been involved with the Kimberley Process, and have had a significant role in monitoring its standards. Nonetheless, the Kimberley Process is still a state-dominated system. Only states can be Chair of the Process or vote in its Plenary meetings. Furthermore, decisions are made by consensus, meaning a minority of states can block a proposed decision. This structure has, in recent years, attracted criticism. Several states involved in the Process have been accused of not living up to their undertakings to ensure that conflict diamonds do not enter general trade, but have neither been suspended nor expelled – the only real sanction available within the Kimberley Process. Particularly in light of the emergence of other approaches to the problem of conflict minerals, it is open to question whether the Kimberley Process will continue or fade into irrelevance.

II THE KIMBERLEY PROCESS — AN OVERVIEW

The Kimberley Process is a coalition of states, non-governmental organisations (NGOs) and business bodies interested in the diamond trade. It is deliberately constructed to avoid the creation of legally binding rules under international law. The foundational documents are clearly intended not to be treaties. However, it is still a state-dominated organisation, where NGOs and corporate actors are Observers rather than Participants, and have no voting rights.

The Process seeks to regulate conflict diamonds to stop them being used as a source of revenue for rebel groups, but does not seek to ban conflict diamonds.\(^3\) Not surprisingly, this approach has been attractive not only to states but to the diamond industry. Business groups appear to have become involved largely because of reputational concerns arising from wide publicity given to conflict or ‘blood’ diamonds.\(^4\) After concerted NGO attention to conflict diamonds,\(^5\) the diamond industry sought to secure confidence in its product. Business support may have been comparatively easy to achieve because of the quasi-monopoly role of De Beers in the diamond trade.\(^6\) A further impetus came from the United Nations, when the General Assembly put its weight behind moves towards regulation of conflict diamonds.\(^7\)

The Kimberley Process defines the problem it seeks to address as conflict diamonds: ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’\(^8\). The Kimberley Process Certification Scheme Core Document, in its preamble, states that:

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4. Ibid 1734, 1737.
7. The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts GA Res 55/56, GAOR 55th sess, 79th plen mtg, Agenda item 175, UN Doc A/RES/55/56 (29 January 2001).
8. Ibid; See also Kimberly Process, Kimberley Process Certification Scheme Core Document (2003) <http://www.kimberleyprocess.com/documents/10540/11192/KPCS%20Core%20Document?version=1.0&t=1331826363000> (‘Core Document’) s 1: ‘Rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations
RECOGNISING that the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and illicit traffic in and proliferation of, armaments, especially small arms and light weapons;  

This definition focuses narrowly on one problem, the exploitation of mineral wealth by non-state armed groups to fund armed conflict. More recently, the idea of conflict minerals has been expanded. Some commentators argue that the idea of conflict minerals should also include the extraction of minerals, under the control of an armed group, where serious human rights abuses occur in the process of extraction.  

All United Nations member states are invited to be Participants. Regional economic integration organisations may also be Participants, with the result that the European Union is a Participant, but not its individual member states. Fifty-four Participants therefore represent eighty countries. The Kimberley Process web site asserts that its Participants represent 99.8% of global diamond production. In addition, seven states are currently applicants to become Participants, most from Africa. Non-state actors may only be Observers in the Kimberley Process. The current observers are: Civil Society Coalition, the Diamond Development Initiative, the World Diamond Council and the African Diamonds Producers Association. Only Participants have defined rights and undertakings, although Observers do have some influence on proceedings, and are explicitly permitted to take part in Plenary meetings.  

The states that set up the Kimberley Process went to great lengths to ensure that the system being established would not create binding obligations at international law. The terminology used emphasises the effort to avoid being categorised as a treaty. There is no mention of signature or ratification. The states are referred to as Participants rather than parties. The document itself is called the ‘Core Document’ rather than a treaty, convention or covenant. The provisions are called ‘undertakings’ rather than obligations. The Kimberley Process can therefore be described as soft law. Soft law obligations, being non-binding, do not give rise to

General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in the future’.  


Kimberly Process, Core Document, above n 8, s 1.  


Kimberly Process, Core Document, above n 8, s 1: ‘a representative of civil society, the diamond industry, international organisations and non-participating governments invited to take part in Plenary meetings.’  


state responsibility when they are breached.\textsuperscript{18} However, the distinction between hard and soft law in international law may be one of degree rather than kind. Many binding international law obligations are not subject to compulsory arbitration or adjudication. Although numerous treaties provide for dispute resolution at the International Court of Justice, only a handful of cases are initiated at the Court each year.\textsuperscript{19} On the other hand, soft law may be functionally similar to binding international law.\textsuperscript{20} As Chinkin has argued, soft law may establish expectations on states which have a normative effect.\textsuperscript{21} This is true of the Kimberley Process, which sets out in detail what states must do to maintain membership, and which has an institutional framework, including Administrative Decisions, to implement its substantive rules.

Since 2000, there has been a clear preference for soft law in matters relating to international regulation of business activity.\textsuperscript{22} Although the Kimberley Process Core Document is addressed primarily to states, the diamond industry was a major influence in its adoption, and it shares with documents such as the OECD Guidelines on Multinational Enterprises and the Guiding Principles on Business and Human Rights a use of soft law and a reluctance to create new binding obligations.\textsuperscript{23}

Although the Kimberley Process avoids creating binding obligations, the model described above is not unique in contemporary international law, where non-state actors often have a defined role in the implementation of international legal rules.\textsuperscript{24} Dame Rosalyn Higgins argued that international law could no longer be defined in terms of a clear distinction between subjects and objects of international law but instead should be seen as being made up of participants.\textsuperscript{25} Ironically, the Kimberley Process uses Participants in a narrow way to designate states only. Nonetheless, in Higgins’ sense of the term, both Participants and Observers are participants in the Kimberley Process.

\begin{itemize}
\item \textsuperscript{18} See, eg. James Crawford (ed), Brownlie’s Principles of Public International Law (Oxford University Press, 8th ed, 2012) 560-61: arguing that international responsibility only attaches to the breach of international duties.
\item \textsuperscript{19} International Court of Justice, List of cases referred to the Court since 1946 by date of introduction (2013) <http://www.icj-cij.org/docket/index.php?p1=3&p2=2>.
\item \textsuperscript{20} Matthias Goldmann, ‘We Need to Cut Off the Head of the King: Past, Present and Future Approaches to International Soft Law’ (2012) 25 Leiden Journal of International Law 335.
\item \textsuperscript{22} See United Nations Global Compact, What is the UN Global Compact? (2013) <http://www.unglobalcompact.org>: an attempt to create binding obligations for business in international law; Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN ESCOR, 55th sess, 22\textsuperscript{nd} mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003), failed to attract sufficient support to progress.
\end{itemize}
The ‘undertakings’, to use the language of the *Core Document*, apply to Participants. By virtue of Section II, every shipment of raw diamonds exported or imported must contain a certificate whose creation and issuance meets minimum certification standards.\(^{26}\) Section III calls on Participants to require a certificate when importing or exporting diamonds, and to ensure that no shipment of rough diamonds is imported from or exported to a non-participant.\(^{27}\)

Section IV sets out detailed undertakings with respect to internal controls. Each Participant is expected to establish a system of internal controls. This includes use of tamper-resistant containers for shipping diamonds and penalties for violation of the internal controls. The internal controls must be enacted as legislation, and states have not been allowed to join as Participants until they have adopted appropriate legislation.\(^{28}\) Furthermore, the 2006 *Administrative Decision 11* on state Internal Controls extended expectations of what states will do, stipulating more documentation for transactions and more inspections, including random checks.\(^{29}\) As a result, although the Kimberley Process itself does not impose binding international law obligations, the expectations associated with membership in the Process do require that binding domestic law be adopted. Section IV is supplemented by annex II, which makes more specific recommendations. These include licensing of all mines and restricting mining to licensed mines.\(^{30}\) Participants should also license diamond buyers, sellers and exporters.\(^{31}\)

Section IV also requires Participants to collect and exchange data on production, import and export of rough diamonds.\(^{32}\) Section V elaborates on the undertakings with respect to information. Participants should provide information about designated authorities for implementing the scheme and information about relevant law and practices. They should compile and make available to all other Participants statistical data in line with the principles in annex III of the *Core Document*.

The Kimberley Process expanded its focus to include alluvial diamond production from 2005. The Moscow Declaration followed a report from a sub-group of the Working Group on Monitoring on challenges facing alluvial miners and examples of best practice.\(^{33}\) The Declaration was intended to build on the Recommendations for Participants with Small-Scale Diamond Mining in annex II of the *Core Document*. The recommendations in the Declaration focused on ensuring traceability through a stringent regime of recording production and regulation of both mining and trade in alluvial diamonds. Artisanal miners were also to be encouraged to move into the formal economy. The recommendations would clearly impose heavy burdens on states with alluvial diamond mining on their territory, so the Declaration

\(^{26}\) Kimberley Process, *Core Document*, s II.

\(^{27}\) Ibid s III.

\(^{28}\) Wexler, above n 3, 1748.


\(^{31}\) Ibid [13]-[16].

\(^{32}\) Wexler, above n 3, 1766-67: Wexler notes that there is still some dispute between NGOs and states over what data should be published, and how much the data should be independently verified by the Kimberley Process itself.

also recommended that Participants and other donors support states in regulating and formalising the alluvial diamond mining sector.

During the following years, however, the issue of the rights and welfare of alluvial miners was not fully resolved. In 2012, the Plenary adopted the Washington Declaration on integrating the development of artisanal and small-scale diamond mining in the implementation of the Kimberley Process. The aim of the Declaration is to advance the artisanal and alluvial mining sector as an engine of economic development. Its recommendations to Participants include improvements to both the economic and social aspects of artisanal mining. Although formalisation and improved governance are still emphasised, the economic recommendations include reducing fees for registration and licensing of miners and improving access to training and equipment. Social recommendations included encouraging environmental sustainability, protection of health and safety of mine workers and diversification of livelihoods. The Declaration also advocates promotion of gender equality and protection of children, particularly through the elimination of child labour in mining. However, beyond this, there is no discussion of human rights issues in artisanal mining. A Working Group on Artisanal and Alluvial Mining with Angola as Chair oversees the Kimberley Process efforts in this area.

Section V(e) sets out an expectation that Participants inform the Chair if they think another Participant’s rules, procedures or practices are inadequate. Under s V(f), Participants are expected to cooperate to resolve problems which could lead to ‘non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates.’ In practice, however, the requirement of unanimity and the emphasis on state sovereignty within the Process have limited the ability of the Process to engage in the sort of problem solving envisaged in s V.

Section VI provides that Participants and Observers will meet in Plenary each year, and otherwise as the Participants deem necessary. The Meetings are chaired on a rotating basis by the Participant who is hosting the meeting. A rotating annual Chair, however, deprives the Process of stability at the centre. Section VI also foresees ad hoc working groups and other subsidiary bodies. This provision has in practice been fundamental in allowing the Process to evolve and to strengthen its implementation processes. Finally, it provides that decisions of Participants are to be reached by consensus. The need for consensus limits potential action

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34 Letter dated 8 December 2010 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN GAOR, 65th sess, Agenda item 32, UN Doc A/65/607 (8 December 2010) (‘2010 UN report’) [37].
37 Ibid 4-6.
38 Ibid 7-8.
39 Ibid 8
by allowing a small minority of states, or even a single state, to block the adoption of a decision.

Section VI also sets out what Participants are expected to do for Plenary meetings. They are to submit the information required in s V, and may be asked to provide further details at the request of the Plenary. The Participants at the Plenary, acting of course by consensus, may decide on additional verification measures, including possible review missions. Review missions are intended to be ‘analytical, expert and impartial’ and may only be conducted with the consent of the Participant in question. They include representatives of Observers as well as Participants. The mission reports to the Chair of the Plenary and to the Participant, who may comment on the report. All these documents remain in the restricted access section of the Kimberley Process web site, with Participants and Observers expected to maintain confidentiality with regard to the entire matter. The sole provision concerning dispute resolution allows Participants to raise issues regarding compliance with the Chair, who is to inform all Participants and enter into dialogue on addressing the issue raised. Again, Participants and Observers are expected to treat such issues as confidential.

Section VI is somewhat paradoxical. Its procedures are clearly intended to operate on the basis of the consent of the state about which concerns are raised. It is intended that such concerns are to be discussed internally only, with no publication of reports or discussions. However, it is nonetheless the case that these procedures are intended to improve compliance. Despite being a soft law measure, the Kimberley Process treats compliance as a rule-based rather than political issue. Nonetheless, recent issues involving questions over Participants’ compliance indicate that politics may be an increasing factor.

The early years of the Kimberley Process saw the development of more detailed review procedures. While Participants had a good rate of submitting reports, the reports were not of consistent levels of detail. As a result, the Monitoring Working Group was created to verify the completeness of reports. It also standardised reporting. The peer review process established in Administrative Decision 5 also created the system of review visits, calling on...

\[\text{AD5, above n 45, annex I.}\]

\[\text{Wexler, above n 3, 1749.}\]

\[\text{2012 Plenary Communiqué, above n 35, [7]: 49 of 54 Participants submitted reports on implementation in 2011 to the 2012 Plenary.}\]


the largest number of Participants possible to volunteer to receive a review visit’ by the time the full implementation of s VI was operational.47 Administrative Decision 5 also established review missions, which were to take place when there are ‘credible indications of significant non-compliance’ in a particular state.48 The first review mission, to include three Participants appointed by the Chair, a representative of the World Diamond Council and a representative from NGOs, was organised following an Administrative Decision on the Central African Republic in 2003.49 To date, only Venezuela has refused a request to allow a peer review mission.50

Section VI(20) of the Core Document provides for periodic review of the Kimberley Process. In 2006, in the context of the Third Year Review,51 the Participants agreed to institute a second cycle of peer review.52 However, a second comprehensive review has not yet been completed, although an ad hoc committee for conducting such a review was created in 2011.53

The Core Document does not directly address the question of expulsion or suspension of Participants, but states in s VI(8) that participation is open to states which are able to fulfil the requirements of the scheme. The authority of the Plenary to vote to expel members is supported by its practice. The Republic of Congo was expelled in 2004, and readmitted in 2007.54 In addition, in 2008 the Plenary adopted Administrative Decision 17, Rules and Procedures for Re-Admission of a Former Participant to KP, to formalise the process.55 It requires a written application following demonstrated compliance with Kimberley Process minimum standards and the removal of ‘inconsistencies’ which had led to exclusion. The application is then assessed by the Participation Committee, which may request or seek additional data. The applicant state will invite a Kimberley Process expert mission to assess implementation of minimum standards and internal controls. The Participation Committee makes a recommendation to the Chair concerning re-admission, which is then transmitted to the Plenary for consideration and decision.

The Core Document does not set out undertakings for Observers, but does contemplate action by corporations. In s IV, it is stated that ‘Participants understand that a voluntary system of industry self-regulation’ is to be established. The industry Observers were expected to develop a system of warranties. The 2002 World Diamond Council resolution set out that members must 1) rely on an invoice system; 2) not buy from sources not in compliance with

47 Ibid [II(a)]; In the 2006 Plenary Communiqué, Letter dated 17 November 2006 from the Permanent Representative of Botswana to the United Nations addressed to the Secretary General, UN GAOR, 61st sess, Agenda item, 10, UN Doc A/61/589 (21 November 2006), (‘2006 UN report’) Enclosure 1, para 8, it was determined that this goal had been achieved.
48 AD5, above n 45, [III], annex II.
50 Wexler, above n 3, 1753.
52 Ibid enclosure 1 [8].
the Kimberley Process; 3) not knowingly buy or sell or assist others to buy or sell conflict diamonds; and 4) ensure relevant employees are informed on rules and policies restricting the trade in conflict diamonds. Member organisations expected to enforce the code by expelling and publicising expulsion of violating members, but NGOs have expressed concerns that the industry bodies do not adequately police their members. The 2007 Brussels Declaration on Internal Controls of Participants with Rough Diamond Trading and Manufacturing put greater pressure on Participants to verify industry compliance.

In 2009, the Kimberley Process adopted an Administrative Decision regulating the participation of Observers. It sets out that Observers may seek to participate via one of the existing civil society or industry coalitions, or as independent Observers. Observers should at least have experience or knowledge in activities relating to natural resources exploitation, particularly diamonds; demonstrated interest in the Kimberley Process; and a willingness and ability to participate in the activities of the Kimberley Process. The Administrative Decision foresees the possibility of withdrawal of privileges if an Observer is not meeting its responsibilities.

While the Kimberley Process requires extensive reporting and information gathering by Participants, the Process itself relies heavily on confidentiality. Section VI of the Core Document calls for confidentiality in relation to review missions and other compliance matters. In 2010, the Plenary adopted an Administrative Decision on Procedures for Respecting Confidentiality within the KP. It states that all documentation is to be considered confidential until finalised, that material to remain confidential amongst Participants or Participants and Observers should be clearly identified, and that Participants and Observers are to respect the confidentiality of any material identified as such. The World Diamond Council and some Participants resisted the publication of data provided. Since 2007, however, trade and production data has been published after a six-month delay. Nonetheless, Global Witness continued to push for greater independent verification of data submitted by Participants.

There have been some clear examples of success of the Kimberley Process. In 2003, the Plenary issued an Administrative Decision on Liberia. This decision resolved to consider an
application from its government to become a Participant only after the Security Council had lifted the diamond trade embargo. Upon such application, a review mission would be organised. The United Nations Security Council lifted sanctions on Liberia in 2007 following cooperation with the Kimberley Process. The Democratic Republic of the Congo was re-admitted to the Kimberley Process after improved internal controls in 2007. Overall, it is estimated that the presence of conflict diamonds in international trade reduced from 4% of the market to 1% during the period of operation of the Kimberley Process Certification Scheme.

III THE KIMBERLEY PROCESS NOW — A FLAWED DIAMOND?

Up to 2006, the image of the Kimberley Process is one of progressive evolution, in every sense. The framework of the Process has been strengthened. Monitoring processes are now more detailed and an embryonic institutional framework has been established through the Working Groups and the Third Year Review. Presciently, Botswana’s Chair’s report to the General Assembly in 2006, following the Third Year Review noted that:

‘[t]here has been a steady stream of innovations, developments and improvements initiated in working groups, transforming the [Kimberley Process] over time. However, there are questions about the sustainability of this over the long term.’

It also noted that diamonds mined in rebel-held areas of Côte d’Ivoire were leaking into legitimate trade, posing an ongoing challenge for the Kimberley Process. The stage was therefore set for a decline in the optimism which accompanied the apparent progress of the first three years of the Kimberley Process.

Nonetheless, commentators began using the Kimberley Process as an example of a successful international regulatory scheme, approving of the fact that it involved business on a voluntary basis rather than through the imposition of binding norms. Paul Collier in particular argued for its value as a prototype. Harrington, while not as unequivocal in her praise, also argued for the extension of the Process to other mining sectors.

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67 2007 UN report, UN Doc A/62/543, [9], appendix 1 [8].
68 Ibid.
69 Wexler, above n 3, 1777.
70 2006 UN report, UN Doc A/61/589, enclosure 2; in 2007, the Plenary Communiqué noted that most of the recommendations of the review had been implemented: 2007 UN report, UN Doc A/62/543, appendix 1 [12].
71 2006 UN report, UN Doc A/61/589, [22.2].
72 See, eg, Letter dated 20 November 2008 from the Permanent Representative of India to the United Nations addressed to the Secretary General, UN GAOR, 63rd sess, Agenda item 11, UN Docs A/63/560 (21 November 2008) enclosure [10] (‘2008 UN report’).
73 2006 UN report, UN Doc A/61/589, [23]-[26].
74 Wexler, above n 3, 1720.
One development which suggests growing disenchantment with the Kimberley Process Certification Scheme is the fact that the United States has begun acting independently of the Kimberley Process to strengthen controls on conflict minerals, although these do not yet impact on diamonds. In 2010, the United States included measures directed at conflict minerals in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1502 of the Dodd-Frank Act gives the Securities and Exchange Commission the power to adopt regulations requiring companies to disclose whether any tin, tantalum, tungsten or gold originated in the Democratic Republic of Congo or a neighbouring country. Companies that cannot confirm the origin of minerals they use must report on what due diligence measures they have employed. The Securities and Exchange Commission adopted the rules implementing the conflict minerals provision in August 2012. 77

The Kimberley Process has had successes since 2006. Its membership has steadily increased, from 47 to 54 Participants between 2006 and 2012. In 2011, following specific improvements to its internal controls, the Plenary removed precautionary measures imposed on Ghana in 2006. While a period of five years to establish satisfactory internal controls is not beyond criticism, the result is clearly improved compliance, which is particularly important because of Ghana’s proximity to Côte d’Ivoire, which continues to be a source of conflict diamonds despite being a Participant in the Kimberley Process.

The Kimberley Process has also demonstrated a willingness to use the tools at its disposal at least in some circumstances. On 23 May 2013, South Africa as Chair announced that, by means of a written process, the Participants had agreed to suspend the Central African Republic on a temporary basis. This followed two Vigilance Notices, in December 2012 and April 2013, based on activity by a new rebel alliance attacking diamond-producing areas. This is a relatively quick reaction by an international group.

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80 Problems with Ghana’s internal controls were first identified in 2004: Global Witness and Partnership Africa Canada, The Key to Kimberley: Internal Diamond Controls, Seven Case Studies, Partnership Africa Canada (2004) <http://www.pacweb.org/images/PUBLICATIONS/Conflict_Diamonds_and_KP/key_to_Kimberley-eng-elect_Oct2004.pdf>. The report concluded, that while Ghana had a good implementation framework, there were insufficient resources to monitor and control the illicit diamond mining and trade, and that diamond smuggling was an issue. It further noted problems in alluvial and artisanal mining, particularly in respect of chain of custody: at 5.
Nonetheless, in the period following 2006, there has been evidence of division within the membership of the Kimberley Process. Some Participants, predominantly Western states, began to identify larger human rights questions as a problem in the diamond trade, and have sought to expand the scope of the Kimberley Process. However, it has been difficult to achieve consensus even on action against states who do not comply with existing Kimberley Process undertakings. Three states have, in different ways, challenged the ability of the Kimberley Process to deliver on its promises. Diamond smuggling out of Côte d’Ivoire has continually been identified as a problem. Venezuela has been in default on its internal controls and reporting undertakings. Most significantly, alleged abuse of alluvial diamond miners in Zimbabwe has divided Participants and demonstrated the limits of consensus-based decision-making.

Decision-making by consensus can be a strength in international law. Without strong external enforcement mechanisms, international law is only as strong as states allow it to be. Where consensus decision-making works, it can allow trust to be built between member states of an international organisation, as happened in the evolution of the European Union. The period necessary for building that trust, however, turned out to be two decades longer than was intended by the drafters of the Treaty. The European Union was supposed to shift from unanimous decision-making to majority voting by 1962, but did not until the adoption of the Single European Act in 1986. In the case of the Kimberley Process, after 2006, trust between Participants decreased. Without that trust, the need for consensus was a barrier to the ability to adopt decisions in controversial matters. It operated as a limit to the ability of the Kimberley Process to function.

A  Côte d’Ivoire

Côte d’Ivoire raises problems for the Kimberley Process in achieving its core goal of eliminating trade in diamonds which is likely to fund armed conflict against established governments. Although Côte d’Ivoire is a Participant, it has been subject to United Nations sanctions for several years and is not trading in rough diamonds. From 2005, diamond production in northern Côte d’Ivoire, where rebel groups were active, became a matter of international concern. At that stage, the Kimberley Process pledged to work with the United Nations Security Council, which was imposing sanctions against Côte d’Ivoire partly due to the proliferation of conflict resources.

The Plenary adopted the Brussels Initiative in 2007 ‘to identify steps to enhance the control and monitoring of rough diamonds from Côte d’Ivoire, including the role of neighbouring countries.’ In 2008, the Kimberley Process report to the General Assembly noted evidence

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85 See, eg, 2007 UN report, UN Doc A/62/543, [5], [8].
87 Ibid 2461-63. See also David Freestone and J Scott Davidson, The Institutional Framework of the European Communities (Croom Helm, 1988) 69.
89 Ibid. See SC Res 1584, UN SCOR, 60th sess, 5118th mtg, UN Doc S/RES/1584 (1 February 2005).
90 2007 UN report, UN Doc A/62/543, [3].
that uncertified diamonds of Ivorian origin were being sold through Mali.\textsuperscript{91} There was also evidence that such diamonds were being controlled and taxed by non-state forces.\textsuperscript{92} The response within the Kimberley Process was to advocate greater vigilance by Participants and to seek dialogue with Ivorian authorities.\textsuperscript{93} In 2010, the Plenary discussed the situation in Côte d’Ivoire in light of Security Council Resolution 1946 (2010), and a report submitted by Côte d’Ivoire itself.\textsuperscript{94} It noted indications of increased diamond and mining activity, and called on Participants ‘to continue implementation of vigilance requirements.’\textsuperscript{95} In the 2012 Plenary Communiqué, emphasis was placed on engagement with the Ivorian authorities and cooperation with the United Nations Security Council.\textsuperscript{96}

The most recent regime of United Nations sanctions is contained in Security Council Resolution 2101 (2013).\textsuperscript{97} This Resolution notes the continuing contraband in natural resources, including diamonds, and determines that Côte d’Ivoire remains a threat to international peace and security. The Resolution has renewed, until 30 April 2014, ‘the measures preventing the importation by any state of all rough diamonds from Côte d’Ivoire’ which were first imposed in 2005.\textsuperscript{98} The ongoing problems with Côte d’Ivoire demonstrates that even within its core function of regulating diamonds which might be used to fund forces rebelling against established governments,\textsuperscript{99} the Kimberley Process has limited capacity to affect active conflict zones. It can call for vigilance by Participants and work with governments but, where rebel forces are active, the impact may be very limited.

B \hfill \textit{Venezuela}

Venezuela raises different questions about the effectiveness of the Kimberley Process. The issue in this instance is failure to report, particularly on internal production of diamonds. A report by Partnership Africa Canada in 2006 found that, although Venezuela had a high level of diamond production, it had no official exports of diamonds since the beginning of 2005, and smuggling appeared widespread.\textsuperscript{100} It recommended expelling Venezuela from the Kimberley Process.\textsuperscript{101} The Working Group on Monitoring, partly based on the Partnership Africa Canada report, determined that there were credible indications of serious non-


\textsuperscript{92} 2008 \textit{UN report}, \textit{UN Doc A/63/560}.

\textsuperscript{93} Ibid [11], annex I [8].

\textsuperscript{94} 2010 \textit{UN report}, \textit{UN Doc A/65/607}, [18].

\textsuperscript{95} Ibid.

\textsuperscript{96} 2012 \textit{Plenary Communiqué}, above n 35, [12].

\textsuperscript{97} SC Res 2101, \textit{UN SCOR}, 68th sess, 6953\textsuperscript{rd} mtg, \textit{UN Doc S/RES/2101} (25 April 2013).

\textsuperscript{98} Ibid para 6.


\textsuperscript{101} Ibid; in 2007, Global Witness also called for Venezuela to be expelled: Global Witness, ‘Kimberley Process Must Expel Venezuela’ (Press Release, 9 October 2007).
compliance in Venezuela, and suggested a review mission be sent. Its recommendations were adopted by the Plenary as Administrative Decision 13. In 2007, the Plenary adopted a revised Administrative Decision, welcoming progress by Venezuela including the submission of reports.

Venezuela invited a review visit for 2008, but later voluntarily withdrew from the Kimberley Process in 2008 for a period of two years, extended for a further year in 2010. During the withdrawal period, Venezuela undertook neither to import nor export rough diamonds, but was expected to fulfil all other rights and obligations under the Kimberley Process. The extension was accepted on the condition that Venezuela complied with reporting undertakings for 2009. In 2011, the Plenary decided that Venezuela would be removed as a Participant if it did not submit the annual reports requested. In the plenary of 2012, Venezuela made a presentation to the Participation Committee, asserting an intention to re-join. The Participation Committee agreed that Venezuela should then submit accurate statistics and permit a Review Mission with access to all diamond producing and trading facilities. The deadline for completing these steps was 1 April 2013, and the Plenary declared that ‘appropriate actions will be taken, which may ultimately lead to Venezuela being removed from the [Kimberley Process].’ While the initial reaction of the Plenary was robust, in determining that a review mission should be undertaken, the follow-up has allowed Venezuela indefinitely to postpone a final decision and possible expulsion.

C Zimbabwe

The discovery of diamonds in the Marange district of Zimbabwe in 2006 has led to a continuing crisis for the Kimberley Process and has revealed its limitations. Partnership Africa Canada has commented that although a number of states have not complied with Kimberley Process undertakings, ‘Zimbabwe sets itself apart from the others because of the government’s brazen defiance of universally agreed principles of humanity and good governance expected of adherents to the Kimberley Process.’ The Marange diamond deposits are suitable for small-scale alluvial mining. At first, the concern was under-regulation – that large numbers of unlicensed small miners were working the Marange diamond deposits. However, in 2008, the Zimbabwean military was deployed to the diamond fields, and accusations of serious human rights abuses emerged.

103 Ibid.
105 Ibid.
106 2012 Plenary Communiqué, above n 35, [19].
107 2008 UN report, UN Doc A/63/560, appendix I [6].
109 2012 Plenary Communiqué, above n 35, [19].
110 Ibid.
111 Ibid.
112 Ibid.
113 Partnership Africa Canada, Diamonds and Clubs: The Militarised Control of Diamonds and Power in Zimbabwe (Partnership Africa Canada, 2010) 2 (‘Diamonds and Clubs’).
114 Wexler, above n 3, 1769-70.
115 Partnership Africa Canada,, Occasional Paper # 18, Zimbabwe, Diamonds and the Wrong Side of History, (Partnership Africa Canada, 2009) (‘Wrong Side of History’); Diamonds and Clubs, above n
have been killed or injured by police and security forces. Human Rights Watch has also documented forced labour, including child labour, as well as torture and inhuman treatment.

The Marange diamonds are not conflict diamonds as defined by the Kimberley Process Core Document. The abuses alleged in the Marange are said to be committed by government agents rather than anti-government rebels, and the abuses do not relate to the funding of conflict but to violations of human rights in the process of diamond extraction. However, it also seems clear that Zimbabwe is not complying with the undertakings set out in the Core Document in terms of internal controls over the movement of diamonds. This alone would be enough to justify a review mission, and possibly expulsion.

The challenge of small-scale mining exacerbated the challenge of ensuring adequate internal controls in the case of Zimbabwe. In 2008, the Kimberley Process Plenary first expressed concern about the situation in the Marange diamond fields, although it rejected calls from Partnership Africa Canada to suspend Zimbabwe. The Working Group on Monitoring and the Working Group on Statistics conducted investigations. A review mission was also established, reporting in 2009 that Zimbabwe was not compliant and recommending it be suspended from the Kimberley Process. The Zimbabwean government committed itself to improving compliance, but failed to withdraw the police and military from the Marange. Human Rights Watch and Partnership Africa Canada both published detailed reports on human rights abuses in the Marange diamond fields. Both organisations, along with Global Witness, recommended that the Kimberley Process Plenary suspend Zimbabwe from membership.

Action by the Plenary in 2009 was blocked by a minority of Participants refusing to agree to consider expulsion. Instead, Administrative Decision 20 was adopted, which concluded that there were ‘credible indications of significant non-compliance’ but noted Zimbabwe’s

113; Human Rights Watch, Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe (Human Rights Watch, 2009) (‘Diamonds in the Rough’)
116 Wrong Side of History, above n 115, 7-8; Diamonds and Clubs, above n 113, 18, 20.
118 Diamonds in the Rough, above n 115, 39.
119 Ibid 43-44.
121 2008 UN report, UN Doc A/63/560, annex I [10], [22].
124 Ibid.
125 Wexler, above n 3, 1772; Nichols, above n 120, 669.
126 Diamonds in the Rough, above n 113.
127 Wrong Side of History, above n 115.
129 Wexler, above n 3, 1772.
willingness to implement an action plan to improve its internal controls. Only diamond shipments certified by a Kimberley Process monitor would be permitted. It is worth noting that the report of the Chair of the Kimberley Process to the United Nations General Assembly did acknowledge that the concerns about Zimbabwe included issues of human rights abuses, even though human rights protection was not part of the action plan agreed between Zimbabwe and the Kimberley Process. In 2010, Participants could not agree to a recommendation that Zimbabwe be allowed to re-commence export under the Certification Scheme on the basis of being compliant, but individual sales were allowed despite the failure of the Participants to formally agree. During 2011, the Chair allowed sales from two specific mines, and finally, in November 2011, the Plenary adopted an administrative decision, ratifying the sales from Marange Resources and Mbada and allowing Zimbabwe to re-commence exports more generally, following verification by a Kimberley Process monitoring team. The Administrative Decision imposed conditions that Zimbabwe must report to the 2011 Plenary and the 2012 Intersessional meeting, and that Zimbabwe must allow Kimberley Process Civil Society Coalition representatives access to the Marange.

The Kimberley Process Civil Society Coalition had boycotted the 2011 Plenary fearing its ongoing concerns about Zimbabwe would be ignored. On 2 November 2011, following the Plenary, Global Witness criticised the Kimberley Process for failing to use its ‘main point of leverage over the Zimbabwean Government’. A few days later, Global Witness announced that it was withdrawing from the Kimberley Process. In its statement, Global Witness argued that while the Kimberley Process had made progress on the issue of conflict

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130 Administrative Decision 20, above n 123.
131 Ibid.
132 Letter dated 8 December 2009 from the Permanent Representative of Namibia to the United Nations addressed to the Secretary-General, UN GAOR, 64th sess, Agenda item 12, UN Doc A/64/559 (9 December 2009) annex [3].
133 2010 UN report, UN Doc A/65/607, annex, [22].
134 Nichols, above n 120, 669.
137 Ibid.
138 Ibid.
139 Ibid.
diamonds, it had not lived up to its promise. It blamed governments for failing to hold each other to account, and the diamond industry for failing to institute independent monitoring of its system of verification. While the situations in both Côte d’Ivoire and Venezuela were cited, the handling of Zimbabwe by the Kimberley Process received the greatest criticism. The decision to allow unlimited diamond exports from Zimbabwe was described as ‘turn[ing] an international conflict prevention mechanism into a cynical corporate accreditation scheme.’

Some elements of the diamond industry have also criticised the acceptance of Zimbabwe within the Kimberley Process. Tiffany’s asserts that it has a ‘zero tolerance policy’ for Marange diamonds. The Rapaport Group withdrew from the World Diamond Council in 2010, arguing that a Kimberley Process certificate was insufficient to guarantee conflict-free diamonds, particularly from Zimbabwe.

In 2012, the Plenary commended Zimbabwe for its efforts to implement more effective internal controls, and the Plenary resolved to lift the special measures imposed in 2011. Zimbabwe was admitted to membership to a number of Working Groups and Committees, including the Participation Committee and the Working Group on Monitoring. Zimbabwe also sought membership of the Kimberley Process Review Committee, but as membership of that committee is restricted to current and past Chairs of the Kimberley Process, Zimbabwe was invited to participate as a guest in the Committee’s discussions.

IV THE DEFINITION OF CONFLICT DIAMONDS — AN INDICATOR OF RESISTANCE TO CHANGE

Events since 2011 have done little to suggest that the Kimberley Process can in fact evolve to address the problems around diamond mining in Zimbabwe. The Kimberley Process has always focused solely on the use of diamonds to fund rebel armies. As a result, it does not directly capture abuses by governments or corporations, and has no direct role in diamond mining in situations which do not count as armed conflict. After the decision to allow Zimbabwe to export diamonds from all sites, it became clear that there was limited scope to address broader human rights concerns through a focus on a Participant’s internal controls. As a result, there has been pressure, including from within the membership of the Process, to broaden the definition of conflict diamonds. As noted above, Global Witness has taken a broader approach to what should be covered by the concept of conflict diamonds, making a more explicit link with human rights abuses.

Nonetheless, a recent debate on revising the definition of conflict diamonds did not lead to change and failed to achieve a consensus. In 2012, the Kimberley Process Plenary, with the United States in the Chair, debated revision of the definition of conflict diamonds, following

141 Global Witness Statement, above n 57.
142 Ibid.
145 2012 Plenary Communiqué, above n 35, [16]-[19]; See also 2011 UN Report, UN Doc A/66/593, [8].
146 2012 Plenary Communiqué, above n 35, [4], [20], [46], [50].
147 Ibid [39].
148 Wexler, above n 3, 1731.
discussion within the Committee on Kimberley Process Review. Ambassador Gillian Milovanovic, representing the United States, had argued in favour of reconsideration of the definition in her address to the 2012 Intersessional meeting. In August 2012, she released a ‘vision statement’ on the definition of conflict diamonds for comment. The key element proposed for a revised definition was that diamonds should be certified as free of all conflict. In other words, the expansion of coverage sought was modest, and would not have satisfied critics such as Global Witness (which by this time had left the Kimberley Process), as the revision proposed no conditions concerning human rights compliance. It might still have captured the situation in Zimbabwe, where there is undeniably conflict, but it is the government rather than non-state armed groups which benefit from their exploitation.

Over the following months, Ambassador Milovanovic consulted widely, and the United States made the issue of the definition a priority for the 2012 Plenary. Although there were ‘lengthy discussions’ in the Plenary, no consensus was reached and therefore the definition remains as set out in the Core Document. Throughout, there were arguments that proposals to change the definition of conflict diamonds were a disguised attack on particular countries, an assertion that the United States continually denied. It argued that consumer expectations were changing and in future greater assurances might be expected. The issue remains on the table as an issue for the Kimberley Process Certification Scheme Review. However, given that some Participants feel that the revision is an implicit attack on states such as Zimbabwe, it seems unlikely that progress will be made.

V CONCLUSION

In 2006, following the Third Year Review, Botswana as Chair of the Kimberley Process listed its strengths as the inclusive nature of the Process, flexibility in its working methods,
and decision-making by consensus ‘on the basis of mutual respect and trust’. After a decade of operation, the Kimberley Process seems to have reached a delicate position. In terms of its original mandate, it appears to have succeeded, given the low estimates of conflict diamonds in worldwide diamond trade. However, in terms of ensuring its Participants live up to their undertakings, its weaknesses are increasingly evident. Its Plenary is often divided between Western states seeking to expand the coverage of the scheme, and Asian and African states which are sceptical about reform, arguing that the reforms are designed to target particular Participants. It is difficult to envisage how the Kimberley Process can move beyond this impasse.

The Kimberley Process has stalled, and has lost the support of at least one key civil society Observer, but all Participant states remain committed to maintaining its operation. The United States has not indicated any wish to withdraw from the Kimberley Process despite the failure of its proposal to expand the definition of conflict diamonds. The United Kingdom government has expressed an unwillingness to include diamonds in other regimes on conflict minerals because of a desire to protect the Kimberley Process. However, concerns about the inability of the Kimberley Process to meet its challenges may ultimately lead some Participants to look elsewhere for an international law mechanism to address the full range of issues relating to conflict diamonds, and possibly one with stronger enforcement mechanisms than a soft law regime can provide.

While soft law is useful for enhancing flexibility and for integrating non-state actors such as the diamond industry and NGOs into international regulatory processes, it is inevitably weak on enforcement. The Kimberley Process as a soft law regime has worked well with states such as Liberia, which use it as a standard to work towards when improving compliance and which cooperate with its mechanisms. It has worked less well with states with weak compliance capacity such as Côte d’Ivoire or with states able to draw out the process of determining non-compliance to avoid a definitive finding, such as Venezuela. The question of whether the Kimberley Process has a future depends on whether Participants continue to believe that the examples of ineffectiveness do not undermine the credibility of the entire Process.

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159 2006 UN Report, UN Doc A/61/589, [22].
BROTHERS IN ARMS CONTROL: INTRODUCING AUSTRALIAN-STYLE GUN CONTROL IN THE UNITED STATES

LAUREN HIRSH*

Over the past 14 months the United States has been rocked by three tragic mass shootings. Following last year’s massacre at Sandy Hook Elementary School, where a lone gunman slaughtered 20 children and 6 adults, there is unprecedented momentum for the introduction of stricter gun control in the US. However, even in the face of this heartbreaking tragedy, Congress has failed to act. In stark contrast, Australia, when faced with its own tragic mass shooting at Port Arthur in 1996, seized the opportunity to completely reform its gun control laws. Quantitative research reveals that the strict and uniform gun control laws introduced in Australia under the National Firearms Agreement of 1996 have been responsible for significant reductions in gun violence in Australia. In light of the failure of the current American gun control regime and the proven success of the Australian regime, this paper considers the possibility of introducing Australian-style gun control in the US. In so doing, the paper assesses whether the Second Amendment to the United States Constitution, as interpreted in the recent Supreme Court cases of District of Columbia v Heller and McDonald v City of Chicago, prevents the US from adopting Australian-style gun control laws. The scope of the newly endorsed individual right to keep and bear arms in the US is examined and a test to assess the American constitutionality of Australian-style gun control laws is developed and applied.

I Introduction

Over the past 14 months the United States has been rocked by three tragic mass shootings. First, in July 2012, 12 people were killed and dozens wounded when a man equipped with two handguns, a shotgun and a rifle, opened fire in a packed movie theatre in Aurora, Colorado. Just months later, in December 2012, a man shot his way into Sandy Hook Elementary School in Newtown, Connecticut, with a semi-automatic rifle and slaughtered 20 children and six adults. Finally, in September 2013, a man entered the Washington, D.C. Navy Yard armed with a semi-automatic rifle, a handgun and a shotgun and murdered 12 people and wounded another eight before being shot and killed himself by police. These massacres have highlighted to the world, once again, the laxity of American gun control laws. In reality, however, they represent only the tip of the iceberg when it comes to the American gun violence epidemic, which claims the lives of over 30 000 Americans annually.¹

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Following the Sandy Hook massacre, there has been unprecedented momentum for the introduction of stricter gun controls in the US.\(^2\) However, even in the aftermath of this heartbreaking tragedy, Congress has failed to act. On 17 April 2013, the Senate rejected President Obama’s proposals to strengthen federal gun control laws, while the families of the Sandy Hook victims looked on from the Senate gallery in disbelief. The defeat marked a major setback in the battle for stronger gun controls in the US. A furious President Obama described it as a ‘shameful day for Washington’.\(^3\)

It is useful to compare gun control in America with that in Australia because the two countries share many relevant characteristics. Both are liberal democratic nations with federalist systems of government and a history of armed European settlement. Both countries have a well-established gun culture, many firearm enthusiasts, and many feral pests to shoot.\(^4\) They have been brothers in arms for nearly a century, and yet, when it comes to arms control, the two countries differ dramatically. In stark contrast to the US, when faced with its own tragic mass shooting at Port Arthur in 1996, Australia seized the opportunity to completely reform its gun control laws. Quantitative research reveals that the introduction of strict and uniform gun controls in Australia has resulted in substantial reductions in gun violence.\(^5\) In light of the proven success of the Australian gun control regime, it is appropriate to assess the possibility of introducing Australian-style gun controls in the US.

Such an assessment necessitates an examination of the constitutionally entrenched right to keep and bear arms in the US, of which Australia has no equivalent. Prior to 2008, the Second Amendment to the US Constitution was interpreted as protecting only the right of the states to maintain a militia and therefore as having no relevance to gun control. However, in District of Columbia v Heller\(^6\) and McDonald v City of Chicago,\(^7\) the Supreme Court endorsed a new understanding of the Second Amendment as protecting an individual right to keep and bear arms, thereby altering the landscape for judging the constitutionality of gun control laws.\(^8\) While many scholars have considered the likely effect of these cases on existing gun control laws, far fewer have considered their likely impact on the possibility of introducing stricter gun control in the US, and none has so far considered their potential impact on the possible introduction of gun control laws in the style of those that proved so successful in Australia. It is that unique consideration that forms the subject of this paper.

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\(^2\) Simon Chapman, Over Our Dead Bodies: Port Arthur and Australia’s Fight for Gun Control (Sydney University Press, 2nd ed, 2013) 5.


\(^6\) 128 S Ct 2783 (2008) (‘Heller’).

\(^7\) 130 S Ct 3020 (2010) (‘McDonald’).

Chapter II begins with an examination of the current American gun control regime. A brief overview of federal and state gun control laws will be provided and the failure of these laws will be demonstrated. Chapter III examines the strict and uniform gun control laws introduced in Australia under the National Firearms Agreement of 1996 (NFA). The effectiveness of these laws in reducing gun violence will be revealed. Chapter IV is concerned with the Second Amendment and its various interpretations. The endorsement in Heller and McDonald of an individual right interpretation will be discussed. Chapter V proposes a framework for assessing the constitutionality of gun control laws post-Heller and McDonald. This framework is then applied to the various laws introduced in Australia under the NFA to assess whether the Second Amendment prevents their adoption in the US. Chapter VI will conclude.

II GUN CONTROL IN THE UNITED STATES

Gun control in the US is lax, but by no means non-existent. Indeed, it has been estimated that there are currently in excess of 20,000 firearm laws in operation in the US. The vast majority of these laws exist at the state and local levels. There are, however, a number of important overarching federal regulations.

A Federal Gun Control

Under the American federalist system of government, the powers of the federal government are limited to those enumerated in the United States Constitution. Those powers not delegated to Congress in the Constitution are reserved to the states. Authority to introduce gun control legislation primarily rests with the states, as the power to enact laws in the interest of public health, safety, and welfare, commonly known as the ‘police power’, was not allocated to Congress in the Constitution. However, Congress does have some power to enact laws regulating firearms under the Commerce Clause of the Constitution, provided there is a sufficient nexus between the law and the regulation of interstate commerce, and the Taxing and Spending Clause, provided the law relates to the imposition and/or collection of taxes. Courts have broadly interpreted the ‘commerce power’, in particular, to allow the federal government to legislate in relation to guns.

Over the years, Congress has used both its ‘commerce power’ and its ‘taxing power’ to introduce a number of federal gun control acts. These federal laws establish minimum

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10 McCullough v Maryland, 17 US 316 (1819).
11 United States Constitution amend X.
12 Spitzer, above n 9, 192 n 6.
13 United States Constitution art 1 § 8 cl 3.
14 See, eg, United States v Lopez, 115 S Ct 1624, 1629–30 (1995), where the Supreme Court invalidated the Gun-Free Schools Act 18 USC § 922(q) (1994), holding that the enactment of the law was beyond Congress’ ‘commerce power’ because it did not have a substantial relation to interstate commerce.
15 United States Constitution art 1 § 8 cl 1.
17 See, eg, Huddleton v United States, 415 US 814, 833 (1974) where the Supreme Court held that Congress has the power to regulate handguns because they affect interstate commerce; and Mack v United States, 856 F Supp 1372, 1379 (1997), where the Federal Court discussed Congress’ ‘raw power to regulate the transfer of handguns’.
18 A table of these acts and their key provisions is included as Appendix A to this paper.
requirements for firearm sales and possession. Significantly, federal law prohibits the manufacture, sale and possession of fully automatic firearms.\textsuperscript{19} Federal law also mandates that anyone engaged in a firearms business must obtain a federal licence,\textsuperscript{20} and that only federally licensed dealers can conduct firearms sales across state lines.\textsuperscript{21} In addition, federal law prohibits access to firearms by minors,\textsuperscript{22} and certain prohibited categories of people such as convicted felons, drug addicts and the mentally ill,\textsuperscript{23} and also requires licensed dealers to conduct background checks on all purchasers to ensure that they do not fall into a prohibited category.\textsuperscript{24}

While these laws provide a very basic level of national gun control, they are extremely weak. In fact, America’s federal gun control laws are the weakest of all industrialised nations worldwide.\textsuperscript{25} The laws are riddled with loopholes, which reduce their effectiveness. For example, although licensed dealers are legally obliged to conduct background checks,\textsuperscript{26} the relevant records are often incomplete because states do not always report mental health adjudications or criminal convictions to the federal government,\textsuperscript{27} meaning disqualified persons have a good chance of successfully purchasing firearms from a licensed dealer.\textsuperscript{28} In addition, the background check requirement does not apply to private sales and sales conducted by unlicensed individuals at gun shows and flea markets, which account for approximately 40\% of all firearm transactions.\textsuperscript{29} This ‘gun show loophole’ makes it possible for prohibited persons to easily access firearms.

There are also huge gaps in federal gun control law. For example, there is currently no federal prohibition on semi-automatic weapons\textsuperscript{30} or high-capacity magazines.\textsuperscript{31} A number of specific types of these weapons and magazines were banned for a period of 10 years under the Assault Weapons Ban,\textsuperscript{32} but this ban expired in 2004 and has not since been renewed.

\textsuperscript{19} Unless government authority is granted or the weapon was possessed prior to 1986: 18 USC § 922(o).
\textsuperscript{20} Ibid § 922(a)(1)(A).
\textsuperscript{21} Ibid § 922(a)(3).
\textsuperscript{22} Under federal law there is an age limit of 21 for purchase or possession of handguns and 18 for long guns: Ibid § 922(b)(1).
\textsuperscript{23} Ibid § 922(d).
\textsuperscript{24} Ibid § 922(t)(1)(A).
\textsuperscript{26} 18 USC § 922(t)(1)(A).
\textsuperscript{29} Garen Wintemute, ‘Comprehensive Background Checks for Firearm Sales: Evidence from Gun Shows’ in Daniel Webster and Jon Vernick (eds), Reducing Gun Violence in America: Informing Policy with Evidence and Analysis (John Hopkins University Press, 2013) 95, 96.
\textsuperscript{30} Semi-automatic weapons are weapons designed for rapid fire that automatically reload a bullet after each shot is fired, allowing shots to be fired in rapid succession. How many shots can be fired will be determined by the size of the magazine. Unlike a fully automatic firearm, the trigger must be squeezed each time in order to fire a shot.
\textsuperscript{31} High-capacity ammunition magazines are ammunition-feeding devices capable of holding more than 10 rounds of ammunition.
In the aftermath of the Sandy Hook massacre, President Obama acknowledged the devastating impact of gun violence in the US and made a number of legislative proposals to strengthen federal gun control, including extending the background check requirement to all gun sales and banning military-style assault weapons and high-capacity magazines. However, on 17 April 2013, the Senate rejected these proposals, caving to heavy pressure from the National Rifle Association (NRA), which spent US$500,000, on the day of the vote alone, campaigning against the proposals. Following the recent Washington Navy Yard shooting, President Obama has made an impassioned appeal to the American people to insist on gun law reform, admitting that change to America’s gun laws is unlikely to come from within Washington.

B State Gun Control

In light of the weakness of federal gun control, some states have attempted to strengthen gun control by introducing stricter laws of their own. There is, however, a significant lack of uniformity in state gun control laws. While some states have enacted reasonably restrictive gun control laws, a majority of states have only weak gun control, and some states impose almost no regulation on guns at all.

This lack of uniformity undermines the effectiveness of state gun control laws. The situation in California provides a useful illustration. California has been consistently ranked as the state with the strongest gun control laws in America. Among many other restrictions, in California, assault weapons are banned, gun sales can only be conducted through a licensed dealer, and there is a 10-day waiting period on all firearm purchases. As a result, many people travel to more permissive states to purchase firearms. Garen Wintemute has discovered at some gun shows in Reno, Nevada, a short distance across the California-Nevada border, more than 30% of the vehicles in the car park were from California.
Likewise, New York has some of the country’s most restrictive gun control laws. Nevertheless, gun violence in New York is rife. Data compiled by the Bureau of Alcohol, Tobacco, Firearms and Explosives reveals that 80-90% of guns used in crimes in New York State come from surrounding states with less restrictive gun laws. The longstanding gun trafficking route from states with weaker gun control into New York is known as the ‘Iron Pipeline’ and highlights the problem presented by non-uniform gun control laws. As Simon Chapman has observed, ‘in a country where the laws are different in every state, the system of gun control is only as strong as the weakest link’.

C Gun Violence in the United States

Despite the plethora of existing regulations, gun control laws in the US are failing to control guns in any meaningful way. The US has the highest rates of gun deaths and injuries of any industrialized nation worldwide. Mass shootings have become a common recurrence in modern American society. Five such tragedies have taken place in the last 14 months alone, claiming the lives of 72 victims. These incidents, however, while highly publicised, are really just the tip of the iceberg. In 2010, the most recent year for which statistics are available, 31 672 Americans died from firearm related injuries. That is an average of 86 firearm related deaths per day. In addition, 73 505 Americans were treated in emergency rooms for non-fatal gunshot wounds. In 2007, guns were used to commit over 385 000 crimes. 11 493 homicides (68% of all homicides), and 18 735 suicides (over 50% of all suicides).

Given that the primary purpose of any gun control regime is to minimise gun-related crimes, deaths and injuries, a gun control regime that fails to control guns to such an extent certainly cannot be described as successful.

44 Spitzer, above n 9, 172.
45 Ibid.
46 Chapman, above n 2, 45.
47 Cutiletta and Leftwich, above n 2, 27.
49 In addition to the mass shootings in Aurora, Newtown and Washington, two further mass shootings have occurred over the last 14 months. One in August 2012, when a gunman murdered six worshipers at a Sikh temple in Oak Creek, Wisconsin and another in July 2013, when a gunman murdered 6 people in an apartment building in Miami, Florida.
50 National Center for Injury Prevention and Control, above n 1.
54 Ibid.
D Reducing Gun Violence

Whether or not the introduction of strict gun control laws is an effective way to reduce gun violence has been the subject of extensive debate. Gun control opponents vehemently reject the idea that strengthening gun control laws will reduce gun violence. Their most common claim, and a popular gun lobby slogan, is ‘guns don’t kill people, people kill people’, and they will continue to do so regardless of gun regulations. Some theorists, most famously John Lott, have gone as far as to suggest that the presence of more guns actually results in less crime.\(^{55}\) However, the weight of available evidence reveals that there is an inextricable link between guns and violence in America,\(^{56}\) and whilst gun control laws are not a panacea for gun violence, the Australian gun control experience, which forms the subject of the next chapter, provides strong evidence that the introduction of strict and uniform gun controls can significantly reduce gun violence.

III Gun Control in Australia

Although the US and Australia share much in common, when it comes to gun control, Australia has taken a radically different path. In stark contrast to the US, gun control laws in Australia are among the most stringent in the industrialised world,\(^{57}\) although this was not always the case. Australian gun control laws underwent extensive reform in the late 1990s, primarily in response to our own tragic mass shooting. On 28 April 1996, at the popular Tasmanian tourist site of the Port Arthur Penal Colony, a lone gunman armed with two semi-automatic rifles murdered 35 people and wounded 18 others. The massacre, which shocked and outraged the nation, was the largest mass shooting by a single shooter ever recorded in the world.\(^{58}\) It focused national and international attention on Australia’s then weak and non-uniform gun control laws,\(^{59}\) and provided the catalyst for the complete reformation of the Australian gun control regime.

A The National Firearms Agreement of 1996

Just 12 days following the events at Port Arthur, at the behest of the newly elected Prime Minister John Howard, the Australian federal, state and territory governments, through the then Australian Police Ministers Council, entered into the NFA, a 10-point nationwide agreement aimed at strengthening and harmonising firearm laws across Australia. Unlike the US federal government, the Australian Commonwealth government does not have any power to regulate the use, possession and sale of firearms.\(^{60}\) This power rests with the state and

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56 Spitzer, above n 9, 83.
59 Chapman, above n 2, 45.
60 The Commonwealth government does, however, have constitutional power to legislate and regulate in relation to the importation of firearms, under the trade and commerce power: *Australian Constitution s 51(i).* Under the NFA, the Commonwealth government agreed to use this power to increase controls over
territory governments. Therefore, in order to ensure a uniform national approach to gun control, all states and territories had to agree to amend their respective firearms legislation, which they did under the NFA. Implementation of the NFA was both rapid and uniform.61 By May 1997, all states and territories had passed legislation to meet their obligations under the agreement,62 with only minor differences among states and territories in regulation and statute.63 The laws enacted under the NFA can be summarised into four broad categories.

1  Prohibitions on Automatic and Semi-Automatic Long Arms

A key component of the NFA was the introduction of legislation banning the importation, sale, ownership, possession, manufacture and use of automatic and semi-automatic rifles and shotguns.64 To encourage compliance with these new prohibitions, the states conducted a large-scale buyback program, funded by the federal government through a temporary increase in the Medicare levy.65 Under this program, owners and dealers were granted a 12-month amnesty to surrender newly prohibited weapons for market value compensation. Within one year, 643 726 prohibited firearms had been bought back and destroyed.66 In addition, substantial numbers of non-prohibited but unlicensed firearms were surrendered for no monetary compensation.67 Cumulatively it is estimated that 20% of the total stock of Australian firearms was removed.68

2  Owner Licensing and Firearms Registration Requirements

A second significant component of the NFA was the introduction of a uniform owner licensing and firearms registration system to replace the various state regimes.69 Under this uniform system, all firearm owners are required to obtain a licence. In order to do so, an applicant must demonstrate a ‘genuine reason’ for owning, possessing or using a firearm. ‘Genuine reason’ includes sporting, recreational and occupational shooting, but specifically excludes personal protection. In addition, as a precondition to obtaining a licence, all first

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the importation of automatic and semi-automatic long arms and their parts, which it did under the Customs Legislation Amendment (Criminal Sanctions and Other Measures) Act 2000 (Cth) and the Customs (Prohibited Imports) Amendment Regulations 2000 (No 7) (Cth). Also, while the Commonwealth government does not have the power to regulate the sale of guns within states, it does have the constitutional power to regulate interstate trade under Australian Constitution s 51(i) and could conceivably use this power to validly regulate the interstate trade of guns, as the US federal government has done.

61 Reuter and Mouzos, above n 48, 129.
62 The relevant firearms legislation in each state is: Firearms Act 1996 (NSW); Firearms Act 1996 (Vic); Weapons Act 1990 (Qld); Firearms Act 1973 (WA); Firearms Act 1977 (SA); Firearms Act 1996 (Tas); Firearms Act 1996 (ACT); Firearms Act 1997 (NT). The relevant firearms regulations in each state are: Firearms (General) Regulation 1997 (NSW); Firearms Regulations 2008 (Vic); Weapons Regulation 1996 (Qld); Firearms Regulations 1974 (WA); Firearms Regulations 2008 (SA); Firearms Regulations 2006 (Tas); Firearms Regulation 2008 (ACT); Firearms Regulations 1997 (NT).
63 Reuter and Mouzos, above n 48, 129.
64 Except for military, police or other government purposes or for occupational categories of shooters licensed for a specified purpose (eg. extermination of feral animals). See, eg, Firearms Act 1996 (NSW) s 7, sch 1.
65 Reuter and Mouzos, above n 48, 129.
66 Ibid 130.
67 Leigh and Neill, above n 5, 519.
68 Reuter and Mouzos, above n 48, 130.
69 See, eg, Firearms Act 1996 (NSW) pt 2 div 2, pt 3.
time applicants are required to complete an accredited safety-training course. Licences may be refused or cancelled for general reasons, such as if the person is not of good character; specific reasons, such as if the person has been the subject of a Domestic Violence Order; or reasons of mental or physical unfitness. All firearms and licences are required to be registered on the National Register of Firearms.

3 Safe Storage Requirements

Another important feature of the NFA was the introduction of a uniform standard for the security and storage of firearms. This standard requires shotguns and rifles to be stored in a locked receptacle constructed of thick, hard wood or steel, fixed to the floor or wall, while handguns are required to be stored in a thick, locked steel safe, bolted to the structure of a building. In addition, all ammunition must be stored in locked containers separate from any firearms. Failure to store firearms in the manner required is an offence and a matter that will lead to licence cancellation and firearm confiscation.

4 Firearm Dealer and Sales Regulations

Finally, under the NFA, a number of provisions were introduced to regulate firearms dealers and sales. These provisions mandate that firearms can only be sold by or through a licensed dealer, who is obliged to ensure that the purchaser is appropriately licensed and to maintain records of all sales transactions and provide them to the National Register of Firearms. In addition, mail order sales can only be conducted between licensed firearms dealers.

B Did the NFA work?

Quantitative research reveals that the reforms introduced under the NFA have been responsible for substantial reductions in the Australian firearm death rate and have also put an end to mass shootings. In the 17 years since the NFA was implemented, a number of major studies have been conducted into its impact on gun violence. An early study conducted by Ozanne-Smith et al, explored trends in rates of firearm related deaths in the state of Victoria compared with the rest of Australia between 1979 and 2000. These authors found ‘dramatic

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70 Other reasons include: conviction for an offence involving violence within the last five years; contravention of a firearm law; unsafe storage; no longer genuine reason; not in the public interest due to (defined circumstances); not notifying of change of address; license obtained by deception.
71 Other reasons include: where applicant/licence holder has been subject of an Apprehended Violence Order, restraining order, or conviction for assault with a weapon/aggravated assault within the past five years.
72 See, eg, Firearms Act 1996 (NSW) pt 4.
73 Provided it weighs less than 150 kilograms, otherwise it need not be fixed.
74 See, eg, Firearms Act 1996 (NSW) pt 5.
75 Ibid ss 52–3.
76 Ozanne-Smith et al, above n 5, 280. The Victorian government had previously reformed its gun control laws in 1988 following the 1987 Queen and Hoddle Street massacres in which 15 people perished to restrict access to semi-automatic long arms. Ozanne-Smith et al analysed mortality data on firearm related deaths, using ABS population data to calculate rates and a Poisson regression model to compare relative rates of firearm related deaths in Victoria and the rest of Australia over three periods of legislative reform (before the Victorian reforms, after the Victorian reforms, and after the national reforms).
declines in rates of firearm related deaths … in the context of strong legislative reform’. Similarly, in 2006, Chapman analysed changes and compared trends in firearm death rates and mass shootings pre- and post-gun law reforms. These authors found accelerated declines in firearm deaths, particularly suicides, after 1996 and no evidence of method substitution. They also found that, while in the 18 years preceding the NFA there were 13 mass shootings, in the decade following its implementation there were none. Likewise, in the seven years since the study was published, no mass shootings have occurred in Australia.

The most comprehensive study into the effects of the reforms, conducted by Leigh and Neill in 2010, found a 65% decline in the firearm homicide rate and a 59% decline in the firearm suicide rate in the decade following the implementation of the NFA, with no parallel increase in rates of non-gun related homicides or suicides. These authors also demonstrated a strong causal relationship between the NFA and these declines. Their research showed that the NFA was responsible for a 36% decline in the firearm homicide rate and a 74% decline in the firearm suicide rate.

Current data reveals that the Australian firearm death rate has today been reduced to 1/100 000, which is less than half of the 1996 rate and one tenth of the current US rate. Likewise, the Australian firearm homicide rate, which was already one fifteenth of the US rate prior to Port Arthur, has been reduced to one twenty-seventh of that rate today. Cumulatively, these studies provide strong evidence that the introduction of strict and uniform gun control laws coupled with the removal of substantial numbers of high-risk guns from the community has significantly reduced gun violence in Australia.

However, it is not universally accepted that the NFA has been successful in reducing firearm-related deaths. Two countervailing studies have concluded that the reforms have had little or no impact on gun violence. In 2007, Baker and McPhedran used a time-series approach to test whether post-1996 trends in firearm death differed from forecasts based on pre-1996 trends. They discovered no difference between observed and forecast rates for firearm

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77 Ibid 285.
78 Chapman et al, above n 5, 365. These authors used negative binomial regression to analyse changes in firearm death rates in Australia from 1979–2003.
80 Ibid 370.
81 This study is the most comprehensive because rather than using a simple time-series variation, as most other studies in the area have done, the Leigh and Neill study used panel data to exploit variation both across states and over time. Further the results of the Leigh and Neill study are robust to a variety of specification checks.
82 Leigh and Neill, above n 5, 518.
83 Ibid 523–38. Leigh and Neill found that the largest falls in firearm deaths occurred in states where more firearms were bought back, which provides strong evidence of a causal chain between the NFA and subsequent reductions in firearm related deaths rates.
84 Ibid 533. The decline caused by the NFA in the firearm suicide rate is higher than the overall decline because the study explored variation across Australian states and the rate of the buyback differed from state to state.
85 Peters, above n 5, 202.
87 Baker and McPhedran, above n 57, 455. The authors used an AutoRegressive Integrated Moving Average (ARIMA) time series approach to predict future firearm death rates based on pre-1996 trends.
homicide. The authors found that the only category of firearm death that may have been influenced by the NFA was firearm suicide, but that societal factors could also have influenced observed changes. Baker and McPhedran concluded: ‘the policy has made no difference. There was a trend of declining deaths [prior to the NFA] that has continued’.

In 2008, Lee and Suardi re-analysed the same data, using an alternative time-series approach testing for unknown structural breaks as a means of identifying the impact of the NFA. The authors found no evidence of a structural break around the time of the NFA and concluded, therefore, that the reforms had not had any significant effects on firearm homicides or suicides.

Since their publication, both of these studies have been heavily criticised and shown to be deeply methodologically flawed. In an article entitled ‘How to Find Nothing’, David Hemenway of the Harvard School of Public Health explained how limitations in the research design of these studies made it impossible for the authors to reject the hypothesis that the NFA had no effect. Therefore, on balance, it seems reasonable to reject the findings of these studies in favour of those that demonstrated a clear correlation between the NFA and subsequent declines in gun violence in Australia.

IV THE RIGHT TO KEEP AND BEAR ARMS

A very significant difference between Australia and the US is that Australia does not have a constitutionally entrenched Bill of Rights, nor is there a constitutionally protected right to keep and bear arms in Australia, as there is in the US. Thus there exists a potential constitutional barrier to the introduction of stricter gun control laws in the US, of which Australia has no equivalent. An analysis of the possibility of introducing Australian-style gun

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91 Wang-Sheng Lee and Sandy Suardi, ‘The Australian Firearm Buyback and its Effect on Gun Deaths’ (Working Paper No 17/08, Melbourne Institute, August 2008) 2–3. This approach involves testing for a structural break in a time series for the relevant data, in this case data relating to firearm death rates. If a structural break were found to coincide with the introduction of the NFA reforms, this would indicate that the NFA had an effect. Conversely if no structural break was found or if a structural break was found at a different time, this would indicate that the NFA had not had an effect.
92 Ibid 23.
94 Hemenway, above n 93, 260–8. Hemenway identified a number of flaws in the Baker and McPhedran study, including their unexplained selection of 1979 as the start year for their analysis, which skewed their results, and their unjustified assumption that the historical downward trend in firearm deaths would continue unabated, which meant that without the NFA firearm deaths would have been negative by 2015, and which therefore made it almost impossible for the intervention to be an improvement on the counterfactual. As regards the Lee and Suardi study, Hemenway explains that where policies have even modest lags, the structural break test can easily miss the effect, and such a test can also miss the effect of a policy that is implemented over a number of years, as the NFA was (1996–1997).
control in the US therefore necessitates an examination of the American right to keep and bear arms.

A The Second Amendment

The Second Amendment to the US Constitution provides: ‘A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed’. There are two basic theories about the meaning of this Amendment – the collective right theory and the individual right theory. Proponents of the collective right theory endorse the view that the Second Amendment protects only the right of the states to maintain a militia without interference from the federal government, while advocates of the individual right theory argue that the Amendment protects an individual right to keep and bear arms unrelated to any militia.

B Second Amendment Interpretation pre-Heller and McDonald

Prior to Heller, there was little disagreement among courts regarding the meaning of the Second Amendment. The collective right view was unanimously endorsed by federal appellate courts, and by a myriad of state courts. In United States v Miller, the only case prior to Heller in which the Supreme Court extensively discussed the meaning of the Second Amendment, the Court endorsed the collective right view. In Miller, two men had been indicted for transporting an unregistered sawed-off shotgun across state lines, in contravention of the National Firearms Act of 1934. The men challenged the constitutionality of this Act, claiming it violated their Second Amendment right. The Court, however, unanimously upheld the indictment, concluding that the Amendment only protects the right to keep and bear arms that have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’. In so holding, the Court insisted that the Second Amendment must be interpreted and applied in accordance with its ‘obvious purpose’ of assuring the continuation of an effective militia.

If this collective right view still represented the accepted understanding of the Second Amendment among courts today, then the Amendment would pose no barrier to the introduction of Australian-style gun control laws in the US. This is because such laws regulate civilian gun use and would not burden the right of states to maintain a militia. However, in two recent landmark cases the Supreme Court reversed course and endorsed the alternative individual right understanding of the Second Amendment.

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95 Vernick et al, above n 8, 2022.
96 With the exception in 2001 of the Fifth Circuit Court of Appeals in United States v Emerson, 270 F 3d 203 (5th Cir, 2001), where the Court endorsed the individual right interpretation of the Second Amendment but ultimately upheld the gun control law in question, concluding that the right could be subject to reasonable, narrowly tailored exceptions.
98 307 US 174 (1939) (‘Miller’).
99 Ibid 178.
100 Ibid.
C District of Columbia v Heller

The first landmark decision came in *Heller*, where the Supreme Court, for the first time, endorsed the individual right interpretation of the Second Amendment and overturned a gun regulation as a violation of that Amendment. The case was concerned with a series of District of Columbia laws that effectively amounted to a ban on handguns. Formally, the District only prohibited the possession of unregistered handguns. However, another provision of the DC code prevented the registration of handguns. In addition, the district required that all lawfully owned firearms be kept ‘unloaded and disassembled or bound by trigger lock or similar device’ unless located in a place of business or used for lawful recreational activities within the District. However, there was no place within the city limits where one could lawfully hunt or shoot recreationally.

The respondent, Dick Heller, a DC police officer whose application to register a handgun to keep at home for self-defence had been rejected, challenged the constitutionality of the District’s laws on Second Amendment grounds. At first instance, his complaint was dismissed. However, the Court of Appeals reversed this decision, holding that the Second Amendment does protect an individual right to keep and bear arms and that the District’s laws violated this right. On appeal, the Supreme Court affirmed the judgment of the Court of Appeals.

In reaching this decision, the Supreme Court, for the first time since *Miller*, addressed in detail the meaning of the Second Amendment. Scalia J, writing for the 5:4 majority, employed an originalist method to provide an interpretation rooted in the Amendment’s text and history. Beginning with a textual analysis, Scalia J divided the Amendment into two parts: a prefatory clause, which reads: ‘A well-regulated Militia, being necessary to the security of a free State’, and an operative clause, which reads: ‘The right of the people to

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101 DC Code Ann § 7-2502.01(a) (2008).
102 Ibid § 7-5202.02(a)(4).
103 Ibid § 7-2507.02.
104 Winkler, above n 27, 1554.
108 The originalist method of constitutional interpretation, at least according to Scalia J’s conception, involves interpreting a constitutional provision based on textual and historical evidence, in order to provide an interpretation that reflects the way in which the provision would have been understood at the time of its adoption: Kyle Hatt, ‘Gun-Shy Originalism: The Second Amendment’s Original Purpose in *District of Columbia v Heller*’ (2011) 44 *Suffolk University Law Review* 505, 510. Scalia J has for many years strongly advocated for the use of originalism as the preferred method of constitutional interpretation, arguing that originalism is more compatible with the nature and purpose of a Constitution in a democratic system than other non-originalist methods and further that it is not the role of the court to evolve the constitution in accordance with current societal values: Antonin Scalia, ‘Originalism: the Lesser Evil’ (1989) 57 *Cincinnati Law Review* 849. Other ‘originalists’ regard Scalia J’s conception of originalism as extreme. In Australia, leading scholar Jeffrey Goldsworthy has advocated for a form of ‘moderate originalism’, whereby courts interpret constitutional provisions in accordance with publicly available evidence as to the founders’ intentions in enacting those provisions, and not their intentions as to how those provisions ought to be applied. Where disputes cannot be resolved by resort to the founders’ intentions, then it may be legitimate, according to ‘moderate originalism’, to apply judicial creativity: Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ in Tony Blackshield and George Williams (eds), *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 314, 314. Hatt, above n 108.
keep and bear Arms, shall not be infringed’. After addressing each of the textual elements of the operative clause in combination with the historical background of the Amendment, Scalia J concluded that its purpose was to confer an ‘individual right to possess and carry weapons in case of confrontation’. Scalia J then conducted a similar analysis of the prefatory clause, concluding that its purpose was to prevent the elimination of the militia. This prefatory clause, however, was held not to limit or expand the scope of the operative clause, but simply to announce the purpose for which the right was codified. On this basis, the majority held that the Second Amendment protects an individual right to keep and bear arms unconnected with militia service.

Having endorsed this interpretation, the majority concluded that the District’s handgun ban violated the Second Amendment, as it prohibited an entire class of ‘arms’ overwhelmingly chosen by Americans for the purpose of self-defence in the home. Similarly, the District’s requirement that all lawfully owned firearms be rendered and kept inoperable was said to make it ‘impossible for citizens to use them for the core lawful purpose of self-defence’ and was hence also declared unconstitutional.

D   McDonald v City of Chicago

The individual right interpretation was shortly thereafter affirmed in the second landmark case of McDonald. The facts of McDonald were very similar to those of Heller. Otis McDonald and several other Chicago residents, who wished to keep handguns in their homes for self-defence, challenged a Chicago law that effectively amounted to a handgun ban because it prohibited the possession of unregistered handguns, whilst at the same time preventing the registration of most handguns. The case was combined with another challenge against a similar law in Oak Park, Illinois. The petitioners sought a declaration that these laws were unconstitutional. Both the District Court and the Court of Appeals rejected the petitioners’ arguments and upheld the laws. However, by a 5:4 majority, the Supreme Court reversed the judgment and affirmed Heller’s holding that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defence.

111 Ibid 2797.
112 Ibid 2799–801.
113 Ibid 2789.
114 Ibid 2801.
115 Ibid 2802–12.
116 Ibid 2817.
117 Ibid 2818.
118 Chicago Ill Mun Code § 8-20-040(a).
119 Ibid § 8-20-050(c).
121 NRA Inc v Village of Oak Park, 617 F Supp 2d 752 (ND Ill, 2008); NRA Inc v City of Chicago, 567 F 3d 856 (7th Cir, 2009).
122 McDonald v City of Chicago, 130 S Ct 3020, 3050 (2010). Many commentators have criticised the individual right interpretation endorsed in Heller and McDonald. See, eg, Winkler, above n 27, 1559–77; Hatt, above n 108, 516–22; Allen Rostron, ‘Protecting Gun Rights and Improving Gun Control After District of Columbia v Heller’ (2009) 13 Lewis & Clark Law Review 383, 385–94; and Spitzer, above n 9, 45; who all scathingly criticize what they see as faux originalism and/or flawed reasoning in Scalia J’s majority opinion. It is not, however, the purpose of this paper to assess the validity of the Court’s decisions in these cases. Rather, the paper accepts the majority opinion as an authoritative statement of the current state of the law pertaining to the Second Amendment, and the matter to be assessed is the
This case was landmark, not only because it affirmed the individual right interpretation, but also because it extended the Second Amendment to apply to the states. Originally, the Bill of Rights only applied to the Federal Government, and prior to McDonald, the Supreme Court had, on a number of occasions, confirmed that the Second Amendment did not extend to the states. However, subsequent to these cases, the Supreme Court began a process, known as 'selective incorporation', whereby the Court uses the wording of the Fourteenth Amendment Due Process Clause to extend particular rights to apply to the states. In McDonald, the Court was required, for the first time, to address the issue of whether the Second Amendment should be incorporated. The majority held that because history revealed that the right to keep and bear arms was ‘deeply rooted in [the] Nation’s history and tradition’, and was considered fundamental to the American scheme of ordered liberty, it must therefore be incorporated to apply to the states.

E  The Scope of the Individual Right

At first blush, the Heller and McDonald decisions may appear to be a major setback for gun control advocates and a tremendous victory for gun rights proponents. However, the impact of these decisions has been lessened substantially as a result of the limited scope that the Court afforded to the right. The Court in Heller recognised that the Second Amendment right is not unlimited. The majority made clear that laws that amount to a complete ban on handguns, in the home, for self-defence, are unconstitutional, but at the same time assured that the right is ‘not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose’. Specifically, the Court guaranteed that:

‘Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’

implications of the endorsement of this interpretation by the nation’s highest court on the possibility of introducing stricter gun control laws.

123 McDonald v City of Chicago, 130 St Ct 3020, 3028 (2010).
124 United States v Cruikshank, 92 US 542, 559 (1876); Presser v Illinois, 116 US 252, 265 (1886); Miller v Texas, 153 US 535, 538 (1894).
125 McDonald v City of Chicago, 130 S Ct 3020, 3034 (2010).
126 Spitzer, above n 9, 32–3.
127 The Court was not required to address this issue in Heller because the District of Columbia is a federal enclave, not a state, and is therefore bound by the Bill of Rights.
128 McDonald v City of Chicago, 130 S Ct 3020, 3036 (2010). In Washington v Glucksberg, 521 US 702, 721 (1997), the Supreme Court held that in order for a right to be incorporated under the Fourteenth Amendment Due Process Clause, it must be ‘deeply rooted in this Nation’s history and tradition.’
129 McDonald v City of Chicago, 130 S Ct 3020, 3042 (2010). In Duncan v Louisiana, 391 US 145, 149 (1968), it was held that in order to be incorporated, a right must be shown to be ‘fundamental to the American scheme of justice’.
130 McDonald v City of Chicago, 130 S Ct 3020, 3050 (2010).
131 Rostron, above n 122, 384.
133 Ibid 2818.
134 Ibid 2816.
Such laws were said to remain ‘presumptively lawful’. The Court assured that these measures were identified only as examples and that the list was not exhaustive. In addition, the Court recognised that the sorts of weapons protected by the Second Amendment are limited to those ‘in common use at the time’, and the protection does not extend to ‘dangerous and unusual weapons’. Further, the Court made clear that their analysis did not suggest the invalidity of all laws regulating the storage of firearms to prevent accidents, although the DC safe storage law, which required that weapons be rendered inoperable, was invalidated because it made it ‘impossible’ for citizens to use their lawfully owned firearms for self-defence. Thus, the Court implied that safe storage laws that do not make it ‘impossible’ to use firearms for self-defence would be constitutional.

The Court in McDonald reiterated that the right to bear arms is not absolute and may be subject to limitation by the state. Incorporation, they assured, ‘does not imperil every law regulating firearms’, nor does it cast doubt on the ‘longstanding regulatory measures’ identified as presumptively lawful in Heller. The McDonald majority went one step further, specifically allowing for the continuation of state and local experimentation with ‘reasonable firearms regulations’.

Due to the inclusion of what is popularly referred to as the ‘laundry list’ of presumptively lawful regulatory measures, critics have labelled Heller as a compromise, a paradox and a Catch-22. At the same time as declaring an individual right to keep and bear arms, the Heller court ‘suggested that nearly all gun control laws currently on the books are constitutionally permissible’, thereby minimising the decision’s impact. This has led many scholars to conclude that Heller will have relatively little effect on the constitutionality of existing gun laws. So far, the case law supports their conclusions. Since Heller, hundreds of challenges to a wide variety of gun control laws have been heard in lower courts, but the challenged laws have almost always survived.

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137 Ibid.
139 District of Columbia v Heller, 128 S Ct 2783, 2817 (2008).
140 Ibid 2820.
141 Ibid 2818.
142 McDonald v City of Chicago, 130 S Ct 3020, 3047 (2010).
143 Ibid.
144 Ibid 3046.
147 Winkler, above n 27, 1551–3.
148 Ibid 1561.
149 Rostron, above n 122, 394.
While the endorsement of an individual right interpretation may not have imperilled existing gun control laws, given the failure of existing laws to control guns in America, the more pressing question seems to be: what impact will these decisions have on the possibility of introducing stricter gun control? In order to answer that question it is first necessary to determine the appropriate test for assessing the constitutionality of US gun control laws.

F Standards of Scrutiny

As the Second Amendment right is not absolute, there will be instances where, although a governmental regulation infringes that right, it is nevertheless constitutional because the infringement is justified. In determining whether infringements of constitutional rights are justified, American courts have traditionally employed a doctrinal framework of fixed standards of review, where each right is protected by one of three standards — rationality review, intermediate scrutiny or strict scrutiny — each of which imposes a greater burden of justification on the government than the last.153 The Court in <em>Heller</em> and <em>McDonald</em> declined to specify the appropriate standard to be applied in Second Amendment cases. It is, however, possible to ascertain the appropriate standard based on the Court’s reasoning in these cases.

Rationality review, the lowest standard of scrutiny, is the minimal protection given to constitutional rights.154 Under this standard, if a particular law bears a ‘rational relationship’ to a ‘legitimate government purpose’ then it is constitutional.155 Whilst the Court in <em>Heller</em> declined to say exactly what standard of scrutiny should apply, they specifically dismissed rationality review, saying this test ‘could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right … [including] the right to keep and bear arms’.156 This is because if all that was required to overcome the right was a rational basis, ‘the Second Amendment would be redundant’.157 The <em>Heller</em> majority thus made clear that some form of heightened scrutiny should apply.

Strict scrutiny is the highest level of protection afforded to constitutional rights.158 Under this standard, a court will permit the restriction of a constitutional right only when the restriction is ‘narrowly tailored to achieve a compelling government interest’,159 meaning that the regulation must present the least restrictive alternative available.160 Some scholars and courts have advocated for the adoption of strict scrutiny as the standard to be applied to the Second Amendment right, arguing that, as the right is fundamental, courts ought to afford it that level of scrutiny.161 However, as Stephen Kiehl explains, strict scrutiny is too stringent a level of review for gun regulations for three important reasons.162

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154 Perkins, above n 150, 1075.
155 <em>Heller v Doe</em>, 509 US 312, 320 (1993). The ‘legitimate government purpose’ need not even be the actual purpose that the government had in mind when enacting the statute, as long as it is plausible that the law could achieve any legitimate government purpose then the law will be constitutional: United States Railroad Retirement Board v Fritz, 449 US 166, 179 (1980).
157 Ibid.
158 Perkins, above n 150, 1076.
161 See, for example, Hatt, above n 108, 520–1; United States v Montalvo, 581 F 3d 1147 (9th Cir, 2009); United States v Engstrom, 609 F Supp 2d 1227, 1231 (D Utah, 2009).
162 Kiehl, above n 152, 1156.
Firstly, as previously explained, *Heller* and *McDonald* recognised a host of presumptively lawful gun regulations, which courts and scholars agree would likely fail a strict scrutiny test.\(^{163}\) While such laws do serve the compelling government interests of reducing crime and protecting public safety, they would not satisfy the strict scrutiny requirement for narrow tailoring.\(^{164}\) By recognising this list of presumptively lawful gun regulations, the Supreme Court in *Heller* thus implicitly rejected strict scrutiny.\(^{165}\) Secondly, the Second Amendment is more similar in its nature and language to those rights that receive intermediate scrutiny than it is to those that receive strict scrutiny.\(^{166}\) Significantly, the Second Amendment lacks the absolute language of the First,\(^{167}\) which begins ‘Congress shall make no law’.\(^{168}\) The language of the Second Amendment, by contrast, suggests space for some restrictions.\(^{169}\) Thirdly, the Court in *McDonald* endorsed the continuation of ‘state and local experimentation with reasonable firearms regulations’.\(^{170}\) Such a statement presupposes a more flexible standard of review than strict scrutiny.\(^{171}\) Therefore, it is apparent that strict scrutiny is not the appropriate standard of review for gun control laws.

The appropriate standard is intermediate scrutiny, which falls between rationality review and strict scrutiny, requiring that a law be ‘substantially related’ to an ‘important government interest’.\(^{172}\) A law will satisfy this test provided it is ‘not substantially broader than necessary to achieve the government’s interest’.\(^{173}\) This standard is appropriate because while it provides a heightened level of review, requiring more than just a rational basis to justify a particular law, intermediate scrutiny does not imperil the presumptively lawful regulations identified in *Heller*.\(^{174}\) Further, intermediate scrutiny provides a more flexible standard of review, which allows for the continued experimentation with reasonable gun regulations endorsed in *McDonald*.\(^{175}\) It is concluded, therefore, that although the Supreme Court declined to explicitly allocate a standard of review for evaluating gun regulations, based on the Court’s reasoning, it is evident that the correct standard is intermediate scrutiny.

V  INTRODUCING AUSTRALIAN-STYLE GUN CONTROL IN THE UNITED STATES

A  A Framework for Evaluating the Constitutionality of Gun Control Laws post-*Heller* and *McDonald*

This Chapter will propose a two-step inquiry for evaluating the constitutionality of gun control laws under the Second Amendment and then apply that inquiry to the laws introduced in Australia under the NFA in order to determine whether such laws could be introduced in the US following the Supreme Court’s decisions in *Heller* and *McDonald*. The first step of

\(^{163}\) *District of Columbia v Heller*, 128 S Ct 2783, 2851 (2008) (Breyer J dissenting); *United States v Skoien*, 587 F 3d 803, 811 (7th Cir, 2009); *United States v Mazzarella*, 614 F 3d 85 (3rd Cir, 2010); Henigan, above n 146, 1198; Kiehl, above n 152, 1156.

\(^{164}\) Kiehl, above n 152, 1157.

\(^{165}\) Kiehl, above n 146, 1198.

\(^{166}\) Kiehl, above n 152, 1158. Only the First and Fifth Amendments receive strict scrutiny.

\(^{167}\) Ibid 1159.

\(^{168}\) *United States Constitution* amend I.

\(^{169}\) Kiehl, above n 152, 1158.

\(^{170}\) *McDonald v City of Chicago*, 130 S Ct 3020, 3046 (2010).

\(^{171}\) Kiehl, above n 152, 1159.

\(^{172}\) *Craig v Boren*, 429 US 190, 197 (1976).


\(^{174}\) Kiehl, above n 152, 1160.

\(^{175}\) Ibid 1162.
the inquiry is to determine whether the relevant gun control law would infringe the right to keep and bear arms. The question to be asked is: does the law burden conduct within the scope of the Second Amendment?\textsuperscript{176} If the law burdens conduct beyond the scope of the Second Amendment, then it is constitutional. If, however, the regulation burdens conduct within the scope of the Second Amendment, the second step is to determine whether the infringement is nonetheless justified.\textsuperscript{177} As explained in Chapter III, the appropriate standard of scrutiny to be applied in making this determination is intermediate scrutiny. If the law passes an intermediate scrutiny test, then it is constitutional. If, however, the law fails, it is unconstitutional and therefore could not be introduced in the US.

B Applying the Framework to Australian-Style Gun Control Laws

1 Prohibitions on Automatic and Semi-Automatic Long Arms

The US federal government already prohibits automatic weapons manufactured after 1986.\textsuperscript{178} A law extending this ban to apply to all automatic weapons regardless of manufacture date would certainly be constitutional because it passes the first step of the inquiry. The Court in \textit{Heller} made clear that such weapons were beyond the scope of Second Amendment protection when they said that Second Amendment protection is limited to those weapons ‘in common use at the time’ and does not extend to ‘dangerous and unusual weapons’.\textsuperscript{179} Thus, the law would not infringe the Second Amendment and would, therefore, be constitutional.

The situation regarding semi-automatic weapons is more complicated. Such weapons, though undoubtedly dangerous, are not unusual. Semi-automatic firearms account for about 15\% of the 250+ million privately owned firearms in the US.\textsuperscript{180} A ban on semi-automatic weapons would, therefore, infringe the individual right to keep and bear arms because it would prohibit individuals from accessing an entire class of weapons currently in common use, thereby burdening conduct within the scope of the Second Amendment.

Such a ban would still likely be constitutional, however, as it would pass an intermediate scrutiny test. The important government interests to be served by this ban are preventing crime and promoting public safety. Semi-automatic weapons, having been designed for rapid fire, are extremely dangerous and often used in the perpetration of violent crimes,\textsuperscript{181} and mass shootings in particular.\textsuperscript{182} While social science is not conclusive on whether there is a link between semi-automatic firearms bans and crime rates, courts do not require lawmakers to have overwhelming proof before they act. They will look to available data to assess the legislature’s judgment.\textsuperscript{183} Trace data collected during the 10 years that the Assault Weapons Ban was in place demonstrated a reduced incidence of assault weapons used in crime, with a

\begin{thebibliography}{99}
\bibitem{176} Rosenthal and Winkler, above n 151, 227.
\bibitem{177} Gardbaum, above n 153, 388.
\bibitem{178} 18 USC § 922(o).
\bibitem{179} \textit{District of Columbia v Heller}, 128 S Ct 2783, 2817 (2008).
\bibitem{181} Perkins, above n 150, 1091.
\bibitem{183} Rosenthal and Winkler, above n 151, 230.
\end{thebibliography}
66% drop in gun crime traces to the weapons banned by the law, as well as a year-by-year and absolute decline in the number of assault weapons traced to crime overall.\(^\text{184}\) Thus there is reliable evidence that banning particular types of weapons reduces the availability of these guns for criminal misuse, thereby preventing crime involving that type of weapon and consequently enhancing public safety. A ban on semi-automatic weapons is therefore substantially related to important government interests and for that reason it is constitutional.

2 \textit{Owner Licensing and Firearms Registration Requirements}

The implementation of a firearm licensing system in the US would not in and of itself be unconstitutional. However, the licensing system may be unconstitutional if its conditions amount to an unjustifiable infringement on the right to keep and bear arms. The Australian system had four key conditions that require analysis.

Firstly, the requirement that applicants demonstrate a ‘genuine reason’, excluding personal protection, for owning, possessing or using a firearm, would undoubtedly be unconstitutional. That is because the imposition of such a condition would prohibit many individuals from keeping and bearing firearms and would, therefore, burden conduct within the scope of the Second Amendment. Further, this requirement is unlikely to pass an intermediate scrutiny test because, while it is undoubtedly intended to serve the important government interests of preventing crime and enhancing public safety, an American court would likely find that because the regulation prohibits law abiding citizens from possessing firearms, it is ‘substantially broader than necessary to achieve the government’s interest’.\(^\text{185}\) In addition, the Court in \textit{Heller} unequivocally stated that the inherent right of self-defence is central to the Second Amendment right, and therefore a law that holds that self-defence is not a ‘genuine reason’ to own, possess or use a firearm would certainly be unconstitutional.\(^\text{186}\)

Secondly, as regards the grounds for licence refusal/cancellation, these conditions do infringe the right to keep and bear arms because they prohibit certain individuals from keeping and bearing firearms. However, most of the grounds would pass an intermediate scrutiny test. The important government interests to be served are preventing crime and enhancing public safety. There is little doubt that preventing high-risk individuals from accessing firearms is substantially related to these important government interests. Indeed, the US federal government already prohibits access to firearms by many such individuals,\(^\text{187}\) and the \textit{Heller} Court guaranteed that their decision was not to cast doubt on these longstanding prohibitions.\(^\text{188}\) Thus, the inclusion of ‘specific reasons’ and reasons of mental and physical unfitness as grounds for license refusal/cancellation would likely be constitutional. However, the inclusion of ‘general reasons’ would likely be unconstitutional because reasons such as ‘not of good character’ and ‘not in the public interest’ are likely to be found ‘broader than necessary to achieve the government’s interest’.\(^\text{189}\)

\(^\text{187}\) 18 USC § 922(d).
Thirdly, the imposition of a requirement to complete a mandatory safety training course as a prerequisite to obtaining a licence would be constitutional, as it does not infringe the Second Amendment right. The safety training requirement does not prevent individuals from purchasing, using or owning firearms and arguably enhances a citizen’s Second Amendment right because it ensures they are adequately trained in how to safely exercise that right.

Finally, the requirement that all firearms and licences be registered on a national register would undoubtedly be constitutional. This requirement does not burden conduct within the scope of the Second Amendment because it in no way prevents individuals from exercising their right to keep and bear arms. ‘Registration does not restrict an individual from owning a firearm or from using it in the manner he wishes’, 190 it simply makes registration a precondition in order for him or her to do so.

3 Safe Storage Requirements

Australian-style safe storage requirements would burden conduct within the scope of the Second Amendment because such laws make it more difficult for individuals to use their lawfully owned firearms for self-defensive purposes. However, the Court in Heller made clear that their analysis did not suggest the invalidity of all laws regulating the storage of firearms, 191 thus opening up the possibility that contemporary safe storage laws might constitutionally burden the Second Amendment right. 192

If subjected to an intermediate scrutiny test, Australian-style safe storage laws would likely be found to be constitutional. The purpose of safe storage laws is to prevent accidental weapons discharges, particularly amongst children, and also to prevent deliberate but rash weapons use. 193 These are undoubtedly important government interests. Once again, social science is not conclusive on whether there is a link between the implementation of these kinds of laws and the achievement of their objective. Some critics argue that there is no evidence that safe-storage laws reduce either juvenile accidental gun deaths or suicide, and that these laws simply impair people’s ability to use guns defensively. 194 However, a vast number of studies have demonstrated that safe storage laws significantly reduce accidental gun deaths among children, 195 as well as unintentional firearm injuries and suicides. 196 Thus, there is sufficient evidence to show that safe storage laws are related to these important government interests.

190 Perkins, above n 150, 1092.
192 Tushnet, above n 150, 1438.
193 Ibid.
In contrast to the DC safe storage law struck down in *Heller*, Australian-style safe storage laws would pass the ‘substantially related’ hurdle because, unlike the DC law, which required firearms to be rendered and kept inoperable, Australian-style laws would not make it impossible for individuals to use their lawfully owned firearms for self-defensive purposes, as citizens could still retrieve firearms and render them useful for self-defence. The Australian-style laws are therefore ‘not substantially broader than necessary to achieve the government’s interest’.

4  **Firearm Dealer and Sales Regulations**

Finally, Australian-style regulations of firearm dealers and sales would also be constitutional if introduced in the US. Such regulations do not infringe the individual right to keep and bear arms because they burden conduct beyond the scope of the Second Amendment. Restricting authority to sell firearms to licensed dealers does not prevent individuals from keeping or bearing arms. Similarly, restricting mail order sales to licensed dealers does not prevent individuals from purchasing firearms in person. Further, requiring firearm dealers to record sales and check licences does not even impact upon the individual right to keep and bear arms, as these are simply conditions on the commercial sale of arms. The court in *Heller* explicitly said ‘nothing in our opinion should be taken to cast doubt on … laws imposing conditions and qualifications on the commercial sale of arms’. Thus all of these regulations would pass the first step of the inquiry.

C  **A Note on State Constitutions**

This analysis has focused on the relationship between gun control laws and the federal constitution. However, all American states also have a state constitution, and 42 of 50 states have a constitutional provision guaranteeing an individual right to bear arms. The above analysis is not undermined by the existence of these state-level constitutional guarantees because any law that passed the above inquiry would also be upheld at state level. That is because no state court applies strict or even intermediate scrutiny when they assess the constitutionality of gun control laws. Instead they apply a lower standard, known as the reasonable regulation test. Any law that meets an intermediate scrutiny test would easily meet this standard as well.

VI  **Conclusion**

What this analysis reveals is that the Second Amendment to the US Constitution, as interpreted in the cases of *Heller* and *McDonald*, does not prevent the US from adopting a successful gun control regime such as Australia’s. In Chapter IV it was demonstrated that a

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197 DC Code Ann § 7-2507.02 (2008).
201 Ibid.
202 Under this test, a court asks whether the challenged law is a reasonable method of regulating the right to bear arms. So long as a law does not render the right nugatory, it will be considered reasonable and therefore constitutional: Ibid.
vast majority of the types of regulations introduced in Australia under the NFA would be constitutional if introduced in the US. The examination revealed that the US could ban automatic and semi-automatic weapons, introduce a licensing and registration system mandating safety training and prohibiting high risk individuals from accessing firearms, tighten safe storage laws, ensure only licensed dealers are entitled to sell firearms, and strengthen firearm dealer and sales regulations, all without violating the Second Amendment. This is because even after the endorsement of an individual right interpretation in *Heller* and *McDonald*, the Second Amendment does not prevent the introduction of gun control laws that are substantially related to important government interests, such as preventing crime and enhancing public safety, as are the vast majority of Australian gun control laws.

In light of the proven effectiveness of Australian gun control laws in reducing gun violence in Australia and the failure of the current American gun control regime to control gun violence in the US, America should seriously consider introducing Australian-style gun control. President Obama has demonstrated that he has the will to introduce stricter gun control in the US. It remains for him to find a way to overcome the powerful and well-funded gun lobby and steer the changes through a hostile Senate and House of Representatives. The Second Amendment, however, does not stand in his way.
## Legislation | Key Provisions
--- | ---
National Firearms Act of 1934 (PL 73-474; 48 Stat. 1236) | – Imposed a tax on the making and transfer of NFA firearms  
– Imposed a tax on persons and entities engaged in the business of importing, manufacturing, and dealing in NFA firearms  
– Required registration of all NFA firearms with the Secretary of the Treasury  
NB NFA firearms included shotguns and rifles having barrels less than 18 inches in length, certain firearms described as “any other weapons”, machine guns, and firearm mufflers and silencers  

The Gun Control Act of 1968 (PL 90-618; 18 Stat. 1226) | – Banned the sale of guns to certain ‘prohibited persons,’ including: minors; drug addicts; convicted felons; and the mentally ill  
– Banned interstate sales of firearms and ammunition to private individuals  
– Strengthened dealer licensing and record-keeping requirements  
– Mandated that all guns be affixed with a serial number  
– Banned the importation of military surplus firearms with no ‘sporting purpose’

The Firearms Owners Protection Act of 1986 (PL 99-360; 100 Stat. 449) (McClure-Volkmer Act) | Amended the Gun Control Act by:  
– Loosening dealer licensing requirements  
– Legalising gun sales by licensed dealers at gun shows  
– Eliminating record-keeping requirements for ammunition dealers  
– Lifting the ban on the interstate sale of long guns  
Also:  
– Limited the number of unannounced ATF gun dealer inspections to one per year  
– Prohibited the federal government from maintaining a centralised database of gun dealer records  
– Banned future transfer and possession of fully automatic machine guns

The Brady Handgun Violence Prevention Act of 1993 (PL 103-159; 107 Stat. 1536) (Brady Act) | – Mandated background checks for all firearm purchases from a licensed dealer  
– Imposed a 5-day waiting period for handgun purchases (replaced in 1998 with the National Instant-Check System)

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This table is based on a similar table published in Spitzer, above n 9, 168–9, with the addition of the National Firearms Act of 1934,  
<table>
<thead>
<tr>
<th>Legislation</th>
<th>Actions</th>
</tr>
</thead>
</table>
| The Violent Crime Control and Law Enforcement Act of 1994 (Title XI; PL 103-322; 108 Stat. 1796) (Assault Weapons Ban) (Expired September 2004) | - Prohibited (for 10 years) the future manufacture, transfer and possession of 19 specified types of semi-automatic assault weapons and copies of these weapons (more than 661 sporting rifles and all existing assault weapons exempted)  
- Prohibited (for 10 years) the future transfer and possession of large capacity ammunition magazines, capable of holding more than 10 bullets |
| The Protection of Lawful Commerce in Arms Act of 2005 (PL 109-92; 119 Stat. 2095) | - Banned civil law suits against manufacturers/dealers/importers of firearms/ammunition (with certain exceptions)  
- Required handguns be sold with a secure gun storage or safety device  
- Banned the manufacture or importation of armour piercing bullets |
### Appendix B – Federal and State Gun Control Areas

<table>
<thead>
<tr>
<th>Gun Control Area</th>
<th>Federal regulation</th>
<th>States with regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CLASSES OF WEAPONS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault weapons</td>
<td>Expired 2004</td>
<td>7 states ban assault weapons (CA, CT, MA, NJ, NY; HI &amp; MD ban assault pistols); 3 states regulate assault weapons (MD, MN, VA); D.C. bans assault weapons indirectly</td>
</tr>
<tr>
<td>Large capacity ammunition magazines</td>
<td>Expired 2004</td>
<td>6 states ban large capacity ammunition magazines (CA, HI, MD, MA, NJ, NY)</td>
</tr>
<tr>
<td>Fifty caliber rifles</td>
<td>No</td>
<td>California bans 50 caliber rifles; Connecticut bans one model of 50 caliber rifle; Maryland regulates one model of 50 caliber rifle</td>
</tr>
<tr>
<td>Handguns</td>
<td>No</td>
<td>No state bans handguns since <em>DC v Heller</em></td>
</tr>
<tr>
<td>Non-powder guns</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ammunition regulation</td>
<td>Limited</td>
<td>19 states regulate use or possession (CA, CO, CT, DE, FL, IL, MA, MI, MN, MS, MO, NV, NH, NJ, NY, NC, ND, OK, OR, PA, RI, SC, SD, TN, TC, UT, VT, VA, WA, WI)</td>
</tr>
<tr>
<td>Ammunition regulation</td>
<td>Limited</td>
<td>41 states and D.C. regulate ammunition (AL, AK, AZ, CA, CT, DE, FL, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, NV, NH, NJ, NY, NC, ND, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WI)</td>
</tr>
<tr>
<td><strong>SALES AND TRANSFERS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prohibited purchasers</td>
<td>Yes</td>
<td>49 States and D.C. (Vermont is the only state without prohibited purchaser laws)</td>
</tr>
<tr>
<td>Minimum age to purchase and possess firearms</td>
<td>Yes</td>
<td>37 states and D.C. stricter than the federal law (AK, AZ, AR, CA, CT, DE, FL, HI, ID, IL, IN, IA, LA, ME, MD, MA, MI, MN, MS, MO, MT, NV, NJ, NY, ND, OH, OK, OR, PA, RI, SC, TX, UT, VT, WA, WI)</td>
</tr>
<tr>
<td>Domestic violence and firearms</td>
<td>Yes</td>
<td>35 states and D.C. stricter than federal law (AK, AZ, CA, CO, CT, DE, FL, HI, IL, IN, IA, MD, MA, MI, MN, MT, NE, NV, NH, NJ, NY, NC, ND, OH, OK, PA, RI, SD, TN, TX, UT, VA, WA, WV, WI)</td>
</tr>
</tbody>
</table>

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This table is primarily based on a similar table that was published as an appendix to: Legal Community Against Violence, ‘Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws’ (Report No 2, Legal Community Against Violence, 1 February 2008) 258–64 <http://smartgunlaws.org/regulating-guns-in-america-an-evaluation-and-comparative-analysis-of-federal-state-and-selected-local-gun-laws/>. The original table has been updated here to take account of recent developments in federal, state and local gun control laws since the LCAV report publication in 2008 and an additional category of ‘open carry’ has been added.
<table>
<thead>
<tr>
<th><strong>Background checks</strong></th>
<th>Yes</th>
<th>49 states and D.C. (Vermont is the only state without laws requiring background checks)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mental health reporting</strong></td>
<td>Limited</td>
<td>14 states authorise or require reporting to NICS (AL, CO, CT, FL, GA, IL, IA, KS, ME, MI, MO, VA, WA, WI)</td>
</tr>
<tr>
<td><strong>Waiting Periods</strong></td>
<td>No</td>
<td>12 states and DC impose waiting period on purchases of some or all firearms (CA, CT, FL, HI, IL, IA, MD, MN, NJ, RI, SD, WI)</td>
</tr>
<tr>
<td><strong>Restrictions on multiple purchases or sales of firearms</strong></td>
<td>No</td>
<td>2 states limit handgun purchases to one per person per month (CA, VA); Maryland limits purchases of handguns and assault weapons to one per person per month</td>
</tr>
</tbody>
</table>

**GUN DEALERS AND OTHER SELLERS**

<table>
<thead>
<tr>
<th><strong>Dealer regulations</strong></th>
<th>Yes</th>
<th>28 states and D.C. license and/or regulate firearms dealers (AL, CA, CT, DE, FL, GA, HI, IN, ME, MD, MA, MI, MN, NH, NJ, NY, NC, OH, OR, PA, RI, SC, TX, VA, WA, WV, WI)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Private Sales</strong></td>
<td>No</td>
<td>2 states and D.C. require universal background checks for all firearm transfers (CA, RI); 3 states require universal background checks for transfers of some firearms (MD – handguns and assault weapons, CT, PA – handguns); 5 states require background checks for all firearm transfers at gun shows CO, CT, IL, NY, OR)</td>
</tr>
<tr>
<td><strong>Gun shows</strong></td>
<td>No</td>
<td>8 states regulate gun shows (CA, CO, CT, IL, MD, NY, OR, VA)</td>
</tr>
</tbody>
</table>

**GUN OWNERSHIP**

<table>
<thead>
<tr>
<th><strong>Licensing of gun owners or purchasers</strong></th>
<th>No</th>
<th>4 states require a license or permit for purchasers or owners of all firearms (HI, IL, MA, NJ); 7 states require a license or permit for handguns only (CA, CT, IA, MI, NY, NC, RI)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Registration of firearms</strong></td>
<td>Limited</td>
<td>Hawaii and D.C. require registration of all firearms; California requires registration of pre-ban assault weapons and 50 caliber rifles; 4 states require registration of pre-ban assault weapons (CT, HI, MD, NJ); Louisiana registers certain other firearms; 9 states prohibit registration of some or all firearms (CA, DE, FL, GA, ID, PA, RI, SD, VT)</td>
</tr>
<tr>
<td><strong>Reporting lost or stolen firearms</strong></td>
<td>Federally licensed firearm dealers only</td>
<td>7 states and D.C. require firearm owners to report lost or stolen firearms (CT, MA, MI, NJ, NY, OH, RI)</td>
</tr>
<tr>
<td><strong>Open carry</strong></td>
<td>No</td>
<td>3 states and D.C. do not allow open carry of handguns in public places (FL, IL, TX); 3 states do not allow open carry of long guns in public places (FL, MA, MN); 5 states prohibit open carry of loaded long guns (CA, IA, WI)</td>
</tr>
<tr>
<td>Carrying concealed weapons</td>
<td>Yes</td>
<td></td>
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<tr>
<td>----------------------------</td>
<td>-----</td>
<td></td>
</tr>
<tr>
<td>2 states do not allow carrying concealed weapons (IL, WI); 34 states are “shall issue” (AR, CO, FL, GA, IA, ID, IN, KS, KY, LA, ME, MI, MN, MS, MO, MT, NE, NV, NH, NM, NC, OH, OK, OR, PA, SC, SD, TN, TX, UT, VA, WA, WV); 11 states and D.C. are “may issue” (SL, CA, CT, DE, HI, MD, MA, NJ, NY, RI, WY); 3 states do not require a permit to carry (AZ, AK, VT)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**CONSUMER AND CHILD SAFETY**

<table>
<thead>
<tr>
<th>Design safety standards for handguns</th>
<th>Imported firearms only</th>
<th>8 states (CA, HI, IL, MD, MA, MN, NY, SC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Locking devices</td>
<td>Yes</td>
<td>11 states and D.C. (CA, CT, IL, MD, MA, MI, NJ, NY, OH, PA, RI)</td>
</tr>
<tr>
<td>Personalised firearms</td>
<td>No</td>
<td>2 states (MD, NJ)</td>
</tr>
<tr>
<td>Child access prevention</td>
<td>No</td>
<td>27 states and D.C. (CA, CO, CT, DE, FL, GA, HI, IL, IN, IA, KY, MD, MA, MN, MS, MO, NV, NH, NJ, NC, OK, RI, TN, TX, UT, VA, WI)</td>
</tr>
</tbody>
</table>

**CRIME DETECTION**

<table>
<thead>
<tr>
<th>Ballistic identification</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA requires handgun microstamping; 3 states use ballistic imaging (CT, MD, NY)</td>
<td></td>
</tr>
<tr>
<td>Retention of firearms sales and background check records</td>
<td>Yes</td>
</tr>
<tr>
<td>21 states and D.C. require sellers to retain sale records (AL, CA, CO, CT, DE, GA, IL, ME, MD, MA, MI, MS, NJ, NY, NC, OR, PA, RI, TN, VT, WA); 10 states retain seller-reported sales information (AL, CA, CT, MD, MA, MI, NJ, NY, PA, WA); 9 states are required to purge background check records (DE, FL, NE, NH, RI, TN, UT, VA, WI)</td>
<td></td>
</tr>
</tbody>
</table>
A SOMETIMES DANGEROUS CONVERGENCE: REFUGEE LAW, HUMAN RIGHTS LAW AND THE MEANING OF ‘EFFECTIVE PROTECTION’

KATE OGG*

In late 2011 the High Court of Australia and the European Court of Justice made rulings on the conditions under which asylum seekers can be transferred to a third country. The High Court of Australia held that asylum seekers cannot be transferred unless they will be protected from persecution and be entitled to all of the rights outlined in the Refugee Convention. However, four months later the European Court of Justice set the threshold much lower. It ruled that a transfer could occur unless the asylum seeker would be subject to persecution or inhuman or degrading treatment. These sharply contrasting decisions raise wider issues for refugee protection especially in light of the desire for a harmonious interpretation of the Refugee Convention. Such a result is also surprising given the proliferation of human rights instruments and jurisprudence in the European Union, compared to Australia’s lack of a national human rights framework. This article will use these cases to demonstrate that, while some courts have drawn on principles of human rights law to progressively interpret the Refugee Convention, the nature of protection in the Refugee Convention is both distinct from and beyond the preservation of fundamental human rights. Accordingly, reference to principles of human rights law in transfer decisions can have the counter-productive effect of lowering the threshold for ‘effective protection’. This raises the need for critical examination of the boundaries of human rights and refugee law and consideration of the extent to which they should remain distinct bodies of law.

I INTRODUCTION

Increasingly, states in the Global North have entered into inter-governmental agreements by which asylum seekers can be transferred to third countries to have their asylum claim processed. For example, on 19 July 2013, then Prime Minister of Australia Kevin Rudd announced and brought into effect the Regional Resettlement Arrangement between Australia and Papua New Guinea (PNG Resettlement Arrangement).¹ Pursuant to the PNG Resettlement Arrangement, asylum seekers who arrive in Australia by boat and without a visa will be sent to Papua New Guinea’s Manus Island for processing and, if found to be refugees, resettled elsewhere. The current Prime Minister, Tony Abbott, has indicated that his government will continue to conduct offshore processing on Manus Island. The 1951 UN

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¹ Article 3 of the PNG Resettlement Arrangement provides that it will commence on the day of announcement.
Convention on the Status of Refugees and its 1967 Protocol (Refugee Convention)² is silent as to whether asylum seekers can be transferred to third countries. Nevertheless, the accepted position is that such a transfer can take place as long as the asylum seekers receive ‘effective protection’ in the third country.³ However, what amounts to ‘effective protection’ remains unsettled. With a High Court challenge to the PNG Resettlement Arrangement on foot, it is timely to consider recent jurisprudence related to the concept of ‘effective protection’.

This article will first outline the nature of protection provided by the Refugee Convention. It will then discuss the practice of transferring asylum seekers to third countries pursuant to intergovernmental agreements and the debates this has triggered about the meaning of ‘effective protection’. This will lead to a discussion of how the concept of ‘effective protection’ was approached by the High Court of Australia in Plaintiff M70/2011⁴ and the European Court of Justice in NS (C 411/10).⁵ This article will demonstrate that the High Court of Australia’s decision was a high water mark for refugee protection: it provided that asylum seekers cannot be transferred to a third country unless they will be protected from persecution and be entitled to all the rights outlined in the Refugee Convention. However, the the European Court of Justice set the threshold for ‘effective protection’ much lower four months later. It drew on article 4 of the Charter of Fundamental Rights of the European Union (Charter) to rule that a transfer could occur unless the asylum seeker would be subject to persecution or inhuman or degrading treatment.

The sharp contrast between the above rulings raises wider issues for refugee protection. This is especially so in light of the desire for a harmonious approach to the interpretation of the Refugee Convention.⁶ Such a result is also surprising when taking into account the proliferation of human rights instruments and jurisprudence in the European Union compared to Australia’s lack of a national human rights framework. Principles of human rights law have been used to progressively interpret the Refugee Convention and this convergence of refugee and human rights law has been welcomed by refugee law scholars.⁷ However, there has been little critical examination of the boundaries of refugee law and human rights law, and the extent to which they need to remain distinct bodies of law. This article will draw on the above cases to demonstrate that, while principles of human rights law have in some instances been used to advance refugee law, the nature of protection in the Refugee

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⁵ NS (C 411/10) v Secretary of State for the Home Department and ME (C 493/10) and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform European Union: European Court of Justice, 21 December 2011 (‘NS (C 411/10)’).
Constitution is both distinct from and beyond the preservation of fundamental human rights. Accordingly, reference to principles of human rights law in transfer decisions can have the counter-productive effect of lowering the threshold for refugee protection.

II THE REFUGEE CONVENTION AND REFUGEE PROTECTION

Pursuant to the Refugee Convention, a refugee is a person who has a ‘well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.’

There is considerable judicial authority and academic discussion on the meaning and parameters of this definition. Much of this debate and discussion is outside the scope of this article, which is concerned with the protection owed to asylum seekers and refugees.

Nevertheless, there are two aspects of this definition that are relevant to the concept of refugee protection. Those are that the refugee is outside his or her country of nationality and, due to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country. These two aspects of refugeehood indicate that the relationship between the refugee and their country of nationality has been severed. This has very significant implications in the nation-state system. In the nation-state system, it is the state that protects and provides fundamental human rights. Most international human rights instruments provide that such rights apply to those within a state’s territory and subject to its jurisdiction. However, in reality, the full benefit of human rights is often only realised by citizens or those with some form of permanent residence status. This goes to the heart of the tension between refugee and human rights law. While human rights law is premised on the assumption that rights flow from the mere fact of being human, in refugee law rights accrue from a legally recognised status. In other words, ‘what international refugee law seems to say is: yes, the rights of the person matter, but recognition of a delimited status counts for much more.’

Accordingly, when the relationship between state and citizen has been severed, as is the case with refugees, ‘surrogate’ state protection needs to be provided by other states.

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8 Refugee Convention art 1A(2).
10 Andrew Shacknove, ‘Who is a Refugee’ (1985) 95(2) Ethics 274, 275.
14 Ibid 75.
surrogate protection allows the refugee ‘a taste of the substance of citizenship.’\textsuperscript{16} The Refugee Convention seeks to achieve this by obligating the host country to provide certain rights and freedoms to refugees. Indeed, it is the protection of these rights that is at the heart of the Refugee Convention. The preamble to the Refugee Convention affirms the ‘principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ and that refugees should be assured ‘the widest possible exercise of these fundamental freedoms.’ The Refugee Convention contains 37 substantive provisions and 32 of these outline obligations that signatory states owe to asylum seekers and refugees.\textsuperscript{17} They include, for example, the freedom to practice religion and the religious education of children,\textsuperscript{18} property rights,\textsuperscript{19} the right of association,\textsuperscript{20} housing,\textsuperscript{21} and freedom of movement.\textsuperscript{22}

These rights accrue to asylum seekers and refugees at different times depending on their level of connection with the host country. The first tranche of rights applies to those who are merely in the territory of the host country. This means that they apply to both asylum seekers whose claims for asylum have not yet been determined and those who have been recognised as refugees by the host state.\textsuperscript{23} These rights include the right to public education\textsuperscript{24} and access to the courts.\textsuperscript{25} The second tranche of rights accrues when refugees are lawfully present in the host state.\textsuperscript{26} This includes the right to self-employment.\textsuperscript{27} The last tranche of rights accrues when refugees are lawfully staying in the host state’s territory.\textsuperscript{28} This includes the right to wage earning employment.\textsuperscript{29}

Included in these three tranches of rights is the principal of non-refoulement which is outlined in article 33 of the Refugee Convention. Article 33 provides that refugees cannot be returned to a place where their ‘life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion’. Importantly, the principle of non-refoulement applies to both recognised refugees and also to asylum seekers whose status is yet to be determined.\textsuperscript{30} Non-refoulement has been described by the United Nations High Commissioner for Refugees (UNHCR) as ‘the cornerstone of asylum and international refugee law’.\textsuperscript{31} Indeed, without the principle of non-refoulement the refugee regime would be ineffectual because states would not be restrained from returning asylum seekers and refugees to a place of persecution. Accordingly, states signatory to the Refugee Convention cannot make any reservations in relation to article 33.\textsuperscript{32}

\textsuperscript{16} Harvey, above n 13, 72.
\textsuperscript{17} Refugee Convention arts 3–8 and 10–34.
\textsuperscript{18} Ibid art 4.
\textsuperscript{19} Ibid arts 13 and 14.
\textsuperscript{20} Ibid art 15.
\textsuperscript{21} Ibid art 21.
\textsuperscript{22} Ibid art 26.
\textsuperscript{23} Hathaway, above n 15.
\textsuperscript{24} Refugee Convention art 22.
\textsuperscript{25} Ibid art 16.
\textsuperscript{26} Hathaway, above n 15.
\textsuperscript{27} Refugee Convention art 18.
\textsuperscript{28} Hathaway, above n 15.
\textsuperscript{29} Refugee Convention art 17.
\textsuperscript{30} Hathaway, above n 15.
\textsuperscript{31} UNHCR, UNHCR Note on the Principle of Non-refoulement (November 1997) <http://www.refworld.org/docid/438c6d972.html>.
\textsuperscript{32} Refugee Convention art 42(1).
Refugee-receiving states in the Global North have increasingly become concerned with what is considered to be an overwhelming number of asylum seekers reaching their shores. A related concern is ‘forum shopping’: states are of the view that on the journey to their final destination asylum seekers may have passed through countries in which they could have enjoyed protection. One way that states have sought to address these concerns has been through intergovernmental agreements by which asylum seekers can be transferred to third countries to have their asylum claims processed. Gregor Noll has argued that through such intergovernmental agreements, ‘liberal democracies have afforded themselves the lethal luxury of a maritime Berlin wall.’

An example of such an agreement is the Dublin Regulation, adopted by European Union member states in 2003 and recast in 2013. The Dublin Regulation determines the state that has responsibility for hearing an asylum seeker’s application and includes provisions for the transfer of an asylum seeker to that state.

More recently, in 2011 the Australian Government entered into an agreement (Malaysia Agreement) with Malaysia by which up to 800 asylum seekers in Australian territory would be sent to Malaysia. Once in Malaysia, the UNHCR would carry out an assessment of the asylum seekers’ protection claims. That agreement was rendered inoperable as a result of the High Court of Australia’s decision in Plaintiff M70/2011. However, after legal subsequent reforms, the Australian Government set up asylum centres in Nauru and Papua New Guinea and, very recently, entered into the PNG Resettlement Arrangement.

The Refugee Convention does not specifically address the transfer of asylum seekers to third countries. In fact, the Refugee Convention does not address any procedural aspect of refugee status determination. Accordingly, the Refugee Convention neither explicitly prohibits nor condones this practice. States have tried to justify such transfers on the concepts of burden sharing and international co-operation in the Refugee Convention’s preamble. This article is, however, not concerned with the legitimacy of transfers to third countries (this issue has been debated elsewhere) but rather the conditions that must be present in the third country before such a transfer can occur.

37 Foster, above n 35; Michigan Guidelines, above n 3, [1].
39 Hathaway, above n 15, 663–4.
Foster, above n 35, 230–237.
In relation to the conditions that must be present in the third country, states have accepted that asylum seekers cannot be transferred to a third country where they will be at risk of refoulement.\textsuperscript{40} This includes situations where the asylum seekers would be at risk of persecution in the third country as well as \textit{chain-refoulement} (where the third country is likely to return the asylum seeker to a place of persecution).\textsuperscript{31} However, the unsettled and contested question is what other conditions must be present in the third country.\textsuperscript{42} The UNHCR has suggested that transfers to a third country can only be permitted if the asylum seeker and/or refugee can enjoy ‘effective protection’ in that country.\textsuperscript{43} ‘Effective protection’ is not a legal term but rather a concept used by the UNHCR and refugee law scholars to describe the nature of protection that states owe to asylum seekers and refugees.

The UNHCR’s position is that ‘effective protection’ includes non-refoulement but, importantly, also requires ‘accession to and compliance with the 1951 Convention and/or 1967 Protocol…unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.’\textsuperscript{44} The UNHCR does not specifically state that all of the rights outlined in the Refugee Convention must be guaranteed by the receiving state. It does however require that ‘the person has access to means of subsistence sufficient to maintain an adequate standard of living’ and that ‘steps are undertaken by the third State to enable the progressive achievement of self-reliance, pending the realisation of durable solutions.’\textsuperscript{45}

The meaning of ‘effective protection’ was further considered in the Michigan Guidelines on Protection Elsewhere 2007 (Michigan Guidelines). The Michigan Guidelines were created and adopted by the Fourth Colloquium on Challenges in International Refugee Law led by Professor Hathaway. The Michigan Guidelines echo the UNHCR’s position that ‘while it is preferable that the state to which protection is assigned (“receiving state”) be a party to the Convention, such status is not a requirement for implementation of a protection elsewhere policy which respects international law.’\textsuperscript{46}

Nevertheless, the Michigan Guidelines adopt the position that ‘effective protection’ means not only non-refoulement but also compliance with \textit{all} of the obligations outlined in the Refugee Convention.\textsuperscript{47} This position is premised on the principle that ‘a state cannot “contract out” of its international legal obligations’.\textsuperscript{48} This is supported by \textit{TI v United Kingdom}\textsuperscript{49} in which the European Court of Human Rights held that a state cannot relinquish its human rights obligations by transferring an individual to another state.\textsuperscript{50} This case concerned the removal of a Sri Lankan man from the United Kingdom to Germany. The court

\begin{itemize}
\item \textsuperscript{40} See, eg, \textit{NAGV and NAGW of 2002 v Minister for Immigration and Multicultural Affairs} [2005] HCA 6; see also Foster, above n 35, 226.
\item \textsuperscript{41} \textit{TI v United Kingdom} (European Court of Human Rights, Third Section, Application Number 43844/98, 7 March 2000).
\item \textsuperscript{42} Michelle Foster, ‘The Implications of the Failed ‘Malaysian Solution’: The Australian High Court and Refugee Responsibility Sharing at International Law’ (2012) 13 \textit{Melbourne Journal of International Law} 1.
\item \textsuperscript{43} UNHCR, above n 3.
\item \textsuperscript{44} Ibid [15(c)].
\item \textsuperscript{45} Ibid [15(g)].
\item \textsuperscript{46} Michigan Guidelines, above n 3, [2].
\item \textsuperscript{47} Ibid [8].
\item \textsuperscript{48} Foster, above n 35, 268.
\item \textsuperscript{49} \textit{TI v United Kingdom} (European Court of Human Rights, Third Section, Application Number 43844/98, 7 March 2000).
\item \textsuperscript{50} Foster, above n 35.
\end{itemize}
concluded that, despite the transfer, the United Kingdom was still under a legal obligation to ensure that the transferee was not treated in a manner that would violate the United Kingdom’s obligations under article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights)\(^{51}\) (that no-one shall be subject to torture or to inhuman or degrading treatment or punishment). The drafters of the Michigan Guidelines argue that the reasoning in this case is equally applicable to the Refugee Convention. Therefore, pursuant to this principle, a host state must ensure that all of the rights in the Refugee Convention will be accorded to asylum seekers by the third country before any transfer can take place.\(^{52}\)

The Michigan Guidelines note that there has been minimal judicial consideration of the conditions under which asylum seekers can be transferred to third countries. Nevertheless, the Michigan Guidelines’ position regarding the meaning of ‘effective protection’ is supported by some case law. For example, the dissenting judgment of Lee J in the Australian case of *Al-Rahal v MIMA*\(^{53}\) provides that ‘as far as the operation of the [Refugee Convention] is concerned under international law, equivalent protection to that required of a Contracting State under the [Refugee Convention] must be secured to an applicant in a third country before it can be said that person is not a refugee requiring consideration under the [Refugee Convention].’\(^{54}\) However, the Michigan Guidelines’ drafters assert that such cases fail to articulate a legal basis for the position that ‘effective protection’ encompasses both non-refoulement and the other rights outlined in the Convention.\(^{55}\)

The Michigan Guidelines were published in 2007 but the issues raised in the Guidelines were not considered by superior courts until late 2011 when matters concerning asylum seeker transfers came before the High Court of Australia and the European Court of Justice. The next section of this article will undertake a comparative and critical analysis of the way in which these courts approached the question of the conditions under which an asylum seeker can be transferred to a third country.

**IV THE HIGH COURT OF AUSTRALIA’S DECISION IN *PLAINTIFF M70/2011***

This matter was brought by two asylum seekers from Afghanistan who arrived in Australian territory in August 2011. Both feared persecution in Afghanistan on the basis of being Shi’a Muslims. The first plaintiff, Plaintiff M70, was an adult. The second plaintiff, Plaintiff M106, was a 16 year old unaccompanied minor. The two plaintiffs were subject to be transferred to Malaysia pursuant to the Malaysia Agreement. The Department of Immigration determined that Plaintiff M70 could be transferred immediately. However, Plaintiff M106 would only be transferred once Malaysia had established the relevant support services for unaccompanied minors. The Malaysia Agreement provided that special procedures would be developed to address vulnerable asylum seekers including unaccompanied minors.

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\(^{52}\) Foster, above n 35.

\(^{53}\) (2001) 100 FCR 73.

\(^{54}\) Ibid 78.

\(^{55}\) Foster, above n 35, 264–5.
Pursuant to the Malaysia Agreement, both plaintiffs would undergo a refugee status determination procedure in Malaysia conducted by the UNHCR. If they were found to be refugees, they would be referred to a country of resettlement in accordance with the UNHCR’s procedures and criteria. If the asylum seekers were found not to be refugees, they were required to return to their country of origin. In return, Australia agreed to resettle 4,000 recognised refugees currently residing in Malaysia. The International Organisation for Migration was responsible for facilitating this transfer and also had other roles in assisting both countries to implement the agreement.

The government of Malaysia agreed to co-operate with the UNHCR, respect the principle of non-refoulement and treat the asylum seekers with ‘dignity and respect and in accordance with human rights standards’.56 The Malaysia Agreement was a bilateral agreement (not a treaty) that merely recorded the countries’ ‘intentions and political commitments’.57 Accordingly, it was not legally binding.

The Malaysia Agreement was made under section 198A(1) of the Migration Act 1958 (Cth) (Migration Act). Section 198A(1) has subsequently been removed from the Migration Act but, pursuant to the wording at the time, section 198A(1) provided that an asylum seeker on an offshore territory58 may be taken to another country if the Minister for Immigration has made a declaration under section 198A(3)(a) that the third country:

1. provides access, for persons seeking asylum, to effective procedures for assessing their need for protection;
2. provides protection for persons seeking asylum, pending determination of their refugee status;
3. provides protection for persons given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
4. meets the relevant human rights standards in providing that protection.

The Minister made a declaration that Malaysia satisfied the above criteria despite the fact that Malaysia is not a signatory to the Refugee Convention, does not grant asylum and does not have any domestic legislation providing protection for asylum seekers or refugees. The Minister based his decision on an assessment of Malaysia’s treatment of refugees provided by the Department of Foreign Affairs (DFAT).59 In its assessment, DFAT noted that ‘fundamental liberties’ were guaranteed under the Malaysian Federal Constitution.60 However, it did not assess whether the rights prescribed in the Refugee Convention would be guaranteed in Malaysia.

The plaintiffs argued that the Minister’s declaration was made ultra vires. This argument was based on the plaintiffs’ submission that the criteria in s198A(3)(a) of the Migration Act were jurisdictional facts. This means that these criteria have to be objectively satisfied before the Minister can make a valid declaration. The plaintiffs argued that these criteria could not have been satisfied because Malaysia is not a signatory to the Refugee Convention nor does it have

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57 Malaysia Agreement cl 16.
58 The Migration Amendment (Excision from Migration Zone) Act 2001 (Cth) amended the Migration Act 1958 (Cth) to designate certain places (such as Christmas Island) as ‘excised offshore places’.
59 Plaintiff M70/2011 (French CJ).
60 Ibid [28].
any domestic law that establishes a refugee protection regime. Contrastingly, the Commonwealth argued that a declaration under section 198A is valid if it is exercised in good faith and within the scope and purpose of the Migration Act — its validity does not rest on the objective truth of the criteria outlined in s198A(3)(a). Accordingly, this case essentially turned on statutory interpretation of domestic law.

In a six to one verdict, the High Court of Australia ruled that the Minister’s declaration was made outside of the powers granted to him under the Migration Act. Gummow, Hayne, Crennan and Bell JJ provided the lead majority judgment. French CJ and Keifel J delivered separate judgments concurring with the majority, while Heydon J dissented.

French CJ did not agree that the criteria in s198A of the Migration Act were jurisdictional facts. His Honour defined a jurisdictional fact as ‘a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion.’61 This can be contrasted to a criterion that ‘involves assessment and value judgments on the part of the decision-maker.’62 French CJ reasoned that the language used in s198A ‘indicates the need for ministerial evaluative judgment’63 and therefore the criteria could not constitute jurisdictional facts. His Honour did, however, also state that if the Minister misconstrued any of the criteria his declaration would be affected by a jurisdictional error and, hence, be invalid.64 French CJ held that the Minister had misconstrued the criteria. Specifically, the Minister made his declaration in ‘a hope or belief or expectation that the specified country will meet the criteria at some time in the future’,65 whereas the language in s198A required the Minister to make a ‘judgment that the circumstance described by each of those criteria is a present and continuing circumstance.’66

The lead majority (with Keifel J concurring) accepted the plaintiffs’ argument that the above criteria constitute jurisdictional facts. This conclusion was based on their examination of the ‘text, context and purpose’ of s198A of the Migration Act. Their Honours held that the text, context and purpose of s198A ‘point to the need to identify the relevant criteria with particularity.’67 Therefore, the power could not be engaged ‘whenever the Minister bona fide thought or believed that the relevant criteria were met.’68

The significance of the lead majorities’ conclusion that the criteria in section 198A(3)(a) were jurisdictional facts (in particular from an administrative law perspective) has been discussed elsewhere.69 The focus of this article is the High Court of Australia’s analysis of whether the criteria in section 198A(3)(a) were satisfied by the Malaysia Agreement. Of particular relevance is the High Court of Australia’s assessment of the plaintiffs’ submission that the word ‘protection’ in section 198A(3)(a) was ‘a legal term of art to describe the rights to be accorded to a person who is, or claims to be, a refugee under the Refugee Convention.’70

61 Ibid [57].
62 Ibid.
63 Ibid [58].
64 Ibid [59].
65 Ibid [62].
66 Ibid [61].
67 Ibid [109] (Gummow, Hayne, Crennan and Bell JJ).
68 Ibid.
70 Plaintiff M70/2011 [63] (French CJ).
Pursuant to this submission, the Minister would have to be satisfied that a third country not only provided protection from refoulement but also guaranteed all of the rights outlined in the Refugee Convention before an asylum seeker could be transferred to that country. While there has been some examination of this argument, its relevance to the larger debate on the meaning of ‘effective protection’ has not been widely explored.

Each of the majority judges was satisfied that the word ‘protection’ encompassed Australia’s obligation of non-refoulement. The question of whether the concept of ‘protection’ also encompassed the other obligations owed to refugees under the Refugee Convention attracted different responses. Gummow, Hayne, Crennan and Bell JJ accepted the plaintiffs’ submission that the word ‘protection’ is a ‘legal term of art’. In their joint judgment they held that the concept of ‘protection’ and the criteria in section 198A(3) of the Migration Act is a ‘reflex of obligations Australia undertook when it became signatory to the [Refugee] Convention.’ The lead majority held that:

When s198A(3)(a) speaks of a country that provides access and protections it uses language that directs attention to the kinds of obligation that Australia and other signatories have undertaken under the Refugees Convention and the Refugees Protocol. Reference has already been made to the non-refoulement obligation imposed by Art 33(1) of the Refugees Convention. But signatories undertake other obligations.

Their honours listed some of these other obligations such as freedom of religion, access to the courts and work rights.

Accordingly, the lead majority concluded that the criteria in section 198A(3)(a) and the concept of protection embedded in that criteria requires the ‘provision of protections of all of the kinds which parties to the Refugees Convention and the Refugees Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement.’ This joint judgment provides a strong precedent for the principle that ‘effective protection’ encompasses both non-refoulement along with the array of positive refugee rights outlined in the Refugee Convention.

This position is essentially the same as that taken in the Michigan Guidelines. While the lead majority did not say that the receiving state had to be a signatory to the Refugee Convention, it did provide that these protections had to be enshrined in law and carried out in practice. Specifically, the lead majority held that ‘a country does not provide protections of the kind described in s 198A(3)(a)(ii) or (iii) unless its domestic law deals expressly with the classes of persons mentioned in those sub-paragraphs or it is internationally obliged to provide the particular protections.’ Therefore, similar to the Michigan Guidelines and the UNHCR it does not go as far as to suggest that the receiving state must be a signatory to the Refugee Convention as long as its domestic law reflects the obligations under the Refugee Convention. One problem with this position is that domestic laws can be repealed and,

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72 Plaintiff M70/2011 [63] (French CJ), [117] (Gummow, Hayne, Crennan and Bell JJ), [240] (Keifel J).
73 Ibid [118] (Gummow, Hayne, Crennan and Bell JJ).
74 Ibid [117] (Gummow, Hayne, Crennan and Bell JJ).
75 Ibid.
76 Ibid [119].
77 Ibid [126].
without any international obligations, the international community and the UNHCR would have fewer grounds on which to press for reform.

It must be acknowledged that the concurring judgments did not embrace the plaintiffs’ submission to the same extent. French CJ did not directly address the argument that the word ‘protection’ was a legal term of art. He acknowledged that ‘the criteria in s198A(3)(a) are dominated by the word “protection”,’ However, he reasoned that protection ‘at its heart... means protection from refoulement.’ He acknowledged the plaintiffs’ submission that the Refugee Convention requires states to provide other forms of protection such as access to the courts and religious freedom. However, he ultimately concluded that ‘it is not necessary to delineate all of the matters comprehended by the term “protection” in s198A(3) or the particulars of “relevant human rights standards” mentioned in s198A(3)(a)(iv).’ It was not necessary for French CJ to answer this question because he held that the Minister was required to determine whether Malaysia’s laws provide the necessary protection for refugees as opposed to the ‘practical reality’ in Malaysia. The fact that the Minister conceded that he had not made such a consideration was the basis upon which French CJ declared that the Minister’s declaration was invalid.

In her concurring judgment, Keifel J held that protection must ‘at the least, be protection against persecution and refoulement.’ While her Honour did not specifically provide that all of the obligations in the Refugee Convention beyond non-refoulement need to be observed, she did state that the third country must have a refugee status determination procedure and recognise ‘the status of refugee and [give] effect to it.’

It can be argued that both French CJ and Keifel J drew an arbitrary hierarchy between non-refoulement and the remainder of rights in the Refugee Convention. While non-refoulement has been described, as noted above, by the UNHCR as ‘the cornerstone of asylum and international refugee law,’ there is nothing in the text of the Refugee Convention that indicates that respecting the principle of non-refoulement alone is a sufficient standard for refugee protection. This is reflected in the structure of the Refugee Convention: non-refoulement is contained in article 33 – one of the last substantive provisions in the Refugee Convention. Also, there is nothing in the wording of article 33 that suggests that it should be prioritised over the other rights contained in the Refugee Convention. In addition, while states cannot make reservations in respect of article 33, reservations are not permitted on other core protection obligations, being the requirement to apply the provisions of the Refugee Convention ‘without discrimination as to race, religion or country of origin’, the requirement to accord refugees ‘treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the

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78 Ibid [63] (French CJ).
79 Ibid.
80 Ibid.
81 Ibid [65].
82 Ibid.
83 Ibid [65.–66].
84 Ibid [240] (Keifel J).
85 Ibid [243].
87 Refugee Convention art 42(1).
88 Ibid art 3.
religious education of their children,\textsuperscript{89} and the requirement to provide refugees with free access to the courts.\textsuperscript{90}

The position that non-refoulement is not a sufficient standard for refugee protection is also supported by the preamble to the Refugee Convention, which provides that ‘it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by new means of agreement.’ The Refugee Convention was not the first international agreement regarding refugees but it was the first to provide extensive provisions for refugee protection. For example, the earlier 1933 Convention Relating to the International Status of Refugees\textsuperscript{91} (which was not widely ratified) contained very few provisions regarding refugee protection. It only addressed free access to the courts,\textsuperscript{92} welfare,\textsuperscript{93} and education\textsuperscript{94} and provided very limited work rights.\textsuperscript{95}

Further, if the rights outlined in the Convention are not guaranteed by the third country, it is possible that asylum seekers will be refouled within the meaning of article 33 of the Refugee Convention. For example, restrictions on access to the courts or freedom of religion could mean that there is a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group. Neither judgment considered this relationship between non-refoulement and the remainder of rights outlined in the Refugee Convention.

In his dissenting judgment, Heydon J referred to the plaintiffs’ argument that the term ‘protection’ is a ‘legal term of art’ as ‘so ambitious a submission as to cast doubt not only on its validity but also on the validity of other arguments advanced.’\textsuperscript{96} He concluded that section 198A(3) of the Migration Act does not require the third country to guarantee the rights outlined in the Refugee Convention because these rights are only owed to refugees whose status has been approved. Therefore these rights cannot be enforced by asylum seekers whose refugee status has yet to be determined.\textsuperscript{97} Heydon J’s conclusion is difficult to support in light of the fact that refugee status is deemed to be declaratory as opposed to constitutive.\textsuperscript{98} Also, the first tranche of rights accrue as soon as the refugee is physically present in the host country’s territory notwithstanding whether a refugee status determination procedure has been carried out. Similarly, the second tranche of rights can accrue before an asylum seeker’s claim has been determined.\textsuperscript{99}

The above judgments do not provide consistent authority on the meaning of ‘effective protection’. Nevertheless, the lead majority judgment was the first judgment of a superior court to declare that asylum seekers cannot be transferred to a third country unless they will

\textsuperscript{89} Ibid art 4.
\textsuperscript{90} Ibid art 16(1).
\textsuperscript{92} 1933 Refugee Convention art 6.
\textsuperscript{93} Ibid arts 9,10 and 11.
\textsuperscript{94} Ibid art 12.
\textsuperscript{95} Ibid art 7.
\textsuperscript{96} Plaintiff M70/2011 [167] (Heydon J).
\textsuperscript{97} Ibid.
\textsuperscript{98} Refugee Appeal No. 75574, No. 75574, New Zealand: Refugee Status Appeals Authority, 29 April 2009, [58]; Hathaway, above n 15, 11.
\textsuperscript{99} Minister of Home Affairs v Watchenuka (2004) 1 All SA 21.
be protected from persecution and be guaranteed access to the remainder of rights in the Refugee Convention.

However, the precedential value of the decision has, in the Australian context, been diminished with the passing of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (*Regional Processing Act*). The Explanatory Memorandum to the *Regional Processing Act* states that it was introduced in direct response to the High Court of Australia’s decision in *Plaintiff M70/2011*:

The purpose of the amendments in this Bill is to address the issues arising from the High Court of Australia’s decision on 31 August 2011 in order to allow for offshore processing of the protection claims of offshore entry persons. The amendments will ensure that the Government has sufficient power to implement offshore processing arrangements. The amendments will ensure that the government of the day can determine the border protection policy that it believes is in the national interest.\(^{100}\)

The Explanatory Memorandum further explains that the ‘national interest’ includes:

\[\text{[m]atters which relate to Australia’s standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, defence, Australia’s economic interests, Australia’s international obligations and its relations with other countries. Measures for effective border management and migration controls are in the national interest.}\(^{101}\)]

The *Regional Processing Act* removes section 198A from the *Migration Act* and inserts new sections 198AA to 198AH. These provisions give the Minister the power to designate a third country as a ‘regional processing centre’.\(^{102}\) The only condition for the exercise of this power is that the Minister thinks that it is in the national interest.\(^{103}\) The reforms specifically provide that ‘the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.’\(^{104}\) Pursuant to these reforms, Nauru and Papua New Guinea have been designated as ‘regional processing centres’. Asylum seekers have been sent to Nauru and Papua New Guinea’s Manus Island since August 2012.\(^{105}\)

At the time the *Regional Processing Act* was passed, it only applied to asylum seekers who were designated as ‘offshore entry persons’. This means that they did not reach the Australian mainland but rather an excised offshore place such as Christmas Island. However, on 16 May 2013 the Australian Federal Parliament passed a Bill that provided that asylum seekers who reached the Australian mainland could be transferred to a regional processing centre.\(^{106}\) Essentially, these reforms provide that asylum seekers may be sent to third countries without

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\(^{100}\)Explanatory Memorandum, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012* (Cth) 1.

\(^{101}\)Ibid.

\(^{102}\)Migration Act 1958 (Cth) s198AB(1).

\(^{103}\)Ibid s198AB(2).

\(^{104}\)Ibid s198AA(d).

\(^{105}\)The Australian Human Rights Commissioner has been denied access but the UNHCR sent a three person team to the facility on Manus Island in January 2013. The UNHCR reported that the asylum seekers on Manus Island were being kept in mandatory and indefinite detention, were not able to process their claim for asylum and the living conditions were ‘harsh, and for some, inadequate’: UNHCR, *Mission to Manus Island, Papua New Guinea* (4 February 2013) UNHCR, 2 <http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>.

\(^{106}\)Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).
any consideration of whether that transfer would breach Australia’s non-refoulement obligations or whether any of the rights outlined in the Refugee Convention would be guaranteed.

Nevertheless, the High Court of Australia’s decision in *Plaintiff M70/2011* still provides an important international precedent on the meaning of ‘effective protection’. Associate Professor Foster, who led the drafting of the Michigan Guidelines, has stated that the ruling ‘provides a valuable addition to our understanding of the constraints on refugee responsibility sharing schemes at international law, and is certain to have significance beyond the Australian context alone.’ Indeed, courts in states signatory to the Refugee Convention often consider jurisprudence from other states. This article will, however, now consider a ruling from the European Court of Justice only four months later that set a much lower threshold for ‘effective protection’.

V THE EUROPEAN COURT OF JUSTICE’S DECISION IN *NS (C 411/10)*

On 21 December 2011, the European Court of Justice handed down its decision in *NS (C 411/10).* This case provided preliminary rulings requested from the United Kingdom Court of Appeal (England and Wales) and the High Court of Ireland. Together, the joined cases from the United Kingdom Court of Appeal and the High Court of Ireland concerned six asylum seekers from Afghanistan, Iran and Algeria. One asylum seeker from Afghanistan made his refugee application in the United Kingdom and the other five had made their asylum claims in Ireland. However, all had first entered the European Union in Greece.

Pursuant to the Dublin Regulation, the member state responsible for assessing their application was Greece and therefore these asylum seekers were due to be transferred there. Greece does not, however, have a functioning asylum system and there are reports of asylum seekers in Greece being arbitrarily detained and being subject to ill treatment.

The proceedings in the United Kingdom Court of Appeal (England and Wales) and the High Court of Ireland were stayed and both courts referred a number of questions to the European Court of Justice. The European Court of Justice considered these questions together. The relevant question for the issue addressed in this paper is whether Ireland and the United Kingdom were obligated to process the asylum seekers’ claims due to the fact that transferring the asylum seekers to Greece would expose them to a risk of violation of their fundamental rights. The fundamental rights that were identified in particular were articles 1 (human dignity is inviolable), 4 (prohibition of torture and inhuman and degrading treatment or punishment), 18 (right to asylum), 19(2) (prohibition of removal where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment) and 47 (right to an effective remedy and a fair trial) of the Charter and Directives 2003/9 (minimum standards for the reception of asylum seekers), 2004/83 (minimum standards for the qualification and status of third country nationals as refugees)

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107 Foster, above n 42, 24.
108 At the time the case was heard, the Dublin II Regulation was in force. The Dublin Regulation has since been recast and is now known as the Dublin III Regulation.
110 *NS (C 411/10)* [50].
and 2005/85 (minimum standards on the procedures for granting and withdrawing refugee status).\textsuperscript{111}

The reason why the Refugee Convention was not referred to is because the European Court of Justice does not have jurisdiction to consider the Refugee Convention. Nevertheless many of the above provisions make direct reference to the Refugee Convention. For example, article 18 of the Charter provides that ‘the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees....’ In this case the European Court of Justice acknowledged that article 18 of the Charter requires that ‘the rules of the [Refugee] Convention and the 1967 Protocol are to be respected.’\textsuperscript{112} In addition, the preambles to the Directives outlined above confirm that the Common European Asylum System is designed to achieve the ‘full and inclusive application of the Geneva Convention Relating to the Status of Refugees 28 July 1951, as supplemented by the New York Protocol of 31 January 1967.’ Indeed, the European Court of Justice described the purpose of the Common European Asylum System as ‘full and inclusive application of the [Refugee] Convention.’\textsuperscript{113}

Nevertheless, the European Court of Justice held that the only grounds upon which a member state is prevented from transferring an asylum seeker to the responsible member state is:

\begin{quote}
\[where \text{they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.}\]
\end{quote}

Therefore, an asylum seeker can be transferred to a member state even if that state does not grant to asylum seekers the rights outlined in the Refugee Convention (as referred to in article 18 of the Charter and the preambles to the above noted Directives). The only principles restraining the transfer of an asylum seeker are non-refoulement and treatment that would amount to inhuman or degrading treatment. In this respect, the European Court of Justice adopted a narrower position than the opinion given by Advocate General Trstenjak who suggested that ‘the transfer of asylum seekers to a Member State in which there is a serious risk of violation of the asylum seekers’ fundamental rights is incompatible with the Charter of Fundamental Rights.’\textsuperscript{115}

In coming to its decision, the European Court of Justice stressed that there is an assumption that the treatment of asylum seekers in all Member States complies with the requirements of the Charter and the Refugee Convention.\textsuperscript{116} While it is conceivable that some member states may violate fundamental rights, the European Court of Justice held that these violations will

\textsuperscript{111} Directives are objectives set by the Council of the European Union that each member state must achieve. Each member state must introduce or adapt laws to ensure that these objectives are achieved. These Directives are part of the European Union’s goal to establish a Common European Asylum System: European Union: European Parliament, Towards a Common European Asylum System – Assessments and Proposals – Elements to be Implemented for the Establishment of an Efficient and Coherent System, September 2008, PE 408.291. This means that the European Union is aiming to harmonise procedures and standards for the treatment and recognition of refugees by European Union member states.

\textsuperscript{112} \textit{NS (C 411/10)} [75].

\textsuperscript{113} Ibid.

\textsuperscript{114} Ibid [94].

\textsuperscript{115} Opinion of Advocate General Trstenjak, \textit{NC v Secretary of State for the Home Department}, Case C-411/10, Opinion delivered on 22 September 2011 [116].

\textsuperscript{116} \textit{NS (C 411/10)} [80].
not prevent a transfer. This is because, if minor breaches of the Charter or Directives prevented an asylum seeker from being transferred, the objective of the Common European Asylum System (to provide a speedy determination of the responsible member state) would be undermined.\textsuperscript{117} As the European Court of Justice put it:

\begin{quote}
At issue here is the raison d’être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.\textsuperscript{118}
\end{quote}

The European Court of Justice’s decision in \textit{NS(C 411/10)} indicates that the European Court of Justice is inclined to give effect to the purpose of the Common European Asylum System at the expense of a thorough examination of the objectives of the Charter and Refugee Convention. This is despite the European Court of Justice being specifically asked to consider article 18 of the Charter (which confirms due respect for the rules in the Refugee Convention). It is difficult to support the European Court of Justice’s position that a state not honouring its obligations under the Refugee Convention would only amount to a ‘minor breach’ of article 18 of the Charter. As outlined above, the bulk of the Refugee Convention is devoted to outlining the obligations states owe to asylum seekers and refugees.

Due to the fact that this was a preliminary ruling, the European Court of Justice did not rule that the asylum seekers could not be transferred to Greece. Rather, this was a matter for the United Kingdom Court of Appeal (England and Wales) and the High Court of Ireland to decide. What is significant about this case is that the threshold for ‘effective protection’ (that a transfer can take place unless substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment) is much lower than the threshold set by the High Court of Australia in \textit{Plaintiff M70/2011}. These sharply contrasting decisions on when asylum seekers can be transferred to a third country have wider implications for international refugee protection. Refugee law scholars have identified that one of the critical contemporary issues in refugee protection is achieving harmony in the interpretation of the Refugee Convention.\textsuperscript{119} The remainder of this article will assess the positions taken by the High Court of Australia and European Court of Justice in light of this objective.

\section*{VI ONE TRUE MEANING OF ‘EFFECTIVE PROTECTION’?: THE SOMETIMES DANGEROUS CONVERGENCE BETWEEN REFUGEE LAW AND HUMAN RIGHTS LAW}

States are ‘in principle committed to a harmonized approach to refugee protection.’\textsuperscript{120} Guy Goodwin-Gill has drawn attention to a wealth of jurisprudence that supports the position that states signatory to the Refugee Convention should interpret the Refugee Convention in a similar manner. For example, Lord Bingham has commented that ‘it is plain that the [Refugee] Convention has a single autonomous meaning, to which effect should be given in and by all member states, regardless of where a decision falls to be made.’\textsuperscript{121} In addition, Lord Steyn, when discussing the Refugee Convention, has provided that:

\begin{itemize}
\item \textsuperscript{117} Ibid [84]–[85].
\item \textsuperscript{118} Ibid [83].
\item \textsuperscript{119} Simeon, above n 6.
\item \textsuperscript{120} Goodwin-Gill, above n 6, 240.
\item \textsuperscript{121} Sepet (FC) and Another (FC) v Secretary of State for the Home Department [2003] UKHL 15, [6] quoted in Goodwin-Gill, above n 6.
\end{itemize}
There can only be one true interpretation of a treaty ... it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its own legal culture, for the true, autonomous and international meaning of the treaty. And there can only be one true meaning.\cite{122}

Despite the above objective, states diverge greatly on their interpretation of the Refugee Convention. This is partly due to the lack of an international treaty monitoring body. Cohesion is sought through UNHCR advisory opinions and materials, judicial reference to major academic works by refugee law scholars and courts looking to relevant jurisprudence from other jurisdictions.\cite{123} However, while there are ‘global conversations’ about aspects of refugee law ‘the reality is of a devolved system whose outcomes are frequently context dependent.’\cite{124}

Concerns have been raised that this has impinged on the legitimacy of international refugee law.\cite{125} One tool for achieving uniformity is the requirement to interpret the Refugee Convention pursuant to the principles outlined in the Vienna Convention on the Law of Treaties (Vienna Convention).\cite{126} Article 31 of the Vienna Convention provides that ‘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.’ However this tool for achieving harmonisation is often rendered nugatory because national courts rarely interpret the Refugee Convention directly. Rather, courts interpret domestic legislation (for example, in Australia, the Migration Act) that may not reflect international obligations.\cite{127} In doing so, they are also drawing on domestic principles of statutory construction.

It is not within the parameters of this article to propose a comprehensive solution to this dilemma. Rather, this article will draw on the above two cases to discuss the inconsistencies that can occur when human rights law is used to interpret the obligations in the Refugee Convention. Refugee law is considered to be part of the broader category of human rights law.\cite{128} Nevertheless, as outlined above, one fundamental tension between these two bodies of law is that refugees accrue rights through an acquired legal status while human rights law assumes that rights are possessed by all regardless of their legal position.\cite{129}

Despite the above noted tension, there are obvious connections between refugee and human rights law. While some courts have maintained a distinction between refugee and human rights law by interpreting the Refugee Convention without consideration of human rights principles,\cite{130} other courts have explicitly drawn on human rights to interpret the Refugee Convention. This convergence has perhaps been most strongly evident in the use of international human rights law to interpret the concept of ‘persecution’.\cite{131} The word ‘persecution’ is not defined in the Refugee Convention. It was Professor Hathaway who first

\begin{thebibliography}{99}
\bibitem{122} Adan (Lul Omar) v Secretary of State for the Home Department [2001] 2 AC 477, 516–517 quoted in Goodwin-Gill, above n 6.
\bibitem{123} Harvey, above n 13.
\bibitem{124} Ibid 70.
\bibitem{125} Simeon , above n 6.
\bibitem{127} Goodwin-Gill, above n 6.
\bibitem{128} Harvey, above n 13.
\bibitem{129} Ibid.
\bibitem{130} Foster, above n 7.
\bibitem{131} Ibid.
\end{thebibliography}
suggested that ‘persecution’ can be understood as violations of fundamental human rights. Many jurisdictions have adopted this approach and drawn on international human rights law to define persecution to include serious violations of fundamental human rights.

The convergence of human rights and refugee law has been very evident in Europe. The European Court of Justice and the European Court of Human Rights have jurisdiction to hear matters regarding the Charter and the European Convention on Human Rights respectively. While neither of these courts has jurisdiction to interpret the Refugee Convention directly, many of their decisions have been hailed as triumphant victories for asylum seekers and refugees. For example, decisions from the European Court of Justice and the European Court of Human Rights have addressed non-refoulement, deprivation of liberty and unlawful detention, and interception on the high seas.

Similar to the use of human rights law to interpret the concept of persecution, the convergence of refugee and human rights law on the above matters has been welcomed by refugee advocates. Indeed, refugee scholars are currently investigating the influence of decisions from these courts on other jurisdictions. It has also been argued that reference to human rights principles to interpret the Refugee Convention is consistent with article 31(3)(c) of the Vienna Convention, which provides that when interpreting treaties courts shall take into account ‘any relevant rules of international law applicable in the relations between the parties.’ Due to the fact that the Refugee Convention concerns the right to seek and enjoy asylum, principles of human rights law have been considered ‘relevant rules of international law.’ However, there has been little critical examination of the boundaries of refugee law and human rights law and to what extent they need to remain distinct bodies of law.

In contrast to the proliferation of human rights jurisprudence in the European Union, Australia does not have a national Human Rights Act or Bill of Rights. Also, the High Court of Australia has been criticised for its reticence to engage with principles of international human rights law. This lack of reference to principles of human rights law has created

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134 Saadi *v* Italy (European Court of Human Rights, Grand Chamber, Application Number 37201/06, 28 February 2008).
136 Hirsi Jamaa and Others *v* Italy (European Court of Human Rights, Application Number 27765/09, 23 February 2012).
139 Foster, above n 7.
140 Ibid.
troubling decisions in respect of refugee rights. For example, in Al-Kateb v Godwin\(^\text{142}\) the majority of the High Court of Australia provided that an asylum seeker whose claim for asylum has failed can be detained indefinitely pursuant to s196 of the Migration Act. In coming to its decision the majority did not have reference to foreign jurisprudence regarding the prohibition of arbitrary detention. Yet, as noted above, the lead majority judgment in Plaintiff M70/2011 was a high water mark in the meaning of ‘effective protection’ and set a much higher threshold for refugee protection than the European Court of Justice in NS (C 411/10).

Before this anomaly can be examined, the nature of protection outlined in the Refugee Convention must be considered. The nature of this protection is not merely the preservation of fundamental human rights. To explain further, while some of the rights in the Refugee Convention reflect general human rights principles (for example freedom of religion), the nature of protection outlined in the Refugee Convention is both distinct from and beyond preservation of basic human rights. Indeed, some of the obligations on states in the Refugee Convention are not paralleled in international human rights law.

A good example is articles 27 and 28 of the Refugee Convention. Article 27 provides that a state shall issue identity papers to any refugee in its territory who does not possess a valid travel document. Article 28 provides that a state shall issue to refugees lawfully staying in its territory travel documents for the purpose of travel outside the territory. There is no corresponding human right to identity and travel documents.\(^\text{143}\) This is an obligation imposed on states under the Refugee Convention due to the special situation of many refugees who do not have identity or travel documents and are not in a position to obtain them from their country of origin. In addition, rights to moveable and immoveable property (article 13 of the Refugee Convention) and artistic rights and industrial property (article 14 of the Refugee Convention) have no direct human right equivalent.\(^\text{144}\)

The subject matter of some state obligations under the Refugee Convention reflects human rights obligations. For example, the right to wage earning employment (article 17)\(^\text{145}\) under the Refugee Convention is similar to article 6 of the International Covenant on Economic Social and Cultural Rights requiring that states recognise the right to work. Similarly, the obligation to accord refugees the same treatment as nationals with respect to social security (article 24) has some parallels with article 9 of the International Covenant on Economic Social and Cultural Rights which requires states to recognise the right to social security.

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\(^{143}\) Article 7 of the Convention on the Rights of the Child, opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990) provides that a child shall be registered immediately after birth but does not go so far as to say that children shall be provided with identity documents.

\(^{144}\) Article 11 of the International Covenant on Social, Economic and Cultural Rights, opened for signature 20 November 1989, UNTS 993 (entered into force 3 January 1976) addressed the need for adequate housing but does not provide a right to property. Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, UNTS 1249 (entered into force 3 September 1981) provides that women shall have rights to administer property on equal terms as men but does not provide a positive right to property.

\(^{145}\) The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment.
However, the rights under the Refugee Convention are absolute and are immediately binding on states. For example, article 24 (social security) requires that as soon as a refugee is lawfully staying within the territory the state must extend the same social security benefits to them that are extended to nationals. Contrastingly, most of the rights under the International Covenant on Economic Social and Cultural Rights are not absolute and immediately binding but are to be progressively realised. This means that states must take steps, within their means, towards the fulfilment of these rights. Again, the reason why these rights operate differently is due to specific aspects of refugeehood — that refugees often have acute protection needs that must be addressed swiftly. In summary, state obligations under the Refugee Convention ‘are both more extensive than those under general human rights law (e.g. binding rights to private property and to benefit from public relief and assistance) and are defined as absolute and immediately binding (in contrast to general human rights norms).’

The above examples indicate that the purpose of the protection scheme outlined in the Refugee Convention is not to merely provide fundamental human rights but to also provide ‘a taste of the substance of citizenship.’ Or, in the words of Professor Hathaway, to ensure that ‘refugees cannot be disenfranchised within their new communities, but rather must be allowed to participate in the economy in a way that genuinely enables them to meet their own needs.

The reason why the High Court of Australia set a high threshold for ‘effective protection’ is because it interpreted the word ‘protection’ with sole reference to the Refugee Convention and without consideration of human rights law. The lead majority in Plaintiff M70/2011 did not specifically address the principle of interpretation that they employed to come to their conclusion that ‘protection’ encompassed not only protection from persecution but also an entitlement to the remainder of the rights in the Refugee Convention. Nevertheless when there is ambiguity in domestic legislation that implements an international treaty, Australian courts often interpret the domestic legislation with reference to the context of the treaty, and aim to provide an interpretation that is consistent with these international obligations.

The lead majority’s interpretation of the phrase ‘protection’ in s198A of the Migration Act with reference to states’ obligation under the Refugee Convention is consistent with this principle of interpretation. In adopting such a position, the High Court of Australia interpreted the phrase ‘protection’ with specific reference to the Refugee Convention and without reference to principles of human rights law. By ruling that ‘effective protection’ requires both protection from refoulement and the satisfaction of all the rights outlined in the Refugee Convention, the High Court of Australia gave effect to the nature of protection in refugee law which is both distinct from and beyond the mere preservation of basic human rights.

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147 Ibid, 190.
148 Harvey, above n 13, 72.
149 Hathaway, above n 146.
150 Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 287 (Mason CJ and Deane J). This rule of statutory construction was discussed in Keifel J’s judgment at [247]. This principle of interpretation is also shared with other jurisdictions – see, eg, the Canadian decision of National Corn Growers Assn v Canada (Import Tribunal), [1990] 2 S.C.R. 1324, 1371.
Contrastingly, the European Court of Justice’s decision in *NS (C 411/10)* demonstrates the sometimes problematic convergence of refugee and human rights law. In coming to its decision on the conditions which must be met in a third country before a transfer can occur, the European Court of Justice focused specifically on article 4 of the Charter. As outlined above, article 4 provides that no-one shall be subject to torture or inhuman and degrading treatment and punishment. The European Court of Justice did not give any reason why article 4 of the Charter was prioritised over the other rights it was asked to consider (including article 18 of the Charter which makes specific reference to the Refugee Convention) other than the suggestion that a full examination of minor infringements of other rights would undermine the objective of the Common European Asylum System.\(^{151}\)

It is possible that the European Court of Justice wanted to come to a position that was consistent with the recent ruling by the European Court of Human Rights in *MSS v Belgium*.\(^{152}\) In this case the European Court of Human Rights ruled that Belgium’s transfer of an asylum seeker to Greece placed Belgium in breach of article 3 of the European Convention on Human Rights (no-one shall be subject to torture or to inhuman or degrading treatment or punishment). The European Court of Human Rights held that Belgium was in breach of article 3 because it could not have been unaware that the deficiencies in the detention centres and living conditions endured by asylum seekers in Greece amounted to degrading treatment.\(^{153}\) Indeed, the European Court of Justice considered the decision of *MSS v Belgium* in its judgment. While protection from torture and inhuman and degrading treatment is a fundamental human right (and one to which there are no exceptions),\(^{154}\) its protection alone truncates the quality of protection outlined in the Refugee Convention and envisaged by its drafters.

In discussing the relationship between refugee and human rights law, Harvey has posed the question: ‘do human rights underpin, challenge, support or even replace refugee law?’\(^{155}\) The above analysis indicates that, in the context of ‘effective protection’, human rights law can undermine and fracture refugee law. In particular, the use of human rights law in transfer decisions truncates and splinters the nature of protection outlined in the Refugee Convention.

**VII CONCLUSION**

This article has conducted a comparative and critical analysis of recent Australian and European Union jurisprudence relevant to the meaning of ‘effective protection’ for asylum seekers and refugees. It argued that the High Court of Australia’s decision in *Plaintiff M70/2011* was a high water mark for refugee protection because it was the first superior court to declare that an asylum seeker or refugee cannot be transferred to a third country unless the principle of non-refoulement will be respected and all the other rights in the Refugee Convention will be guaranteed. While its precedential authority in Australia has been diminished after the passing of the *Regional Processing Act* and the subsequent PNG Resettlement Arrangement, it still provides the strongest clarification of the protections that must be guaranteed before an asylum seeker can be transferred to a third country. Only four

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\(^{151}\) *NS (C 411/10)* [84]–[85].

\(^{152}\) *MSS v Belgium and Greece* (European Court of Human Rights, Application Number 30696/09, 21 January 2011).

\(^{153}\) *NS (C 411/10)* [88].

\(^{154}\) *Saadi v Italy*, above n 134.

\(^{155}\) Harvey, above n 13, 69.
months later, however, the European Court of Justice set the threshold for ‘effective protection’ much lower by ruling that asylum seekers can be transferred unless they would be subject to inhuman or degrading treatment or punishment.

These contrasting decisions raise wider issues for international refugee protection especially in light of the desire to have a harmonious interpretation of the Refugee Convention. While this paper did not attempt to provide a comprehensive solution to this dilemma, it investigated the under-examined issue of the convergence of refugee and human rights law and its implications for achieving an internationally consistent understanding of the obligations in the Refugee Convention. It did this by highlighting that the High Court of Australia reached its decision on the meaning of ‘protection’ with sole reference to the Refugee Convention and no consideration of principles of human rights law. Conversely, the European Court of Justice’s much lower threshold was based on European Union human rights law which truncated and fractured the scope of protection in the Refugee Convention.

Ultimately, it was argued that the reason why the High Court of Australia’s decision was a high water mark for refugee protection is because the nature of protection outlined in the Refugee Convention is both distinct from and beyond the preservation of fundamental human rights. The nature of protection was not just meant to confer fundamental human rights but also a form of surrogate state protection. By exploring this issue this article highlights the need for a critical examination of the boundaries of human rights and refugee law and the extent to which they should remain distinct bodies of law.

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PIRACY AND UNIVERSAL JURISDICTION

TAMSIN PAIGE*

This article will examine the history of piracy jure gentium and the law as it currently stands, showing that piracy does not lie within the realm of universal jurisdiction or international criminal law. The history component will separate the rhetoric of ‘pirates’ and ‘piracy’ from the legal definition, a practice that is often lacking in considerations of piracy jure gentium. The examination of the current law will explore the codification of piracy in UNCLOS, particularly the articulation of jurisdiction in Article 105 as it compares to the universal jurisdiction afforded other jus cogens crimes. From this it will be clear that piracy is not a crime of universal jurisdiction based on the heinousness of the crime, as is the case with international crimes, but rather a crime of concurrent municipal jurisdiction based on the stateless nature of the crime.

I INTRODUCTION

I need not tell you the heinousness of this offence ... Pirates are called ‘Hostes humani generis’ the enemies of all humanity.1

Mindful that, during this last century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity…

Recognizing that such grave crimes threaten the peace, security and well-being of the world …2

The above quotes are separated by 297 years; one is the pre-deliberation address to the jury in the trial for piracy of Capt William Kidd in 1701, and the other is part of the preamble to the Rome Statute of the International Criminal Court in 1998. These quotes address legal issues that are often considered to a part of the same body of law, a claim that is supported by the rhetoric, which is remarkably similar. In spite of the use of similar rhetoric, piracy and international criminal law possess distinctly different jurisdictional foundations and therefore different legal regimes. However, the differences in foundation and operation are often overlooked and it is often claimed that piracy exists within the umbrella of, and is a foundational basis for, international criminal law and universal jurisdiction. This claim is

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1 Rex v Kidd (1701) 14 How St Tr 123.
based on the questionable notion that heinousness is the foundation of jurisdiction over piracy.  

A detailed history of the development of piracy from the Roman Empire, circa 60 BCE, to the present day has already been eloquently achieved by Rubin in his *The Law of Piracy*, which is regarded as the seminal work on this issue (a sentiment that is supported by the number of scholars who cite his work when writing on this topic). That said, this article will provide an examination of historical developments in the relevant law at the key points in history, namely during the Roman Empire, the 16th and 17th century British experience and the 19th century United States and British experiences. The purpose of these examinations is to illustrate the developmental shifts of the relevant law while also separating where piracy was used as a legal definition and where it existed as political or policy rhetoric. By separating the historical rhetoric from historical legal practice this article will argue that heinousness is not the basis of the crime of piracy *jure gentium*, as is often claimed by those linking crimes of piracy to other international crimes.

Following this examination of the historical development of the law, the current state of the law will be outlined, along with the debates surrounding its interpretation so as to provide a stable, working definition of what constitutes the crime of piracy *jure gentium*. Within this section the jurisdiction to enforce piracy law will be compared with universal jurisdiction to illustrate that piracy is not a crime of universal jurisdiction but rather a crime of concurrent municipal jurisdiction and that piracy does not belong within the realm of international criminal law.

II  ROMAN EMPIRE CIRCA 60-70 BCE

There is widespread agreement that the term *hostis humani generis*, which is often cited as the basis for piracy *jure gentium* existing, was used by Cicero to describe pirates as the Roman Empire knew them and translates roughly to mean ‘enemies of all mankind’. However, what scholars do not agree on is the context and legal implications of this assertion. Some scholars note the difficulties of differentiating between the political and legal definitions of this phrase and its implications but decline to attempt to engage with the issue. Those who enquire generally fall into one of two camps.

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The first camp argues that the Roman Empire branded individuals who engaged in piracy as criminals who were to be subject to the municipal jurisdiction of whosoever wished to engage in counter-piracy actions. Other scholars assert that this statement, as a legal definition when understood in the context of Roman counter-piracy action, refers to communities who by virtue of their conduct existed in a state of permanent, legal war without the need for a declaration. When the arguments are examined, the former is unconvincing.

Those who assert that the Roman Empire claimed dominion in a municipal criminal sense over pirates often do so without considering the historical context of the phrase *hostis humani generis*; they assume that the understanding of the phrase came into being during the 16th and 17th centuries. Often this line of argument is linked to the inference that piracy and the jurisdiction afforded to it are based on the heinousness of the crime.

By contrast, those who hold the stance that pirates under Roman law were communities existing in a state of constant legal war with the world make this assertion on the basis of a detailed examination of the circumstances of counter-piracy actions undertaken by the Roman military. The most notable historical action was the campaign against the Cilician raiding communities by Pompey, circa 67 BCE. During this campaign the Roman armies engaged the pirates not as criminals to be punished but as a sovereign enemy to be conquered for the good of the Empire. The argument that these pirate communities were viewed as sovereign nations to whom the laws of war applied is supported by the historical evidence that the campaign was ended not by prosecutions but a negotiated surrender and peace agreement.

The other noteworthy instance of the Roman Empire’s interaction with pirates, as they understood the term, was just prior to Pompey’s campaign. One of the communities that he subdued and forced into vassalage had kidnapped Julius Caesar during his youthful exile from Rome. The Cilician pirates demanded a ransom for Caesar’s safe passage, which he more than paid. Upon his release Caesar returned to the location of the pirates, resulting in their capture and execution. While Plutarch’s brief account of Caesar’s run in with pirates does not clarify whether they were engaged under the conditions of war (the tone seems to suggest they were dealt with in the manner of a personal vendetta), their execution was carried out in a manner that infers that their status was not one of criminals, but rather prisoners of war, rebels or the populace of a resisting city – groups of people who were legally subject to execution at the behest of the captor well into the middle ages.

Rubin argues that the reason a state of permanent war existed within communities that were referred to as pirates was because they pursued an economic course of raiding and other
warlike activity without any formal declaration of war, something that in the Empire required a formal, multi stage religious and political ceremony. It was in this context that Cicero defined them as *hostis humani generis* and it was their failure to formally declare war before engaging in warlike action which meant that the Empire was under no obligation to do so either. The argument that pirates in Roman times existed in a state of war and were dealt with according to the laws of war is supported by undated references in Justinian’s Digest regarding the status of men captured by brigands, who remained free men, when by contrast those captured by enemies in the context of war legally became slaves. In this context it is understood that those who had been captured in marauding actions by piratical communities (such as those engaged by Pompey) became legal slaves, making it difficult to read *hostis humani generis* as referring to a municipal criminal jurisdiction. The argument in support of reading Cicero’s assertions as referring to a state of legal war is that Rome tended to attached the term ‘pirate’ to any state or community which opposed the empire. This makes it difficult to argue that they were asserting a municipal criminal jurisdiction over the world at large on the basis of a group’s opposition to Roman rule.

The meaning of the definition *hostis humani generis* in relation to pirates has by no means remained static throughout history however; it is clear that in the context of its origin in the Roman Empire, via Cicero, it referred to a state of legal war rather than criminals who were subject to a universal jurisdiction of municipal law. This understanding would change as the phrase was revitalised in the late 16th century, as will be explored below. That said, the work and positions of those who assert that this later definition existed during the Roman Empire is called into question by their historical legal interpretation.

### III 16th and 17th Century Britain

The experience of England in the 16th and 17th centuries significantly shaped how piracy is viewed today. During this period the use of letters of marque and reprisal were commonplace, allowing holders to recapture goods taken by foreign nationals unlawfully on behalf of the Crown. At the same time, the Barbary States engaged in marauding and slave taking with the blessing of the Ottoman Empire, a practice that branded them, in political rhetoric, as pirates. During this period the term ‘pirate’ ceased to hold its historical legal meaning (a state or community in a state of perpetual war by virtue of its conduct) and first became synonymous with privateering, then later to mean privateering without, or in excess of, a commission. Rubin argues that this flexible use of the term ‘pirate’ in political rhetoric and everyday vernacular caused the erosion of its classical legal meaning.

Suggestions have been made that legal scholars discussing piracy in this period do so in a misleading way, implying that acts of attack and capture of goods under a letter of marque and reprisal were unlawful or acts of state-sanctioned terrorism, rather than a legitimate

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17 Rubin, above n 4, 12.
19 Ibid.
20 Ibid 11.
21 Kraska, above n 9, 12.
22 Rubin, above n 4, 22.
23 Kraska, above n 9, 21.
24 Rubin, above n 4, 15.
26 Ibid 17.
exercise of market control or warfare. In fact, it was only plundering in excess of the commission or without a commission that caused privateering to slip from valid state practice to become piracy, and hence criminal. Indeed some authors simply refer to privateers as merely state-sanctioned pirates, or as state-sponsored terrorists. However, when this period is examined in detail and the legal development of the term is separated from the political rhetoric and from careless use of the term pirate in everyday vernacular, it is easy to see that, while the line between privateering and piracy might be thin (and possibly not enforced for political reasons), the line was clear in the legal system, and the practice of courts reflected this clarity.

In 1569 piracy moved beyond the realm of rhetoric and began its re-entry into the legal sphere when Queen Elizabeth I proclaimed that all who practised piracy (in the context of actions in excess of a valid commission or without a commission) were beyond her protection and were to be lawfully taken and punished by whosoever should encounter them. This proclamation was followed in 1577 with the Warrant to the Warden of Cinque Ports which set out that English common law was to be followed by the Admiralty when goods changed hands as a result of said counter-piracy operations. Under the Warrant, pirates covered not only those who engaged in plunder on the seas without a commission but also to British subjects who took a foreign commission and smugglers. From these developments it became a legal requirement to have a crown licence to hunt pirates, with most merchant vessels holding a licence in case they should be set upon, as such action was considered legal enforcement and to do so without crown authorisation would be unjust. The result of these enforcement practices was routinely summary execution of the captured pirates by hanging. As an extension of the rise in counter-piracy action at the end of the 16th century, it was declared in 1589 that all goods seized from pirates must be submitted to in rem proceedings in an Admiralty prize court to determine the lawful title; failure to do so resulted in the buyer receiving no title and the seizer having their commission revoked.

This surge of anti-piracy action from the Crown caused legal theorists to begin considering the legal status of pirates and piracy. While these theorists paved the way for the existence of the crime of piracy jure gentium (the British common law is where the modern day crime of piracy jure gentium finds its roots), state practice at the time denied that either a crime of piracy jure gentium, or a universal jurisdiction to enforce municipal law without an

27 Ibid 14.
28 Kraska, above n 9, 7; Rubin, above n 4, 78.
30 Burgess, above n 6, 302.
32 Queen Elizabeth I, ‘Instruction for the better direction to Privateers for the taking of Pirates and Sea Rovers.’ (1577).
33 Ibid.
34 Rubin, above n 4, 79.
36 Rubin, above n 4, 44.
37 Kraska, above n 9, 105.
intersection of state interest, existed. This position is confirmed at numerous points in the 1876 case of *The Queen v Keyn* with Sir Robert Phillimore stating it most succinctly when he said: 'I am not aware of any instance, none was cited to us, of the existence of criminal jurisdiction over a foreign vessel for an offence committed when she was not within a port or harbour of the inland waters of the realm.'

It was Gentili, circa 1598, who resurrected the *hostis humani generis* when considering pirates. In this context he was not referring to communities or states who engaged in the economic practice of raiding and thus in a state of constant lawful war, but to individuals who were subject to summary execution for unlawful acts of plundering. Gentili’s reasoning for this position was that only a prince (or theoretically a sovereign by a different title) had the legal authority to go to war. Therefore, it was impossible for a pirate to be in a state of lawful war, making their actions criminal and synonymous with brigandage and robbery. This also had the effect of ending the concept of the ‘pirate state’ in a legal sense. This is supported by the fact that goods captured by Barbary corsairs were considered to have transferred title legally in the same manner as a wartime capture, although such a state remained in political rhetoric for some time.

In spite of the British adopting an approach that insisted on an intersection of British interests for jurisdiction to exist, the work of Grotius, Coke, and to a lesser degree Gentili through this period set up the jurisprudential framework for what is often termed universal jurisdiction over piracy (even though such a description is a misnomer). Coke, like Gentili, considered pirates to be *hostis humani generis*, and like Gentili he used this as a description of criminal behaviour that, depending on the circumstances, was robbery *animo furandi*, or petit-treason (should the offender be an English citizen) within Admiralty jurisdiction. However, Coke began his consideration of piracy as a crime of universal jurisdiction through his approach to what constituted the jurisdiction of the British Empire. He considered that all vessels sailing under English colours were within the territory of the Empire and thus within its jurisdiction. This has been used today to justify arguments of universal jurisdiction existing since the 17th century. However the reasoning is closer to modern concepts of flag state jurisdiction as articulated in Article 92 of the *United Nations Convention on the Law of the Sea* (UNCLOS).

Grotius on the other hand, paved the way for universal jurisdiction over piracy much more profoundly than either Coke or Gentili. He argued that the term ‘piratical’ could not apply to

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38 Rubin, above n 4, 42, 48 and 80–81.
39 *R v Keyn* (1876) 2 ExD 63.
41 Ibid 22.
42 Ibid 25.
43 Rubin, above n 4, 20.
44 Ibid 29.
45 Kraska, above n 9, 20–27.
47 Ibid 111.
48 Ibid 113.
49 Ibid.
states unless the state existed for the primary purpose of engaging in wrongdoing. Given that states existed for many legitimate purposes, and the pirate-like activity was but a part of the activity, they could not be considered to be pirates in the legal sense.\footnote{\footnote{Hugo Grotius, \textit{De Jure Belli Ac Pacis Libri Tres} (Francis W. Kelsey et al. trans., 1925) 631.}} In this vein Grotius supported the notion that goods captured by states engaging in such activity amounted to a legal capture and legitimate transfer of title.\footnote{\footnote{Ibid 673.}} By inference from his arguments regarding states being legally considered pirates, Grotius consigned piracy to a crime committed by individuals in breach of natural law.\footnote{\footnote{Rubin, above n 4, 29–30.}} In \textit{De Jure Belli ac Pacis} he then laid the framework for universal jurisdiction. In this work, Grotius argued that sovereignty on the high seas was gained in the same manner as it was on land — through the use of military force and the exercise of effective control. As an extension of this premise, navies could justifiably capture pirates and enforce their municipal law, acquiring jurisdiction through the sovereignty gained with an exercise of effective control through use of force.\footnote{\footnote{Grotius, above n 52, 214.}}

The result of these arguments was that foreign individuals captured in counter-piracy actions who could not show a valid commission (entitling them to be treated as enemy combatants) became subject to the municipal law of England.\footnote{\footnote{Rubin, above n 4, 31.}} As noted above, in most cases this exercise of jurisdiction usually resulted in the captured pirates being summarily executed.\footnote{\footnote{Goodwin, above n 6, 997; Kontorovich, ‘The Piracy Analogy’, above n 3, 190; Simpson, above n 35, 168.}} Kontorovich argues that the branding of pirates as \textit{hostis humani generis} through this period in history was used to apply the legal disabilities of both combatants and civilian criminals to pirates while avoiding granting them the legal protections of either category.\footnote{\footnote{Kontorovich, ‘A Guantánamo on the Sea’, above n 35, 257.}}

This legal debate about piracy was revisited in the later part of the 17\textsuperscript{th} century by Molloy and Jenkins, although by this stage the phrase \textit{hostis humani generis} had become firmly embedded in the above noted concepts of English municipal law.\footnote{\footnote{Rubin, above n 4, 84.}} Molloy, as a general rule, argued that traditional concepts of jurisdiction must apply to piracy for it to fall within English jurisdiction. However, he qualified this position by arguing that, where acts of piracy occur beyond state jurisdiction, anyone who captures the perpetrators is legally justified in subjecting the pirates to summary execution by hanging on the basis that piracy was a breach of natural law.\footnote{\footnote{Charles Molloy, \textit{De jure maritimo et navali, or, A Treatise of Affairs Maritime, and of Commerce} (T Whieldon and T Waller, 1778).}} The implication of Molloy’s work is that the jurisdiction afforded to piracy is grounded in the notion of the heinousness of the crime. However, the case law of the time does not reflect this assertion.

The first significant case demonstrating this is the trial of Capt. Vaughan in 1696.\footnote{\footnote{\textit{Rex v Vaughan} (1696) 13 How St Tr 485.}} In this matter, Capt. Vaughan was tried for high treason on the high seas because of his conduct while sailing under a French commission. Even though the recounting of his conduct was consistent with acts of piracy, such a charge was never considered due to the existence of a valid commission.\footnote{\footnote{Ibid 493, 536.}} If heinousness were the basis of the crime, the validity of his French commission would have been unimportant. However, at no point was piracy raised as a valid
charge because his guilt lay in his status as a subject of the British crown sailing for the French during a conflict with Britain.  

The next case worth considering is that of Capt. Kidd in 1701. The rhetoric used by the judge in this case has already been seen at the beginning of this article. However, the facts of the case and the nature of the charge do not reflect the rhetoric. Capt. Kidd was charged with, and convicted of, piracy conducted while under a commission as a pirate hunter and privateer for the British Crown. However, the charges were based upon Capt. Kidd’s privateering in excess of his commission and his failure to submit goods to the prize courts for in rem proceedings. While the charge of piracy is completely valid it is worth noting that, should Kidd have restricted his targets to those that were authorised under his commission and then submitted the captured goods to in rem proceedings, the very same conduct that caused him to be hanged for piracy would have been completely permissible at law, calling into question the suggestion that heinousness was the basis of jurisdiction to capture and prosecute pirates.

Jenkins adopted a different approach to Molloy, one that is very similar to the modern day law of piracy and consistent with the legal practice of the time. He argued that pirates were hostis humani generis and as such all peoples were commissioned to legally capture and punish pirates— an approach that was the norm at the time. Where his views became progressive was that he argued first that the Admiralty had jurisdiction over all of the high seas, and that this jurisdiction was concurrent with other nations. This view was supported by Sir Charles Hedge in Rex v Dawson, creating a hierarchy of jurisdiction on the high seas based upon traditional standing, but one where jurisdiction was never absent. He then proceeded to argue that pirates by virtue of their actions have removed themselves from the protection of their sovereign, making them essentially stateless. By contrast, privateers engaging in the same activity, but with a sovereign commission, are acting as an arm of the state, thus the state and not the individual is responsible. When these two arguments by Jenkins are considered together we end up with a theory of concurrent municipal jurisdiction for each nation to enforce its municipal piracy laws based upon positivist notions of sovereignty and jurisdiction, rather than on the vaguer notions of natural law and heinousness which Molloy argued in favour of contemporaneously. It was the arguments of Jenkins that led to pirates occupying a unique position in international law as individuals who derived their legal personality in relation to their personal actions rather than as an extension of their state.

By the end of this period it was clear than in a legal sense piracy was a crime under municipal law under the jurisdiction of the Admiralty. Regardless of the assertions of some scholars that universal jurisdiction existed over piracy at this point in time, historical evidence suggests that while the framework was laid during this period for the labelling of piracy as a

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63 Ibid 535–536.
64 Rex v Kidd 14 (1701) How St Tr 147.
65 Ibid 212–217.
67 Ibid xc.
68 Rex v Dawson (1696) 13 How St Tr 451, 454–455.
69 Wynne, above n 66, 714.
70 Rubin, above n 4, 89–90.
71 Simpson, above n 35, 162.
72 Burgess, above n 6, 302; Kontorovich, ‘The Piracy Analogy’, above n 3, 190; Paradiso, above n 6, 194; Sterio, above n 6, 378.
crime of so-called universal jurisdiction, this position did not actually become accepted custom until much later. The crime itself was confined to robbery at sea animo furandi, privateering in excess of the commission, or failure to submit goods captured under a commission or pirate hunting licence to in rem proceedings in an Admiralty prize court. The assertion that the existence of privateers negated the requirement for animo furandi in the crime of piracy is not supported by the historical evidence.

IV 19TH CENTURY UNITED STATES AND BRITAIN

The 19th century brought about an end of privateering as well as the cessation of piracy as a menace on the high seas. It was also a period where the rhetoric of pirates was more prevalent than any legal definitions, such definitions often becoming lost or languishing in obscurity. This period saw the United States at war with the Barbary States, the 1856 Paris Declaration banning the use of privateers and a naval dominance by the British Empire that was so overwhelming that it was used to justify British Imperial Law as International Law in regards to piracy.

Just prior to the beginning of the 19th century, Wooddeson expanded the definition of the law of nations to mean not only those laws that are common between all states (the classic natural law definition) but to also include the law between states inter se, which at the time was predominantly custom but also incorporated a degree of treaty law. He then proceeded to define piracy as falling into this broad category, strengthening the conception of piracy being a crime jure gentium rather than simply a crime municipally with concurrent jurisdictions. Concurrently, the Constitution of the United States (herein US) was drafted, with Article 1 §8 suggesting that the drafters did not consider piracy to be a crime jure gentium, but simply a municipal felony.

A United States

Before the US courts dealt with any cases of piracy, it engaged in a conflict with the Barbary States, a conflict that is often called the Barbary pirate wars. The classification of this conflict as a war against pirates is problematic as it was conducted as a conflict against hostile states rather than as a policing action against criminals. When referring to this conflict, the majority of authors fail to distinguish between rhetoric that branded the Barbary States as pirates and the legal definition that dictated that the conflict was conducted jure belli. In the case of some authors this failure is incidental because the way in which they

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Rubin, above n 4, 48 and 80–81.
74 Rubin, above n 4, 48, 92, 98.
75 Ibid 98; Kraska, above n 9, 7.
76 Rubin, above n 4, 100.
77 Burgess, above n 6, 315–316.
78 Rubin, above n 4, 201; Kraska, above n 9, 105.
80 Ibid 437.
81 The Constitution of the United States 1787, art 1 §8; Rubin, above n 4, 122–126.
82 Benerson Little, Pirate hunting the fight against pirates, privateers, and sea raiders from antiquity to the present (2010) 219–220; Rubin, above n 4, 154.
write infers the difference, but in the majority of cases there is a blurring of the line between the political rhetoric and legal definition of the day. For example, in the 2008 UN expert report on piracy off the coast of Somalia the ‘Barbary Coast wars’ are referenced in the development of extraterritorial law and universal jurisdiction over piracy *jure gentium*. Sterio and Burgess refer to the Barbary wars whilst arguing that the basis of piracy as a crime is the heinousness of the act, omitting that the US engaged the Barbary States under conditions of war, not conditions of policing. This failure has implications for modern interpretations of piracy *jure gentium*, as noted above, however, it is important to note that the US Barbary wars were just that – wars, not policing actions against pirates, thus rendering them irrelevant to the development of piracy as a legal term.

In the early part of the 19th century, US courts handled a number of cases dealing with the question of what constituted piracy, the ramifications of which are still being felt today. The first of these cases was tried under the 1790 *Act of Congress*, and later under the 1819 Act (which was brought into being because Congress was unhappy with judicial interpretation of the 1790 Act), which was then rewritten in 1820 into 18 USC §1651. The first of these cases was *United States v Tully and Dawson* in 1812. The accused had commandeered the schooner *George Washington* while the owner and captain was ashore, then proceeded to scuttle it off the coast of St. Lucia in an attempt the cover up their theft. In the judgment it was determined that piracy was defined to be ‘acts of robbery and depredation upon the high seas, which, if committed on land would amount to a felony there’, also noting that violence is not necessary for the crime of piracy to exist. Although Justice Story fails to clarify the basis of this definition (although it appears to be a paraphrasing of section 8 of the 1790 Act), it forms the first judicial interpretation of US piracy law and the first significant case of piracy in the English speaking world since 1705.

The next significant case was *United States v Hutchings* in 1817. Hutchings was accused of piracy for sailing an American registered vessel under a Buenos Aires commission and colours as a part of their independence struggle against Spain. It was held that *animo furandi*, a necessary component of piracy, could be negated if it could be shown that the accused was acting under a commission or acting on government service without a commission, shifting actions to a *jure belli* character. This position was affirmed in the case of *United States v Klintock* in 1820 where the court found that there was no middle ground between taking *jure belli* and taking *animo furandi*, with only taking *animo furandi*

83 Kraska, above n 9, 23–27.
85 Burgess, above n 6, 314; Sterio, above n 6, 379.
86 *An Act for the Punishment of Certain Crimes Against the United States 1790*, §8.
87 *An Act to Protect the Commerce of the United States and Punish the Crime of Piracy 1819*.
88 *Crimes and Criminal Procedure 18 USC § 81(1651)*.
89 *United States v Tully et al 28 F Cas (1 Gall) 226 (Circuit Court, D Massachusetts, 1812).*
91 Ibid 228 (per Story J).
92 Ibid 228–229.
93 *R v Green and Ors (1705) 14 How St Tr 1199*.
94 *United States v Hutchings* 26 F.Cas. (Brunn.Coll.C) 440 (Circuit Court, D. Virginia, 1817).
95 Ibid 440.
96 Rubin, above n 4, 159–160.
constituting piracy. The case of Hutchings also held that the punishment for a crime committed on land did not have to be death for it to amount to piracy when committed on the high seas, overcoming arguments that mere robbery could not constitute piracy because piracy carried a death sentence whereas robbery did not.

It was the case of United States v Palmer in 1818, where the accused were US citizens who had engaged in piracy against the Spanish merchant vessel Industria Raffaelli on the high seas, which arguably led to the piracy being consciously characterised as a crime jure gentium, requiring no nexus of jurisdiction, rather than simply a municipal felony occurring on the high seas requiring traditional notions of standing for jurisdiction to exist. This case drove this shift not by affirming the existence of such law, but rather by denying that such law existed. While this case affirmed the definition of piracy as being robbery on the high seas committed animo furandi, it denied that universal or concurrent municipal jurisdiction existed, rather, requiring that there be an intersection of US interests for US courts to have jurisdiction, to the point of denying even a perpetrator personality jurisdiction. Congress, as a response to the restriction placed upon the 1790 Act by US v Palmer, passed the 1819 Act, section 5 of which made piracy a crime, punishable by death, which the US had jurisdiction over on all of the high seas, the substantial offence being defined by the law of nations. This had the effect of forcing the US courts to treat piracy as a crime jure gentium as Congress had chosen to use that as the definition of its own municipal criminal definition.

This new statute was interpreted in the case of United States v Smith in 1820 in which Thomas Smith stood accused of engaging in piracy, due to the absence of a commission (one from Buenos Aires was claimed but could not be produced), against unnamed Spanish vessels while on board the Creollo in conjunction with the Irresistible, an Artigas vessel captured in the port of Margarita. In this case the court, as directed by the statute, considered the substantive content of piracy jure gentium and found that ‘robbery or forcible depredations upon the sea, animo furandi, is piracy’. It was also held that when considering piracy jure gentium, no nexus of jurisdiction was necessary by virtue of pirates being enemies of the human race. However, it is unclear whether this is an assertion of universal jurisdiction, based upon heinousness or concurrent municipal jurisdiction based upon statelessness. This was the last significant case until 2010 in the US considering the charge of piracy jure gentium; the vast majority of later US cases of piracy in this period dealt with the question of the validity of privateering commissions issued by unrecognised belligerents and are of little relevance to the development of piracy law.

98 Ibid 146–147.
99 United States v Hutchings 26 F Cas (Brunn Coll C) 440, 442 (Circuit Court, D. Virginia, 1817).
100 The United States v Palmer et al 16 US (3 Wheat) 610 (Supreme Court of the United States, 1818).
101 Ibid 611–612.
104 Ibid 633–634.
105 An Act for the Punishment of Certain Crimes Against the United States 1790.
106 An Act to protect the commerce of the United States and punish the crime of piracy 1819.
107 Ibid, §5.
108 The United States v Smith 18 US (5 Wheat) 153 (Supreme Court of the United States, 1820).
110 Ibid 161.
111 Ibid.
112 Rubin, above n 4, 160–183.
B Britain

As noted above, throughout this period of British naval dominance, the distinction between British assertions of international law and actual international law was negligible. Although the justification was unclear, Britain’s prolific Navy adopted the stance that it had the authority to protect shipping lanes on the high seas and thus capture and execute pirates when no direct link to British interests existed. The uncontested nature of this policy and approach by Britain had a profound impact on the development of piracy law. Part of the justification used by the British Admiralty was the argument put forward by Marshall CJ of the US Supreme Court and also by Jenkins in 1675 that pirates by virtue of their acts become stateless. This notion of concurrent municipal jurisdiction for piracy on the high seas had been the only exception to flag state jurisdiction over vessels for centuries (UNCLOS now provides much broader rights of visit to foreign vessels).

In 1825 (retroactive to 1820) the British government offered a bounty on all pirates engaged. Under the Bounty Act, there was no requirement for the prosecution of pirates (in fact the payments were based predominantly on pirates killed), only the return of captured property for in rem procedures. This act became the basis of most of British antipiracy action throughout the 19th century. It blurred the legal definition of piracy jure gentium because of court cases dealing with piracy under the Bounty Act rather than piracy as a municipal crime. The only significant case of piracy jure gentium within the British Commonwealth during this period is the 1840 case of Mohamed Saad. In this matter the British courts held they did have jurisdiction over piracy jure gentium but that the actions of the accused were on behalf of the Sultan of Kedah, thus the requirements of the crime had not been met.

In 1850 the Bounty Act was repealed and replaced with a much narrower statute in the wake of Dr Lushington’s findings on what constituted a pirate under the Act in the matter of Serhassan (Pirates). This case considered whether or not a raid made on a shore-based emplacement by the Royal Navy would constitute an antipiracy action. For the purpose of the Bounty Act, Dr Lushington concluded that shore-based persons could be classified as pirates when engaged by British naval or amphibious forces. It is important when considering the crime of piracy jure gentium through history to note that this was not a criminal definition of the law but an interpretation of a bounty statute.

The other major case where the definition of pirate was considered under bounty statutes was the 1853 case of the Magellan Pirates. This case was related to a bounty claim under the

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113 Ibid 201.
115 The United States v Palmer et al. 16 US 610, 614 (Supreme Court of the United States, 1818); Wynne, The Life of Sir Leoline Jenkins, above n 66, 714.
118 An Act for encouraging the Capture or Destruction of piratical Ships and Vessels 1825, 6 Geo 4 c 49.
119 Ibid, s2.
120 Ibid, s3.
121 Rubín, above n 4, 205–206.
122 Regina v Tunkoo Mahomed Saad and ors (1840) 2 Kyshe (Cr) 18 Commonwealth International Law Cases 31.
124 Serhassan (Pirates) (1845) 166 ER 788, 790.
modified statute that replaced the 1825 *Bounty Act* and considered whether insurgents could be classified as pirates under this statute. In this matter it was held that it was not necessary for piracy *jure gentium* to have taken place for the bounty to be payable. The basis of this argument was that the statute relied on piratical acts (as defined by British government policy), and used the phrase ‘persons alleged to be pirates’ for the application of the statute, rather than on piracy in a criminal sense.\(^{125}\) Thus it was held that the Chilean insurgents could be classified as pirates under the statute for the purpose of the bounty.\(^{126}\) As with the *Serhassan (Pirates)* case definition of pirates, this represents a definition under a bounty statute rather than a definition of piracy at municipal criminal law, giving it the same weight as a policy rhetoric definition when considering the legal historical definition of piracy *jure gentium*.

The vast majority of other British case law through this period, much like the US, deals with the acts of unrecognised belligerents issuing commissions or exercising blockade rights.\(^{127}\) However, it is also worth noting that in the early 19th century in Southeast Asia, British colonies often couched military action as antipiracy action to circumvent the Act of 1784 prohibiting the colonies from engaging in warlike activity without prior approval from London.\(^{128}\) Such rhetoric can be seen in discussions of Britain’s failed attempt to annex the Island of Pankour, circa 1819, which was justified as an antipiracy action.\(^{129}\) Around the same time, similar use of rhetoric was also engaged in by the Dutch in relation to the British acquisition of territory, with Col. Nahuijs referring to the British acquisition of Singapore as the treaty made with ‘the head of the pirates’.\(^{130}\) The liberal use of the term piracy within the British Empire both in terms of policy and in bounty statutes clouds historical legal definition. What is clear about the 19th century British experience of antipiracy is that policy and rhetoric were rife but legal definition scarce. Indeed it has been argued that by the end of the 19th century the terms ‘piracy’ and ‘pirates’ were used in such an undisciplined manner that they became completely unsupportable by any legal or historical scholarly analysis,\(^{131}\) although by this time piracy was virtually non-existent.\(^{132}\)

Within the context of this prolific antipiracy activity by the British Navy, the issuing of letters of marque and reprisal, and thus privateering, became an internationally wrongful act. Under the 1856 Declaration of Paris (which has been ratified by some fifty states and is now considered custom) it was agreed that privateering would no longer be a legitimate method of war.\(^{133}\) Some authors argue that this was an agreement by nations to stop using state sanctioned terrorism (in order to support a heinousness argument).\(^{134}\) However such claims

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\(^{125}\) *The Madgellan Pirates* (1853) 164 ER 47, 47–48.

\(^{126}\) Ibid 50.

\(^{127}\) Ibid n 4, 241–266.

\(^{128}\) *An Act for the better Regulation of the Affairs of the East India Company, and of the British Possessions in India; and for establishing a Court of Judicature for the speedy and effectual Trial of Persons accused of Offences committed in the East Indies* 1784, 24 Geo 3 s 2 c 25, s35; Rubin, above n 4, 222–223.

\(^{129}\) Letter from the Secretary of Prince of Wales Island to the Chief Secretary of the Government, Fort William, 22 January 1819 in C D Cowan, ‘Early Penang and the Rise of Singapore 1805-1832’ (1950) 23(2) *Journal of the Malaysian Branch of the Royal Asiatic Society* 1, 88–89.

\(^{130}\) Col Nahuijs in the fifth letter of this series, dated Penang, 10 June, 1824 in H Eric Miller, ‘Extracts from the Letters of Col. Nahuijs’ (1941) 19(2) *Journal of the Malaysian Branch of the Royal Asiatic Society* 169, 192.

\(^{131}\) Rubin, above n 4, 292.


\(^{133}\) *Paris Declaration Respecting Maritime Law* (signed and entered into force 16 April 1856).

\(^{134}\) Burgess, above n 6, 298–299; Sterio, above n 6, 379–380; Paradiso, above n 6, 190–191.
again fail to recognise that privateering was considered a legitimate act of war and thus not akin to piracy in a legal sense as privateers were considered enemy combatants. This treaty is often cited as the point at which piracy *jure gentium* began to truly exist as a *jus cogens*.

Twenty-one years later the *Huascar* incident clearly indicated that the international community required that any enforcement of piracy *jure gentium* occur only on the high seas, with any attempt to enforce purported acts of piracy in the territorial sea constituting a gross breach of state sovereignty. This supports arguments that jurisdiction afforded piracy *jure gentium* is one based on the notion that it is a crime that occurs beyond territorial jurisdiction of any state. Thus all states have a concurrent municipal jurisdiction, rather than a universal jurisdiction, highlighting that the nature of jurisdiction to capture and prosecute pirates is based upon this premise rather than on the premise of the heinousness of the crime, which is the argument used as the basis of links between piracy and international criminal law.

V THE CURRENT STATE OF PIRACY LAW

The current law of piracy is found in UNCLOS articles 100 to 107, which were directly inserted, verbatim, from the Geneva High Seas Convention of 1958 (GHSC). It is acknowledged that by the time the GHSC was drafted, piracy was considered an historical throwback and sections governing it were included as a matter of historical propriety rather than out of any genuine need. This was made clear in the 288th meeting of the ILC (10 May 1955) where Scelle commented that issues of piracy and the slave trade were exceptional in modern times. Before the GHSC was drafted there were a number of unsuccessful attempts to codify customary law on piracy *jure gentium*. However, these attempts were considered to be *de lege ferenda* rather than merely a codification of the existing state of the law.

The GHSC drew heavily on these prior attempts to codify custom, and also by virtue of the language adopted, cemented the prohibition on privateering from the 1856 Paris
Declaration. Articles 100 to 107 of UNCLOS are widely regarded as both the relevant authority defining the crime of piracy *jure gentium* and as a codification of custom on this issue, although some deny that UNCLOS is custom. Denials of UNCLOS’s customary nature hold very little weight when considered in light of the 1989 Jackson Hole joint statement by the US and the USSR, in which both governments stated that with regard to traditional ocean uses, UNCLOS represents custom. Before the substantive definition of piracy law is explored it is worth noting that Article 100 of UNCLOS only requires states to cooperate with piracy suppression, with all other counter piracy action being voluntary.

A Definition of Piracy

Article 101 of UNCLOS outlines a substantive offence of piracy *jure gentium* as follows:

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).

This definition has been the source of much debate as to its meaning. The first point of debate is the meaning of the phrase ‘private ends’ in subsection (a) of article 101. This debate hinges

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146 Kraska, above n 9, 117–122.
on whether the phrase simply excludes acts conducted with state sponsorship or whether *animo furandi* is still a required element of crime, thus denying acts that are politically motivated as piracy. The ILC drafts have been used to argue that acts done with a political motivation cannot constitute piracy,152 but also to argue that *animo furandi* is no longer necessary and that ‘private ends’ was used so that acts of hatred and vengeance were also covered by the definition.153 These arguments find their basis in examinations of the Harvard draft of 1932 conducted by the ILC in its 290th meeting (12 May 1955), which included acts beyond taking *animo furandi* but distinguishing those of a political motivation as not being covered by the phrase.154 The ILC clearly supported this view when the commentary of article 39 of the draft *Articles concerning the Law of the Sea* is examined.155 On the basis of traditional understandings of the phrases ‘public’ and ‘private’ in international law a number of scholars have argued that in this context the phrase ‘private ends’ should be understood as merely lacking state sponsorship.156

Others argue on the basis of a traditional understanding of piracy *jure gentium* that ‘private ends’ in the context of article 101 still requires that actions be taken *animo furandi*.157 Several scholars suggest that the phrase constitutes a middle ground between these two positions, in line with Kraska’s view that *animo furandi* is no longer necessary, but acts of political and religious motivation are excluded,158 a view which as noted above is implied in the ILC draft articles. Simpson clarifies the issue by arguing that the phrase ‘private ends’ in UNCLOS was most likely intended by the drafters to mean mercenary ends, but it was deliberately left open to broader interpretation.159 However, he suggests that what makes a pirate a pirate is his lack of political motivation; pirates are ‘enemies of mankind because they are not enemies of only one particular sovereign’.160

Minutes from the ILC drafts, which formed the basis of UNCLOS, support both of Simpson’s arguments. At the 326th meeting (4 July 1955) the drafters declined to expand upon the meaning of ‘private ends’,161 and at the 343rd meeting (9 May 1956) they dismissed objections about the failure to include politically motivated acts within piracy.162 While both Garmon and Dahlvang agree that ‘private ends’ excludes acts done with a political or religious motivation, they argue strongly in favour of expanding the meaning to bring it into line with those who argue it means ‘not state-sanctioned’.163 Regarding dual-purpose piratical

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152 Simpson, above n 35, 167.
153 Kraska, above n 9, 130.
154 *Yearbook of the International Law Commission 1955*, above n 143, 40–43.
158 Garmon, above n 73, 258, 263, 265; Jesus, above n 117, 377–378; Dahlvang, above n 7, 21; Kraska, above n 9, 130; Simpson, above n 35, 167.
159 Simpson, above n 35, 164–165.
160 Ibid 166.
162 *Yearbook of the International Law Commission 1956*, above n 155, 47.
163 Dahlvang, above n 7, 27; Garmon, above n 73, 275.
acts, Direk et al convincingly argue that the primary motivation of the crime should be examined to determine whether or not it constitutes an act of piracy. In this vein they suggest that, where the piratical act is directly intended to achieve a political aim, it is beyond the scope of piracy. However, when the primary aim is to procure funds, and any political statement is subsequent or incidental, then it falls within the scope of piracy.\textsuperscript{164}

When considering the high seas requirement of Article 101 it must be recognised by virtue of Articles 33 and 58 that both the contiguous zone and the exclusive economic zone are considered part of the high seas for the purposes of piracy law.\textsuperscript{165} With the exception of Burgess, scholars agree that for piracy \textit{jure gentium} to have occurred, the attack must have taken place outside the 12 nautical mile territorial sea.\textsuperscript{166} By contrast Burgess argues that, provided the attack descended from the sea, it can still be classified as piracy even if the attack takes place within the 12 nautical mile territorial sea or on land. To arrive at this position he makes use of the 2001 edition of the 1924 text \textit{A Treatise on International Law} by William Hall, possibly because it assists his argument that piracy and terrorism are intertwined.\textsuperscript{167} While this interpretation may have had merit when it was first written, superseding treaty law (in the form of the GHSC and UNCLOS) and state practice – historical and contemporary – suggest that this is not good law.

There are those who argue that the high seas requirement of piracy \textit{jure gentium} is an absurd fetter to the law and serves as a deterrent to enforcement.\textsuperscript{168} There have been suggestions that the UNCLOS definition of piracy, specifically the high seas requirement, should be abolished in favour of using the broader International Maritime Bureau (IMB) statistical definition that incorporates all the acts of violence or theft against ships regardless of whether they occur within territorial, archipelagic or internal waters or on the high seas.\textsuperscript{169} Such a shift would be dangerous and inappropriate (why the high seas requirement is important when considering piracy \textit{jure gentium} will be explored in more detail when considering universal jurisdiction). Bahar summed it up most simply when he said ‘the answer: “Nebraska”’,\textsuperscript{170} likening the removal of the high seas requirement to France policing crime in Nebraska.\textsuperscript{171} What is clear though is that, with the exception of Burgess, even those who do not like the high seas requirement agree it exists, supporting the view that the foundation of piracy is the stateless nature of the crime and not the heinousness of the crime.

There has been a measure of debate as to whether or not Article 101 actually requires two vessels to be involved for piracy to exist. Bahar argues strongly that the two ship requirement that is implied in Article 101(a)(i) is mythical.\textsuperscript{172} The basis for this argument hinges on the 17\textsuperscript{th} century conception that mutiny is a form of piracy and is punishable in the same manner.

\textsuperscript{164} Direk et al, above n 7, 128.
\textsuperscript{166} Bahar, above n 29, 18–19 and 21–22; Bento, above n 7, 419–421; Direk et al, above n 7, 131; Geiss and Petrig, above n 142, 64; Kontorovich, ‘The Piracy Analogy’, above n 3, 191; Sterio, above n 6, 388–390; Wilson, above n 147, 56.
\textsuperscript{167} Burgess, above n 6, 322.
\textsuperscript{168} Bento, above n 6, 419–421; Garmon, above n 73, 266–267; Houghton, above n 148, 273; Jesus, above n 117, 379–380.
\textsuperscript{169} Bento, above n 6, 424; Garmon, above n 73, 266–267; ICC International Maritime Bureau, \textit{Piracy and Armed Robbery Against Ships: Report for the period 1 January - 30 June 2013} (2013) 3.
\textsuperscript{170} Bahar, above n 29, 21.
\textsuperscript{171} Ibid 21.
\textsuperscript{172} Ibid 38–39.
He also refers to the *Achille Lauro* incident in 1985, in which an Italian cruise ship was hijacked by members of the Palestinian Liberation Front who then held the passengers hostage, killing a US citizen when their demands were not met.\(^{173}\) This incident led to the drafting of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) after the United States claim that it constituted piracy was rejected by the international community.\(^{174}\) Bahar’s argument is problematic because while Articles 101 (b) and (c) have no such requirement, Article 101(a)(i) clearly states ‘against another ship or aircraft’,\(^{175}\) which *prima facie* must require two vessels to satisfy that requirement. The requirement for two ships to be involved is the predominantly accepted view.\(^{176}\)

### B Jurisdiction

The concept of the concurrent municipal jurisdiction to enforce piracy law was codified in Article 105 UNCLOS as follows:

> 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 or aircraft 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.\(^{177}\)

As is evident, this concept of jurisdiction hinges upon the crime being committed beyond the territory of any State. While some assert jurisdiction is based upon the notion of pirates being *hostis humani generi*,\(^{178}\) this is a flawed supposition. As explored previously in this article, notions of jurisdiction to capture and punish pirates have always hinged upon the presupposition that the high seas are beyond the territory of any one sovereign, thus all sovereigns have a concurrent municipal jurisdiction over it. Unlike war crimes, genocide and other crimes of universal jurisdiction that are clearly based on the heinousness of the actions (and usually occur within an area of territorial sovereignty), such an argument regarding piracy is deeply flawed, ignoring both historical and current state practice regarding the question of piracy enforcement.\(^{179}\) To understand the reasons for the importance of this, Bahar’s statement above about Nebraska can be deconstructed and then contrasted with that of war crimes. In summary, Bahar argues that to include the territorial sea in the definition of piracy would be akin to France sending its military to police an act of armed robbery in Nebraska. Not only would such an action be ridiculous, it would be a gross breach of state sovereignty.\(^{180}\) In the same way, sending warships into another state’s territorial sea to chase

\(^{173}\) Geiss and Petrig, above n 142, 42–43.

\(^{174}\) Azubuike, above n 29, 53; Dahlvang, above n 7, 28; Elagab, above n 147, 62–63; Sterio, above n 6, 386–387.


\(^{176}\) Azubuike, above n 29, 53; Elagab, above n 147, 62–63; Jesus, above n 117, 376–377.


\(^{178}\) Burgess, above n 6, 314; Harrelson, above n 147, 291; *United States v Hasan et al.* 747 F. Supp. 2d 599, 602 (US District Court for the Eastern District of Virginia, Norfolk Division, 2010).

\(^{179}\) Direk et al, above n 7, 131; Kontorovich, *The Piracy Analogy*, above n 3, 210–211; Wilson, above n 147, 56.

\(^{180}\) Bahar, above n 29, 21.
criminals who have committed their crimes within the exclusive jurisdiction of that coastal state would constitute a gross breach of state sovereignty. International agreement on this point is clear. For example, UN Security Council resolutions authorising the entry of foreign navies into Somali territorial waters, contingent upon the Transitional Federal Government's permission, clearly indicate that such an arrangement is not evidence of custom and is specific to the situation in Somalia.\(^{181}\)

These jurisdictional requirements raised questions as to whether the crimes under Article 101 (b) and (c), in particular 101(c), had to be committed on the high seas as well. The recent cases of *US v Ali* and *US v Shibin* clarify this issue with regard to Article 101(c) by finding that, so long as the act facilitated occurs on the high seas, then concurrent municipal jurisdiction exists through an aiding and abetting charge.\(^{182}\) Oddly, the court in *US v Ali* held that the language of Articles 101(c) with Article 105 did not provide a jurisdiction for conspiracy to commit charges on two separate grounds.\(^{183}\)

The first ground was that Article 101 of UNCLOS,\(^{184}\) while broad enough to give rise to aiding and abetting liability, was silent on the questions of attempted piracy and conspiracy to commit piracy.\(^{185}\) As such they found that ‘facilitating’ under Article 101(c)\(^{186}\) did not extend to conspiracy to commit piracy, and thus the court did not have jurisdiction under Article 105 of UNCLOS.\(^{187}\) The other reason the court declined to uphold the offence of conspiracy to commit piracy was that the municipal criminal code of the United States required the crime committed be an ‘offence against the United States’\(^{188}\) As the crime of piracy for which the accused was charged had no nexus of jurisdiction in the United States, the court held that a §371 offence had not occurred.\(^{189}\) However, given that this is a US criminal case, it is unclear how other jurisdictions will interpret and apply this precedent.

### C Concurrent Municipal Jurisdiction v Universal Jurisdiction

When piracy is juxtaposed with the concept of war crimes, we see a breach of international law that almost exclusively occurs within territorial jurisdiction but is held by the international community to be universally justiciable on the basis of its heinousness,\(^{190}\) as

181 Resolution 1816 (2008); Resolution 1838 (2008); Resolution 1846 (2008); Resolution 1851 (2008); Resolution 1897 (2009); Resolution 1950 (2010); Resolution 2020 (2011).
188 Crimes and Criminal Procedure 18 USC §371.
opposed to one that is subject to concurrent municipal jurisdiction on the basis of statelessness. The basis of these *jus cogens* crimes being universally justiciable is that they are considered grave breaches of international law — the crime is so abhorrent that all states possess jurisdiction to try and punish the perpetrator based on its heinousness.\(^{191}\) That heinousness is the basis for war crimes and crimes against humanity prosecution, which is clear from statements by the ICTY about the role of such trials:

The International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.\(^{192}\)

Ruby notes that the structure for dealing with such jurisdiction is generally articulated by treaties in a ‘prosecute or extradite’ manner.\(^{193}\) This was explored in the 2012 case of *Belgium v Senegal*\(^ {194}\) regarding the extradition of individuals suspected of perpetrating torture. In this case the ICJ held that where a country held a suspect that it was bound under treaty to prosecute for crimes against humanity (in this instance the relevant treaty was the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*)\(^ {195}\) it could absolve itself of this duty by extraditing the suspect to a country that was willing to prosecute.\(^ {196}\)

Similar frameworks can be seen in the *Convention on the Prevention of Punishment of the Crime of Genocide*,\(^ {197}\) and the various Geneva Conventions.\(^ {198}\) A prosecute or extradite framework can also been seen in Article 16 of the *United Nations Convention against Transnational Organised Crime* (UNTOC). However, this can be distinguished from the treaty provisions pertaining to *jus cogens* crimes as it only applied to State parties of the convention and crimes covered by the convention that have been sufficiently criminalised in each State.\(^ {199}\) The prosecute or extradite framework of the SUA can be distinguished for the same reasons.\(^ {200}\)

Customary universal jurisdiction for war crimes and crimes against humanity on the basis of heinousness was explored in the case of *Israel v Eichmann*.\(^ {201}\) The District Court of

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\(^{193}\) Ruby, above n 132, 583–585.

\(^{194}\) Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (International Court of Justice, 2012).

\(^{195}\) United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed 10 December, 1465 UNTS 85 (entered into force 26 June 1987) art 5–8.

\(^{196}\) Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), 94–95 (International Court of Justice, 2012).


\(^{198}\) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 1949 49–50; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 1949 51 & 52; Convention (III) relative to the Treatment of Prisoners of War, Geneva 1949 129 & 130; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 1949 146 & 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 88.


Jerusalem held that under international law jurisdiction to prosecute for war crimes was exercisable by any judicial and legislative authority in the absence of a competent international tribunal due to the heinousness of the crimes. On this point the court found that it was ‘the moral duty of every sovereign state … to enforce the natural right to punish, possessed by the victims of the crime, whoever they may be, against criminals whose acts have “violated in extreme form the law of nature or the law of nations”’. Further it was held in Eichmann (after an examination of a great deal of case law) that an illegal arrest, in the form of abduction from the sovereign territory of a foreign state in this matter, did not negate the jurisdiction provided to the Israeli courts under international law. In spite of the examinations of piracy law in paragraph 13 of the judgment the conclusions drawn by the court draw on the rhetoric of piracy and the phrase hostis humani generis rather than the legal history of piracy.

By contrast Article 105 UNCLOS and customary piracy jure gentium simply provide standing to exercise municipal jurisdiction in areas where no territorial sovereignty exists. For this reason it is argued in this article that piracy jure gentium is not a crime of universal jurisdiction but a crime which occurs outside the sovereign territory of any state and thus all states have a concurrent municipal jurisdiction. This view is supported by historical and current state practice, and the language of Article 105 UNCLOS. Thus, it is also argued that piracy cannot be considered to fall within the ambit of international criminal law as the jurisdiction and basis of jurisdiction are foundationally different. This view is supported by Boister’s recent considerations of the possibility of an International Piracy Court, where he rightly refers to piracy as a transnational crime. However, his earlier work on the differences between international criminal law and transnational criminal law suggest that piracy fits into neither category. This is because it does not require a nexus for a state to exercise jurisdiction in the same way that transnational criminal law does.

It is important to recognise that the basis of piracy being a crime of concurrent municipal jurisdiction, combined with the fact that it occurs beyond territorial sovereignty of any nation, does not mean that it exists in a jurisdictional void. Even should concurrent municipal jurisdiction cease to exist, jurisdiction to capture and prosecute pirates will still be present in traditional notions of standing, such as flag state jurisdiction.

D  Sentencing and Due Process

There have been arguments that the definition of piracy articulated by the GHSC and UNCLOS is actually irrelevant when considering the crime piracy jure gentium, on the basis that Article 101 undermines concepts of universal jurisdiction (as articulated by Article 105 and as understood historically). The basis of this argument is that UNCLOS does not provide

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202 Ibid 11–12.
203 Ibid 14.
204 Ibid 41–52.
206 Direk et al., above n 7, 131; Jesus, above n 117, 374; Kraska, above n 9, 106; Wilson, above n 147, 58.
uniform punishment for the crime it defines. In the case of *US v Said*, Justice Jackson held that the GHSC and UNCLOS were lacking in authority and thus irrelevant when considering the charge of piracy under 18 USC §1651. As a result, he applied the much narrower definition of piracy *jure gentium* found in the 1820 case of *US v Smith*, being sea robbery *animo furandi* (of which the defendants were found not guilty). Similarly, Goodwin argues that, because piracy is a different charge in most municipal jurisdictions when considering the sentence it carries, the exercise of universal jurisdiction precludes notice and thus due process.

Goodwin and Justice Jackson are correct that piracy does not have uniform international sentence; the disparity of sentencing globally is clear, with punishments ranging from between three years in prison to a death sentence. While the Rome Statute does provide guidelines for sentencing for the International Criminal Court, this is by no means uniform sentencing; one need only look at the variety of sentences handed down by the ICTY to see that, even when war crimes are considered judicial, discretion on sentence severity is exercised taking into account the facts of the case. However, while arguments about a lack of sentencing guidelines might have some weight if piracy was truly a crime of universal jurisdiction, because it is a crime of concurrent municipal jurisdiction (defined by Article 101 UNCLOS), the lack of uniform sentencing standards does not undermine the authority of relevant treaty law and custom defining the offence. Nor does it *prima facie* stand in opposition to the due process rights articulated in Article 14 of the International Covenant on Civil and Political Rights (herein the ICCPR). This is because at no point in Article 14 is it necessary for the jurisdiction in which a crime will be tried to make clear to the offender before a charge is brought, nor does it require that the state that effects the arrest to exercise judicial jurisdiction over the offence. Further the wording of Article 105 of UNCLOS in effect provides notice as to legal consequences to potential pirates for all jurisdictions as it specifies that every nation may exercise criminal jurisdiction over such acts on the high seas.

### E Applicable use of force during enforcement

Since UN Security Council resolutions began making reference to relevant international humanitarian law, there have been questions as to what is applicable regarding the use of force in counter piracy operations. Kontorovich argues that historically the definition of pirates as *hostis humani generi* gave pirates the legal disabilities of the combatants and civilians without the protections of either, usually resulting in summary execution upon capture. Simpson argues that in the same way current attempts to link terrorism and piracy

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212 Goodwin, above n 6, 1004–1005.
213 Bahar, above n 29; Chang, above n 147, 280; Dahlvang, above n 7, 39–40; Goodwin, above n 6, 997 and 1008.
through the use of historical and political rhetoric are an attempt to justify summary execution without the protections of humanitarian law or criminal due process. When considering whether the laws of war have a role to play in suppressing piracy "'the simple answer is "no"'. The reason for this is that UNCLOS provides for constabulary enforcement, not warlike enforcement, against piracy. Further, it is generally accepted that under international humanitarian law pirates are classified as civilians and not combatants, meaning they are to be fired upon only in self-defence, defence of another or to prevent the commissioning of each crime. The ITLOS case of the M/V Saiga (No. 2) clarifies that the use of force must be avoided as far as possible. On this note Judge Anderson made the position very clear when he said:

Force must be resorted to only in the last resort and after warnings (including shots across the bow) have been given. Even then, any live shots must be fired in such a way as to avoid endangering the lives of those aboard. In order to ensure respect for these standards, law enforcement officers should receive adequate training and maritime practices and, if armed, should be provided with specific rules of engagement.

There have been arguments that the inability of navies either to treat pirates as hostile combatants or to engage in summary execution upon capture is a fetter upon enforcement efforts. The problem with permitting the summary execution of captured pirates (as was the custom historically) is that it would amount a grave breach of due process and the right to not be arbitrarily deprived of life, violating Articles 6 and 14 of the ICCPR. The issue with classifying pirates as enemy combatants in an armed conflict is that such a definition is a question of fact, not a question of convenient rhetoric. So while some may find treating pirates as civilians and affording them due process distasteful, especially since historical rhetoric places pirates in a grey area between combatants and civilians, thus affording them the legal protections of neither group, pirates are civilians, and in this day and age that means they are afforded due process for their crimes. While Kontorovich makes a case that Somali pirates fit all of the factual requirements to be classified as an irregular militia, classifying them as combatants rather than civilians, Guilfoyle rightly points out that the

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220 Ibid 150.
221 Elagab, above n 147, 66; Geiss and Petrig, above n 142, 130–135; Kontorovich, ‘A Guantánamo on the Sea’, above n 35, 257; Kraska, above n 9, 92.
224 Bento, above n 7, 410; Elagab, above n 147, 66; Mario Silva, ‘Somalia: State Failure, Piracy, and the Challenge to International Law’ (2009) 50 Virginia Journal of International Law 553, 577; Sterio, above n 6, 390.
227 Prosecutor v Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 70 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, 1995).
actions of the Somali pirates have no connection to the protracted civil war in Somalia, causing any attempt to classify them as combatants to fail.\footnote{Guilfoyle, ‘Piracy off Somalia’, above n 156, 144–146.}

\section*{Summary of the current law}

Piracy \textit{jure gentium} can be defined as an act of violence, depredation or detention committed for private ends on the high seas, involving two or more vessels. While the offence no longer requires \textit{animus furandi}, it is questionable whether acts committed for a political or religious reason meet the private ends requirement. Because of the requirement that the crime occur on the high seas (with similar acts occurring within the territorial sea, archipelagic or internal waters being armed robbery at sea and within the exclusive jurisdiction of the relevant state) the crime attracts the concurrent municipal jurisdiction of all states to enforce and prosecute, distinguishing it from other \textit{jus cogens} crimes which attract a universal jurisdiction. Any engagement in enforcement must be done using constabulary force rather than warlike force, resulting in due process for the offenders by virtue of their status as civilians committing a crime rather than as enemy combatants in an armed conflict.

\section*{VI Conclusion}

What is clear from this article is that the crime of piracy \textit{jure gentium}, as well as the terms ‘pirate’ and ‘piracy’ are steeped in a rich history where legal definition and political rhetoric are often confused. The liberal use of political rhetoric, historically and recently, has caused a great deal of confusion around the substantive content of the law, and in particular the meaning of universal jurisdiction in the context of piracy. It is suggested that when the current treaty law, which is considered to codify custom, and historical state practice are examined, piracy \textit{jure gentium} cannot be classified as a crime of universal jurisdiction but must be considered as one afforded a concurrent municipal jurisdiction. The differences between universal jurisdiction and concurrent municipal jurisdiction are clear when piracy is juxtaposed with other \textit{jus cogens} crimes such as war crimes or torture. Therefore the inclusion of piracy within the canon of international criminal law, both foundationally and contemporarily, is based upon a flawed understanding of the history of piracy law, the jurisprudential foundation of the current law and the misleading use of the term ‘universal jurisdiction’. As a crime, piracy is more akin to transnational criminal law frameworks, but even this is problematic due to the ability for states to exercise jurisdiction without a nexus.
ANIMAL WELFARE UNDER THE SHARI’A

ASMI WOOD*

This paper examines the law related to the specific issue of animals ritually slaughtered by the Muslim halal method for food in Australia. Currently, the main contentious religio-legal issue for Muslims is that some Muslim leaders have resisted the general use of stunning of animals before slaughter on religious grounds, and have reacted negatively to the RSPCA’s recommendation that stunning is made mandatory in Australia. The validity or otherwise of this opposition is examined by interrogating the primary sources of Islamic law (the shari’a), and by examining the use of halal certification in the Australian food industry context. Particular attention will be given to how Australian law and practice relates to the broader law on what is lawful under the shari’a. The paper then examines possibilities of using this broader understanding of Muslim law to promote animal welfare, and concludes that the shari’a is a greatly underutilised means of protecting animal welfare, not only in Australia, but also among Australia’s trading partners with Muslim majorities.1

INTRODUCTION

This paper will examine the treatment of domesticated animals as mandated under Islamic law (the shari’a).2 Australian practice with respect to ‘halal’ animal slaughter will be compared to the requirements of ‘classical’ shari’a, defined below. The terms ‘Islamic law’ and the shari’a are used synonymously.

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1 The author would like to thank the blind referees for their very extensive and constructive comments on this paper. Any omissions or errors remain the author’s responsibility.

2 E W Lane, Arabic English Lexicon Volume 2 (Cambridge Islamic Texts Society, 1863, 1984 ed) 1534. The root of the word shari’a is شر. Lane’s lexicon states that the word shari’a, among other things, means ‘a path to water’ (a source of something good), or something that God made apparent or plain. It is a place where one leads an animal or person to water; actual following or drinking is something that cannot be compelled. The word shari’a also has the sense of being ‘in’ (في) the drinking place, ie one is immersed in it in order to drink, which gives the impression that the shari’a is primarily applicable to those ‘in’ Islam. It is also important that the metaphor is viewed in its desert origins and setting. Therefore, one may imagine that one has seen water in the form of a mirage, been fooled by it, and been led to destruction by the mirage. Thus the ‘right path’ must be followed if one is to be led to sweet water, and not to the mirage. One must use one’s ‘inner sight’, ie insight and wisdom coupled with right knowledge, to prevent one from being fooled by one’s own senses and desires.
The structure of the paper is as follows. Part II briefly explores some fundamental concepts of Islam and Islamic law, with a view to contextualising the broader discussion and scope of halal (a term which includes all that is lawful under the shari’a). The scope of halal in the Australian context (that is, as used in the food and food preparation industries — a significantly narrowed conception of halal) is then examined within this broader context of shari’a lawfulness. The key issue here is an identification of the breadth and scope of ‘lawfulness’ in Islam, with halal slaughter identified as a small subset of this broader ‘lawfulness’. It is argued, therefore, that limiting animal welfare discussions of halal to Australian ovine and bovine welfare is too restrictive, and does little to promote animal welfare generally. The paper goes on to examine how this broader context of halal (lawfulness) can be used to promote and enhance animal welfare. Part III relates to the conditions under, and the purposes for, which animals may be used in both Islamic and Australian law. Specifically, Australian law and the shari’a are compared on the issues of the slaughter of food animals and the halal certification process. The fourth part then examines how the shari’a can help to improve animal welfare generally, and posits that halal in its broader Islamic sense is a powerful and effective tool for improving animal welfare, not only in Australia but also among Islamic nations with which Australia trades in animal products. The paper concludes on balance that this broader use of the shari’a can result in a better outcome from an animal rights perspective.

‘Classical’ Islamic law, for the purposes of this paper, is law that is founded in both primary (independent) sources and secondary (or dependent) sources, terms that are defined below. There is no uniform or universal acceptance of what specifically constitutes the shari’a. Classical Islamic law has dealt with this potential source of uncertainty by dividing the shari’a into two broad areas. Firstly, there are laws on which there is almost universal consensus (usul) and, secondly, there are all other laws (furu’). However, an examination of usul and furu’ is well outside the scope of this paper. A law is treated as usul only when it is accepted as such by the vast majority of Muslims. For example, belief in one God, belief in the prophethood of Mohammed, Jesus, Moses and Abraham, and the prohibitions on the consumption of pork and alcoholic drinks are all held to be usul.

While the issue of interpretation under the Qur’an and shari’a is a subject in its own right, the methodology used in this paper is briefly noted here. A crucial shari’a requirement is that legitimate development of the shari’a must fall within the scope or ‘aims’ of the shari’a, referred to as the maqasid al-shari’a (or the object and purpose of the law). The Qur’an states that, when read in its own context, the Qur’an is ‘its own best commentary’, in that it

3 There are several texts in English on this subject. See, eg, Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, 2005).
5 See Ahmad al-Raysuni, *Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law* (International Institute of Islamic Thought, 2005); Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah)* In *Islamic Jurisprudence: An Analysis of the Concept in the Shafi’i School* (International Islamic University, 2003) 9. The concept of maqasid al-shari’a now appears to be accepted and settled. It is noted, however, that the concept itself has evolved, and its development occurred (in both Shi’i and Sunni schools) about 300 years after the death of the Prophet: Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought, 2008) 16.
6 *The Holy Qur’an: Translation and Commentary* (Abdullah Yusuf Ali trans, Dar ul Qibla, 1980) 25:33, 6:115, 10:37, 75:17–19. Please note that in various translations of the Qur’an, the numbering of the verses can vary, depending on the grammatical constructs that the translator has used to indicate the ‘end’ of a verse.
will make all things clear, and arguably provides some authority for a textual approach to interpretation. There is consensus among Muslims that the best juristic practice within Islamic jurisprudence is the normative practice of the Prophet. The shari’a concept of the maqasid, on the other hand, favours a purposive approach to its interpretation. The juristic nature of Islamic law has, over time, resulted in a broad range of interpretations of the same text. The Prophet encouraged diversity by stating that ‘difference of opinions is a boon to my community.’ On the other hand, El-Fadl opines reasonably that classical Muslim jurists created doctrines such as idjma’ and the concepts of usul and furu’ to limit the indeterminacy that emerges from this juristic concept of authority. Generally, Muslim jurists recommend taking the most obvious meaning of the text as the best meaning, and avoiding convoluted interpretations that stretch the ordinary meanings of words. The form of words that best describes this recommended mode of Qur’anic interpretation, and which is used as the starting point with respect to interpretation in this paper, is called khabar, or giving the text ‘the apparent meaning according to contemporary usage’. This ordinary meaning is then examined in the context of the hadith of the Prophet on the issue. This paper refers to the classical methodology of al-Shatibi, but for the contemporary ‘ordinary meaning’ of the text it relies on shari’a scholars based predominantly in common law states. It is noted that there is very little written on the subject of halal in Australia from a perspective that compares the common law and the shari’a.

Clearly, regulation of evolving aspects of human activity requires law that will change with time. However, the proposition that shari’a can be adapted with changing circumstances is somewhat theoretically contentious (even though it seems to be almost universally practised). A number of moribund laws and practices that have crystallised into custom are considered by some to be binding forever, a position that is rejected in this paper. Some of these customs (of particular interest here are food laws) have evolved in different Muslim states and are thus particular to those states. In some cases they may then have been carried to Australia by immigrants. While cultural practices of immigrant groups that are not outside Australian law are protected as ‘culture’ (for instance, under Australia’s multiculturalism policies), some of these cultural practices can at times create tension, among them animal slaughter and sacrifice, as discussed below. This paper examines the legal grounds for

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7 Ibid 43:2.
9 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (Oneworld, 2001) 64.
11 Khaled Abou El-Fadl, above n 9, 64.
12 Ahmad Hassan, above n 10, 4.
14 Ahmad al-Raysuni, Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law (International Institute of Islamic Thought, 2005).
adapting these customs (specifically the *shari‘a* as applied to *halal* meats) to contemporary Australian circumstances. To achieve the broadest acceptance by Muslims, such legal development must be based on, developed in concert with, and remain within the legal power of the *usul*.

This paper employs the ordinary meaning of ‘domestic animal’, but a broad statutory definition, such as the one used in Australian Capital Territory animal welfare legislation, would also suffice.  

Discussions on the *shari‘a* are sometimes confused because of the non-specific conflation of a broad range of issues, resulting in a lack of precision and clarity. For example, Muslim nations at times make broad reservations to international instruments on unspecified *shari‘a* grounds, regarding matters on which there is no general consensus among Muslims.

*Halal* slaughter in Australia, for the purposes of this paper, means slaughter that is eligible for certification as defined in the Australian Government Supervised Muslim Slaughter program (AGSMS). In Australia, *halal* slaughter laws are sometimes problematically conflated with general issues of *shari‘a* ‘lawfulness’. *Halal* slaughter of animals for food only forms a small subset of the broader issue of ‘lawfulness’ in Islam. This paper examines the term *halal* in both the narrow and broad sense, which will allow the narrow conception of *halal* (as related to meats in Australia) to be located within the broader context of general lawfulness under the *shari‘a*.

As examined below, there is *not* a general consensus that the various *halal* means of animal slaughter for food fall into the category of *usul*. There are minor differences between the various Islamic schools of law, but these are not examined in this paper, as they do not influence, nor is any particular school favoured in, the Australian *halal* certification process. As a result, there is no bar to *halal* slaughter regulations being developed to suit Australian conditions, provided again that such development is also within the bounds of Australian law. The principled use of the *shari‘a* for a general animal protection regime is discussed as a broad policy objective. While Australians (including Muslims in Australia) use animals for a range of human purposes, this paper only discusses in detail the welfare of

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17 Animal Welfare Act 1992 (ACT) s 2. Specifically, it holds that: “‘animal’ means: (a) a live member of a vertebrate species, including (i) an amphibian; and (ii) a bird; and (iii) a fish; and (iv) a mammal (other than a human being); and (v) a reptile; or (b) a live cephalopod; or (c) a live crustacean intended for human consumption.”


19 See for examples the reservations of some Muslim majority countries (including Bahrain and Bangladesh, among others) to multilateral UN-sponsored conventions such as The Convention to Eliminate All Forms of Discrimination Against Women (CEDAW): United Nations Entity for Gender Equality and the Empowerment of Women, *Declarations, Reservations and Objections to CEDAW* (2009) UN Women <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.


animals used for human consumption, which is the key issue from a ‘halal’ branding perspective.

Thus, the broader aim of this paper is to examine ways in which Islamic law might be developed and employed in Australia to improve the conditions under which animals are raised, traded and used for human purposes. A major issue with respect to all slaughter at present is whether the stunning of animals prior to slaughter should be made mandatory. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) advocates a ban on the slaughter of animals while they are still conscious. This could affect halal branding because some Muslims, including religious leaders, believe that some forms of stunning might not be lawful. The legal question here is whether Muslim opposition to stunning is valid and supportable under the shari’a. The question of whether stunning (in its various forms) is objectively better for animal welfare is a separate issue, and this paper examines the shari’a sources on both these questions. Here, the discussion of animal slaughter under the shari’a includes the treatment of domestic animals and wild animals that are hunted for food. It is noted in passing that hunting purely for sport appears to be prohibited under Islamic law, though this is a matter that does not appear to be settled among Muslims, and is nevertheless outside the scope of this paper.

II WHAT IS ISLAM?

A General Overview

The word ‘Islam’ derives from the Arabic root سلم (‘peace’) and means ‘to submit’. The Qur’an, which Weeramantry describes as the bedrock of the faith, states that ‘human beings submit to the will of the one true God. There is a distinction between a Muslim (one who merely submits to God’s will) and a mu’min (one who truly believes): Rodolphe J A De Seife, The Shari’a: An Introduction to the Law of Islam (Austin & Winfield, 1994) 50. C G Weeramantry, Islamic Jurisprudence: An International Perspective (Other Press, 1988) 7.
were created for worship.'\(^{31}\) In Islam, worship is a very broad concept, and a detailed discussion of it is outside the scope of this work.

To perform acts of worship in practice, the Qur'an invites humanity to ‘freely’\(^ {32}\) and ‘wholeheartedly’\(^ {33}\) enter into ‘a binding Covenant with God.’\(^ {34}\) The Covenant includes the so-called ‘pillars of Islam’, including ritual prayer, fasting, and giving alms to the poor.\(^ {35}\) Performing these obligations lawfully and with the right intention ‘discharges a person’s covenantal obligations’.\(^ {36}\) In its broader sense, the _shari’a_ ‘guides and aids’ Muslims to this end.\(^ {37}\) The Qur’an and the _sunna_ (which are made up of _hadith_, \(^ {38}\) and, in context, are often used synonymously)\(^ {39}\) are the _primary_ (or independent) sources of the _shari’a_.\(^ {40}\) The main _secondary_ (or dependent) sources include reasoning by analogy (_qiyaṣ_), consensus of the interpretative community (_idjma’_), and just custom (‘_urf_).\(^ {41}\) English translations of primary and secondary sources are used throughout this paper; these translations are also treated as primary and secondary sources respectively. Legal scholars discover the particular laws of the _shari’a_ through legal methodologies which are widely discussed in the relevant literature.\(^ {42}\) The broader Covenant, central to this paper, requires Muslims to act lawfully while abstaining from what is clearly prohibited,\(^ {43}\) and is discussed below. Doctrinally, however, only God may legitimately declare something _halal_ (permitted) or _haram_ (prohibited).\(^ {44}\) The Covenant commands Muslims to abstain from that which is clearly proscribed.

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31 Yusuf Ali trans, above n 6, 51:56; 2:30 also states that human beings are created and that they will be (future tense) God’s representatives (_khalifa_) on earth.
32 Ibid 2:286.
33 Ibid 2:208.
34 Ibid 16:91.
35 That is, acts that can be observed by others. This is contrasted with ‘having faith’, a primary covenantal obligation, but one which is not directly discernible by observation. See A Wood, ‘The position of the Niqab (Face Veil) in Australia under Australian and Islamic Laws’ (2012) 29.3 American Journal of Islamic Social Sciences 106, 117.
38 _Hadith_ are collections of sayings of the Prophet and his early companions. They have been collected and published in compendiums. In addition to individual translations of _hadith_ (which are identified when cited), this paper uses two of the main _Sunni_ collections of the _sunna_: Muhammad Al-Mughirah al-Bukhari, _The Translations of the Meaning of Sahih al-Bukhari_ (Kazi Publications, 1976); Abu’l Hussain Muslim, _Al Jami’us Sahih_ (Dar al Arabia, 1972).
40 Yusuf Ali trans, above n 6, 43:2, 44:2.
41 Ibid 5:87, 6:114, 10:59; see also 6:148, 7:32, 16:35.
However, the Qur’an also commands Muslims to ‘not deprive yourself the good things that God has made lawful for you’, indicating that Muslims should not ‘create’ prohibitions through construction. This construction may arise through a narrow interpretation of broad and general prohibitions, and may occur for cultural, as opposed to law-based, reasons. The Qur’an reminds Muslims that Islam was not meant to make things difficult for them, and that the Prophet was sent as a mercy to all creation. It follows by implication that Muslim scholars may be complicating things beyond what is necessary through broadly constructed prohibitions and for no good or useful practical outcome.

In addition to stunning, the important and broader issue in this context is whether the industrial scale of contemporary Australian abattoirs meets the animal welfare requirements mandated by the Prophet and highlighted below. Further, the Qur’an also reiterates that excess is generally prohibited. This prohibition must surely apply to the excessive consumption of food, including meat. The spiritual values promoted by Islam and supported by the primary sources do not exclude sentient animals. The authority for this proposition of kindness comes from a hadith (paraphrased below):

It was narrated from the Prophet that a prostitute [in one version, a male] came upon a well [on the edge of an oasis] to have a drink. She saw a dog licking the mud to quench its excessive thirst. After she had her drink, she thought, ‘this dog is suffering as much as I did’, so she went down into the well again, filled her shoe with water, and gave the dog a drink. God Most Merciful thanked the prostitute and forgave her all her previous sins. So the people asked the Prophet: ‘O God’s Apostle, is there a reward for us for serving the animals? The Prophet replied ‘(Yes.) There is a reward [from God] for serving any animate being [living thing].’

The prohibition on animal cruelty is further developed in another hadith of the Prophet that relates the example of a person who had discharged all their externally observable aspects (or the pillars) of the Covenant, but was punished in hell because the family cat was not fed at home and was also locked up, preventing her from foraging for herself. There appears to be reliable scientific authority that larger animals will suffer slaughter more than smaller creatures, and that different animals have varying levels of consciousness; that a mouse has a different and lower level of consciousness when compared to that of a cat, which is again different and lower than that of a cow. This consideration seems to be relevant, although shari’a food laws do not appear to address it explicitly (and it is suggested that perhaps they should). Thus, Muslims can be urged to reduce their consumption of the meat of larger, more sentient animals, and instead to consume smaller animals such as poultry, fish and insects as sources of animal protein in preference to the larger bovines. This approach would also help to ease some of the tension surrounding the stunning issue, as stunning is more frequently used in bovine slaughter. Such an application of shari’a principles may be one legitimate way...
of using the *shari’a* to encourage a reduction in the consumption of bovines, possibly triggering further animal welfare (and even some environmental) benefits.

### B The General Concept and Scope of Halal under Islamic Law

The Qur’an states that under the Covenant, what is lawful (*halal*) and what is unlawful (*haram*) is clear.\(^53\) The concept of *halal*, used in food labelling, derives from the Arabic word *halal* which literally means ‘lawful’.\(^54\) All foods that are *halal* and good are permitted.\(^55\) While this section deals with the broader concept of *halal*, it will draw out aspects of the *shari’a* that can reasonably be developed with respect to domesticated animals raised and slaughtered for food.

In case there may be doubt on the issue, the Qur’an also explicitly permits Muslims to eat the food of the ‘people of the Book’ (Jews, Christians, Sabians, and so on): ‘This day are [all] things good and made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them…’\(^56\) This permission clearly makes lawful for Muslims the meat slaughtered by both the Jewish *shechita* method (making it *kosher*) and the less prescriptive Christian methods, each according to their own religious standards. Although the Qur’an is unambiguous, this is clearly not a settled view among Australian Muslims, reflected both in practice and in the lack of documented consensus. On the other hand, anecdotally, many Muslims living in minority situations do appear to adopt this broader interpretation of the Qur’an.

Muslims are instructed not to be fastidious over food. They are commanded to eschew excess and to minimise consumption. Currently, there are strong commercial pressures in Australia to increase consumption of meat. In this context, a religiously mandated command to minimise Muslims’ consumption of animal products — to the benefit of animal welfare — has to date been underutilised: ‘O you who believe, make not unlawful the good things which God hath made lawful, but commit no excess, for God loveth not those given to excess.’\(^57\)

Further difficulties may arise through construction. For example, Yusuf Ali translates Qur’an 6:118, a ‘food’ verse, as follows: ‘So eat [meat] over which God’s name hath been pronounced…’\(^58\) Although the word ‘meat’ appears in this translation, the word is not present in the original, but is an interpolation on the part of the translator. A general translation of these words holds that God’s name should be recited over all food being consumed by Muslims, a broadly accepted practice.\(^59\) Its application is not restricted to the slaughtering of food animals, which is merely a specific instance of a general command. Muhamad Asad translates the same verse as: ‘Eat then of that over which God’s name has been pronounced…’\(^60\)

\(^53\) Yusuf Ali trans, above n 6, 43:2, 44:2.

\(^54\) Beyond the food context, the term *halal* (*هلال*) is also employed in Arabic to describe what is lawful: J Milton Cowan (ed) *The Hans Wehr Dictionary of Modern Written Arabic* (Macdonald & Evan, 1980) 1030.

\(^55\) Yusuf Ali trans, above n 6, 2:168.

\(^56\) Ibid 5:6.

\(^57\) Ibid 5: 90.

\(^58\) Ibid 6:118.


\(^60\) Asad, above n 49, 190.
The two interpretations of the verse can give rise to a spectrum of meanings. Cognisant of the first translation, Asad goes on to explain in a footnote to that verse that:

[t]he purpose [of this and the following verse] is not, as might appear at first glance, a repetition of already promulgated food laws, but rather a reminder that an observance of such laws must not be made an end in itself and an object of ritual... [T]he errant values spoken of in verse 119 are such as lay stress on artificial rituals and taboos rather than on spiritual values.\(^61\)

Meat killed by hunting animals (such as falcons and dogs) is lawful for Muslims, but God’s name must be pronounced over it.\(^62\) The custom is to pronounce God’s name before the hunting animal is released.\(^63\) The prey is still lawful even if it dies before the hunter reaches it for slaughter.\(^64\) The Prophet identifies an exception when the hunting animal has started to eat the prey, in which case it must be presumed that the hunting animal killed the prey for itself. The prey is consequently not lawful for the hunter.\(^65\) While there are several possible interpretations here, it is reasonable to conclude that the prey is not required to be conscious when slaughtered, as it is clearly possible that the animal could die before the hunter reaches it. Killing must be quick and certain, so the Prophet permitted killing with arrows, but not with stones, which he forbade because ‘[they] did not kill the game but may break its tooth or gouge its eye.’\(^66\)

Generally, domesticated animals at Muslim slaughter were both alive and conscious.\(^67\) The development of technology, when appropriately used, makes it possible to render animals unconscious before slaughter. An important shari’a issue is to identify forms of stunning that can be shown to be lawful, reliable and less painful. The underlying shari’a legal question is whether the animal must remain conscious to make the flesh lawful. Further, aquatic animals are lawful for Muslims as food,\(^68\) but in this case slaughter is not required. The Qur’an refers to the flesh of fish as ‘meat’ that is lawful without slaughter.\(^69\) Muslims at the time of the Prophet and since have customarily treated all sea creatures, even large fish or mammals, as though they had been lawfully slaughtered.\(^70\) Pronouncing God’s name before eating aquatic animals and all other food (animal or vegetable) is the customary universal Muslim norm.\(^71\) While this argument is not conclusive, it is posited that it can raise sufficient doubt over the custom of refusing to stun animals prior to slaughter. A deeper, more detailed discussion and debate that uses the broader range of hadith and draws from the various schools and sects is not possible here, but would be useful in developing new custom.

Arguably, the intent behind ritual slaughter is to ‘take life’ in God’s name alone, acknowledging the sacredness of life. Land animals such as locusts are also lawful,\(^72\) but clearly for practical reasons do not need to be slaughtered. Further, if one forgets to mention

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\(^{61}\) Ibid (emphasis added).
\(^{63}\) Ibid 241, particularly at footnote 698. Importantly, the translator notes here that life must not be taken wantonly and that Muslims may take a life for food, but must do so solemnly.
\(^{64}\) al-Bukhari, above n 59, 285.
\(^{65}\) Ibid 281.
\(^{66}\) Ibid 231.
\(^{67}\) See discussion on hunting at the text accompanying n 50 above.
\(^{68}\) Yusuf Ali trans, above n 6, 5:96.
\(^{69}\) Ibid 35:12. The word used is لحمًا, which is the same collective noun as is used for the flesh of land animals.
\(^{70}\) al-Bukhari, above n 59, 293.
\(^{71}\) Ibid 221.
\(^{72}\) Ibid 294.
God’s name during slaughter (but did not avoid it through disobedience or ingratitude, or by mentioning a name other than of God), then that meat is still lawful.\(^7\)

Finally, Muslims are warned not to make unlawful what is lawful, and vice versa, or worse still, to attribute ‘[their] guesswork to God.’\(^7\) That is, Muslim jurists and lawyers should not be given to excessive legalism and should not let ritual override spiritual values.\(^7\) In this case, the value at stake is that of reducing harm to a sentient being. On the other hand, the law must be interpreted correctly,\(^7\) and Qur’anic verses should not be taken out of context so as to produce instrumental or prejudiced results. The position of the sects and schools of contemporary Islam on halal certification have not been considered in this discussion, for the sake of brevity. Anecdotally, however, Australian Muslims purchase halal meats from butchers who are not of their own sect or school, and will often dine in each other’s homes.

These examples indicate that, for the vast majority of Muslims in Australia, differences between sects and schools are not considered to be significant, at least as far as halal food is concerned.

\section{Shari’a Elements of Animal Slaughter}

The principal religiously mandated issues for halal slaughter will now be identified from the primary sources. The Prophet said, ‘when you slaughter, kill in a good way … so every one of you should sharpen their blades and let the slaughtered animal die comfortably.’\(^7\) Further conditions specified in the hadith and pertaining to halal slaughter are:

The knife should be well sharpened so that the throat is cut immediately without causing much pain; secondly, the knife should not be sharpened before the eyes of the animal; thirdly, the animal should be killed in a place where there is no other animal present and so that the other animal will not see this painful sight; fourthly, the animal must not be brutally dragged to the slaughtering place, but should be driven there with ease; and finally, the animal should be left free after slaughter so its body might move freely while it is bleeding [and until it stops moving].\(^7\)

Thus, while the killing of animals for food is clearly permitted in Islam, the rules that must be observed appear to be quite strict and prescriptive. These mandatory religious commands appear to have an important goal of minimising the distress and pain of the animal. Arguably, then, these commands from a merciful God should lawfully take precedence over economic and cultural considerations.

\section{Prohibitions with Respect to Food}

Foods which are explicitly prohibited in the Qur’an are described as follows:

\[^7\] Ibid 297.
\[^7\] Yusuf Ali, above n 6, 10:59.
\[^7\] Ibid 5:87.
\[^7\] Ibid 5:41.
\[^7\] Abûl Husain Muslim, Al Jami’us Sahih (Dar al Arabia, 1972) vol 3, 1076.
\[^7\] Ibid. The Islamic Council of Victoria website reflects many of these conditions, and also certifies halal, which reasonably means that it certifies at a higher threshold: Islamic Council of Victoria, above n 12. However, the RSPCA, which monitors animal welfare, appears to reflect a different threshold (see below, n 112).
[God hath only forbidden you] dead meat [carrion, (land) animals that have died naturally] and blood [of all species], the flesh of swine, and that on which a name other than of God has been invoked… [goes on to make exceptions for necessity and acts not amounting to wilful disobedience].

This is later reiterated as:

Forbidden for you [for food] are: dead meat, blood, flesh of swine and that on which hath been invoked the name of other than God, that which hath been killed by strangling or by a violent blow, or by a headlong fall, or gored to death, that which hath been (partly) eaten by wild animals (unless its slaughter in due form is possible) and that which is sacrificed on stone altars. Also prohibited for you is the division of meat by raffling [i.e. gambling of all forms] … but if any of you is forced by hunger [the exception for necessity], with no inclination to transgress, then God is indeed oft-forgiving, most merciful.

A ‘violent blow’ refers to animals killed with a blunt object, and arguably forms the legal grounds for a prohibition against stunning with a blunt bolt; the analogy of the prohibition of the stoning of animals to death might be apt. As killing by sharp weapons such as knives or arrows is permitted, it appears that causing unconsciousness with a sharp object prior to slaughter is not prima facie unlawful. However, much deeper and broader analysis is required before this point becomes settled.

Stunning animals for slaughter can include a range of processes, and is not entirely free of pain. Without more information, directly substituting the pain of a bolt in the head for the pain of a slitting of the throat is not an obvious step. To simply reduce the debate to whether stunning (in whatever form) may or may not be used is unhelpful. The onus of proving that general commercial Australian methods of slaughter (including the use of large-scale abattoirs) are more humane than halal slaughter as identified in the primary Islamic sources perhaps rightfully rests with its proponents. The continuing evolution of stunning technology is an indication that this is not a settled or perfected area. Nevertheless, proven ‘improvements’ in pain reduction should generally be supported by the vast majority who are agnostic as to the issues of ritual, as this would further the cause of making animal slaughter as humane as possible.

Lawfulness is contingent. For example, meat or food that would otherwise be lawful can become unlawful if it is distributed by a game of chance (which is prohibited in Islam). Similarly, animals that are stolen or purchased with the proceeds of usurious transactions — both theft and usury being prohibited in Islam — are not made lawful by subsequent halal slaughter. Further, eating from utensils made of silver or gold is prohibited, notwithstanding

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80 Ibid 5:4; 16:114–115 repeats the prohibition (emphasis added).
81 al-Bukhari, above n 59, 310–313.
83 See text accompanying n 66.
84 al-Bukhari, above n 59, 304.
85 Islamic Council of Victoria, above n 12, particularly at footnote 3.
86 Yusuf Ali trans, above n 6, 5:93.
87 Ibid 60:12.
88 Ibid 2:275.
89 al-Bukhari, above n 59, 249.
that *halal* is otherwise observed. The *sunna* also holds that the consumption of the flesh of donkeys and the flesh of animals with fangs is prohibited.\footnote{Ibid 310–313.}

The spirit of the *shari’ā* therefore requires general observance, not punctilious or ostentatious attention to public aspects of the *shari’ā* that convey ‘piety’, while eschewing the more private and charitable aspects of the law. That is, ‘*halal* meat’ might in some cases still be unlawful, notwithstanding that the packaging bears the *halal* certification insignia.

The submission here is that *halal* extends well beyond the merely ritual slaughtering practices. That is, the *shari’ā* arguably requires Muslims to take a much broader range of considerations into account, rather than *halal* certification alone, in making a final determination of what is actually *halal* in its wider religious (as opposed to its commercial) context. Therefore, *halal* certification in the context of this paper is only one of many relevant *shari’ā* considerations.

**E The Use of Food Laws in the Australian Context**

Australian Muslims, in the main, consider the issue of *halal* meat to be a ritual aspect of their faith, and arguably tend to maintain it as a cultural practice. This generally, but not always, reflects the practices from their ancestral homelands and fits in with the schools of thought followed in those homelands.\footnote{N’Zouiten, *Muslim Social Life and Local Meats* (MN & MT Zouiten, 1985).} Many Muslims appear to purchase their meat at general stores or supermarkets, while others may purchase meat only from a ‘*halal* butcher’. What subjectively constitutes a ‘proper *halal* butcher’ may vary according to individuals and can depend on factors such as the individual’s language group, country of origin, sect, or school of law. There may also be a difference between the sect or school followed by the butcher or shop owner and that followed by their customers.\footnote{Ibid.} Those Muslims who strictly adhere to the subjective limits of their schools appear to constitute a relatively small minority of Australian Muslims.\footnote{Ibid.}

While a detailed discussion of section 116 of the Constitution is far more complex than is indicated here, Australia is what is broadly represented as a secular state and the federal government is constitutionally prohibited from favouring or funding any religion or, arguably, expressions of religion.\footnote{Australian Constitution s 116.} Thus, the practical demand for a *halal* practice is arguably accommodated and supported as a cultural practice. In the broader economic context, maintaining such culture or custom is in many cases permitted in Australia and is promoted as a ‘distinct competitive advantage in the global economy’,\footnote{Department of Immigration, *The People of Australia: Australia’s Multicultural Policy* (2013) Departmental Publications <http://www.immi.gov.au/media/publications/multicultural/pdf_doc/people-of-australia-multicultural-policy-booklet.pdf>.} demonstrated here by the significant ‘*halal* certified’ meat export market.\footnote{Department of Agriculture, Forestry and Fisheries, *Food Exporter’s Guide to Indonesia* (2004) Agriculture and Food Publications <http://www.daff.gov.au/__data/assets/pdf_file/0006/183570/indo_chapter6.pdf>.}
Custom is recognised as a valid source of Islamic law. What is posited here is that custom is not immutable, and that it could and should be lawfully adapted for contemporary conditions in accordance with both the letter and the spirit of the shari’a. For example, in the sixth century AD, animals were sometimes slaughtered with a sharp stone. Notwithstanding the disputes as to whether the shari’a was immutable, as technology improved steel knives became available. When sharp, they caused less pain and suffering at slaughter. This technology was in time rightly adopted without dispute.

III THE PLACE OF ANIMALS IN THE MUSLIM WORLDVIEW

There are no prescribed limits on the use of animals in the Qur’an. This does not mean, however, that humanity is unrestrained. Everything and everyone must be treated in a fair and just manner, as mentioned above with reference to the treatment of the family cat.

Relevant in Australia, including among Muslims, is that animals may be used firstly for general human purposes, including, but not restricted to: seeing eye and hearing dogs; monkeys that assist the disabled; racing animals; circus animals; hunting animals; companionship animals; test animals; laboratory animals; and children’s pets. They may also of course be used for food, the major focus of this paper. The third major category for animal use is sacrifice, which is involved in the Muslim celebration of the ‘Day of Sacrifice’, or at the birth of a child (aqiqah). In the past, animals were more frequently used for transporting people and goods. These uses are regulated by the national law and the shari’a, and therefore are not discussed in any detail. Unfortunately, discussion of the shari’a is largely omitted from these issues.

A The Legal Regime and the Use of Animals in Australia

Animals in the wild and on Crown land are considered the personal property of the Crown. Domesticated animals are considered personal property at common law. The common law definition of domesticated animals (‘animals as are commonly kept and cared for in or about human habitations’) falls within the ordinary meaning of the term, and therefore the use of the term for a discussion of the shari’a should not be problematic. Australian law and the shari’a are not dissimilar, in that animals can be used for a variety of purposes under both laws. However, while Australia has developed its animal law to cater for a range of human uses, the shari’a as practised in Australia does not appear to have been developed in step.

Slaughtering domestic animals for food or sacrifice is permitted under Australian law. Australian society has continued to adopt new technologies for reducing suffering to

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98 Hallaq, above n 15.
99 al-Bukhari, above n 59, 294.
100 Yusuf Ali trans, above n 6, 4:135.
101 See text accompanying n 51.
104 Alex Bruce, Animal Law in Australia: An Integrated Approach (Lexis Nexis, 2012) 76.
105 Ibid.
106 Attorney-General (SA) v Bray (1964) 111 CLR 402, 411.
individual animals at the time of slaughter. On the other hand, cost pressures have led to industrial-scale abattoirs where animals are not isolated at the time of slaughter, as required under the *shari’a*, and as would have been the case in previous times — when meat was produced on small farms, was slaughtered locally, and was not consumed in the vast quantities that it is today.

### B Halal Branding in Australia

If a practising or observant Australian Muslim was asked the question: ‘Should you only eat *halal* meat?’, the answer must be ‘yes’. This is because the question can alternatively and more accurately be phrased: ‘Should you eat only that which is lawful under the *shari’a*?’ The answer must once again be ‘yes’, because the Qur’an requires Muslims to eat only lawful food and to eschew what is unlawful.108

On the other hand, consider if the same Muslim was to be asked the following question:

‘Should you only eat meat that is branded or certified *halal*, which in Australia means that it was killed by a Muslim butcher who faced Mecca and invoked God’s name while killing the animal, but also means that he did so under industrial conditions where a key criterion is that the slaughterman must work to kill as many animals as was practical, which could mean that the animals were within sight of each other when being killed, that the blades were not sharpened for each separate animal, and, for expediency and efficiency, that the animals might have been handled roughly or prodded to hasten the animals for maximum throughput?’

The answer to this question is likely to be less unequivocal. In Australia, the term *halal*, as broadly used with respect to food, is almost synonymous with the ritual killing of ovines, bovines and poultry described by the RSPCA:

Halal describes what is lawful for Muslims to eat. It gives a range of beverages and foods (including meat) that are acceptable. Halal food laws are based on interpretation of the Quran, the Muslim scripture. Before halal slaughter, the invocation of Allah’s name over the animal is required. Halal slaughter in Australia may differ from halal slaughter overseas because of the differing interpretations of the Quran … The only difference between this halal slaughter method is that it uses a reversible stunning method, while conventional humane slaughter uses an irreversible stunning method. Halal slaughter overseas may not permit stunning of the animal, and this is the key difference between halal slaughter in Australia and halal slaughter in some other countries.

The elements that must be satisfied for receiving certification are as follows:

Only authorised Muslim slaughtermen can perform the halal slaughtering procedure for halal products.110 It is the competent slaughterman’s responsibility for identifying halal or non-halal carcasses in accordance with the procedures that are approved within the arrangement.111

*Halal* certification does not appear to satisfy all the elements of *halal* slaughter as derived from *shari’a* law, discussed above. Nonetheless, meat slaughtered in accordance with standards set by the Department of Agriculture is eligible to receive *halal* certification or

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107 See text accompanying n 78, above.
110 *Halal* slaughter done by men is a lawful Australian custom. Under the broader *shari’a*, however, both men and women may slaughter an animal. See al-Bukhari, above n 59, 300–301.
Further, abattoirs in Australia that produce halal meats are not permitted to kill haram (prohibited) animals, which is consistent with universal Muslim practice.

C The Limits of Large Abattoirs with Respect to Halal

Islamic prescriptions for slaughter, as mentioned, envision a labour-intensive process that is costly and difficult to replicate in contemporary industrial abattoirs. Traditional, small-scale halal abattoirs in Muslim states, however, may be required to pay attention to the broader range of Islamic laws, beyond merely invoking God’s name at slaughter. If the RSPCA is correct, large-scale abattoirs in Muslim states are not significantly different to those found within our major trading partners. In such cases, animal rights issues may in fact be significantly worse, despite the broader halal requirements.

The Prophet said, ‘hurry up in (the killing process of) slaughtering’, a condition that might not be practical in large abattoirs where animals may have to spend considerable amounts of time waiting for slaughter. Further, automated killing of fowl, for example, means that it is not always possible to ensure that the animal’s throat is cut first. The Prophet cursed the one who cut the limb (or some other part) of an animal while it was still alive, which effectively constitutes a prohibition.

IV USING HALAL TO PROMOTE HUMANE TREATMENT

Australian Muslims may plead ignorance of the deeper issues of ‘halal’. This is not unreasonable, as it appears large numbers of Muslim adults in Australia were born overseas, and knowledge of Islam or Islamic law is not a criterion for migration to Australia. Many observant Muslims would, however, have a country-specific or confessional-specific knowledge of religious custom, characterised by Woodcock as ‘the strong ethnic identification of [Australian] mosques’. Notwithstanding this, the gap in religious knowledge should be overcome by education and discussion, particularly if Muslims would

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113 Ibid.


116 ibid.

117 al-Bukhari, above n 59, 304.


like the broader community to adopt the more humane aspects of halal for the improvement of animal welfare.

El-Fadl notes that many Muslim leaders in the USA (Australia is not likely to be any different) politically exploit Islamic symbols for pragmatic purposes, and ‘halal’ certification is one such issue. On the other hand, it is not uncommon for non-Muslims in the West to exploit broader concerns about Islam (such as the ‘Muslims are dangerous’ rhetoric) for political purposes. For example, the Four Corners exposé of horrific abattoir scenes in Indonesia was effective in raising awareness of animal welfare concerns among Australians. However, it also tapped into a deeper xenophobic vein. The subtext of such programmes is that there is an implicit notion of Australian superiority over Indonesians (or the ‘poorer’ Asians generally) in both technology and general animal welfare issues.

After the Four Corners report, the Australian government temporarily suspended live animal exports to Indonesia. This was perhaps not entirely unpredictable, given that a significant percentage of Four Corners viewers were appalled at the footage. The temporary ban was lifted after the immediate furore had died down. What the programme did effectively, however, was raise the level of general awareness of animal cruelty, particularly among a previously unsympathetic segment of the Australian population.

On the other hand, the reaction to the programme damaged the Australian meat industry (perhaps temporarily), causing some human pain and suffering to exporters. On one estimate, the cost was $320 million; the effect of such ‘shock campaigns’ should not be discounted. The unspoken, more insidious assumption is that slaughter in Australia is more humane, which, although possibly true, is far from being an absolute ‘fact’. In this context, comedian Dave Hughes commented on ‘how he used to work in a slaughterhouse and that he felt the footage from the Indonesian abattoir wasn’t that much different to what was happening here.’

Thus, it is not the nationality or the colour of the skin of the slaughterman that leads to cruelty, but the relentless pressure to improve productivity. Animals that do not ‘cooperate’ are beaten and prodded cruelly, a merciless system that desensitises humans. To attribute animal cruelty to industrial pressures is not to condone what is happening either here or overseas. Muslims, who are the majority in Indonesia, are bound by their Covenant to minimise the pain and suffering caused to animals. If they honour their Covenant, they should not bow to the pressures of the industry.

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121 Ibid vii.
124 Ferguson, above n 123.
While human beings should not ignore the pain they cause to other sentient species, they must also consider the pain they may cause to the poorest workers of other countries. When some segments of the Australian community campaign to keep abattoir jobs local, they risk depriving underpaid workers in poorer countries of their jobs, food and income.

Perhaps a more constructive role that Australia can play is to help develop standards from within the shari’a traditions in a way that engages Muslim nations and Muslim scholars. Animal activists can find a wealth of useful precedent and argument in the shari’a, and are quite negligent insofar as they only superficially explore these avenues of animal welfare.

This paper, however, does not seek to depict Australian practice as some form of global exemplar that can be used to teach our ‘less civilised’ neighbours. There is no basis or authority for such a proposition. These are matters of importance to the domestic and export industries of both Australia and many of our Muslim neighbours. They call for open and robust discussions in a collaborative manner, which would greatly advance Australian interests and animal welfare. Finding a way to achieve this without causing detrimental effects on our trading partners should be a priority. What is posited here is that, if it is legally and ethically possible to reduce harm to a sentient animal, then every lawful shari’a means to do so must be explored and put into practice. Such a sentiment is clearly within the legal power of the Qur’an and the broader shari’a.

V CONCLUSION

Muslims are instructed to be kind to all living things, including animals. The shari’a does not distinguish between the slaughter of large and small animals, and this issue arguably requires some examination. The Qur’an commands Muslims to walk gently on the earth, an allusion to humility that also invites a literal interpretation: one should not step on even an ant thoughtlessly, as is evident in the Qur’an’s story of King Solomon.¹²⁷

The Prophet reminded Muslims that an act of kindness towards an animal could ‘clean their slate’ in God’s eyes. In any event, Muslims are commanded to eschew excess. Observant Muslims in Australia should be reminded to consume much less meat. As the world’s population grows beyond seven billion people, a fifth of these being Muslims, a concerted effort among shari’a scholars to encourage the reduction of meat consumption among the wealthy would surely reduce the number of animals that have to be killed for meat. While each killing should be done with care, an overall reduction in consumption, at least in terms of raw numbers, would greatly help animal welfare, as well as producing various health and environmental benefits.

For the meat that they do consume, observant Muslims should look beyond simple halal certification. It was argued in this article that certification sometimes satisfies some, but generally not all, of the strict commands of the Prophet. This is because large industrial abattoirs do not seem to be structured to satisfy animal welfare requirements, as commanded by the Prophet.

Programmes such as the Four Corners exposé on the problems of ‘halal’ slaughter in Indonesia may be well-intentioned, but the ‘take home’ message to the Australian public was

¹²⁷ Yusuf Ali trans, above n 6, 27: 18. King Solomon sought God’s forgiveness after he rode into a valley inhabited by ants, and overheard one ant warning the others of the thoughtless horse riders who were destroying their nests.
one that struck a ‘superior’ chord, and appeared to play on an innate feeling of Australian racial superiority over Indonesia. Harmonious relations in Australia are endangered by racist or anti-religious jingoism. While freedom of speech is something that Australia values greatly, this ‘race tap’, once opened, is not so easily turned off.

Indonesia is a nation of about 220 million people and the consumption of animals for food will be correspondingly high. Encouraging Indonesians to follow the dictates of the shari’a with respect to animal slaughter, which many Indonesians will consider binding, is more likely to improve animal welfare than hypocritical ‘shaming’ by Australians. Pointing a ‘superior finger’ at Indonesians also takes the pressure off Australians to address the animal cruelty that accompanies mass-produced meat in their own country. Animal cruelty, as discussed, is driven by significant cost pressures, and the Australian meat industry is therefore likely to find an implementation of halal prescriptions to be significantly more expensive.

On the other hand, if Australian animal welfare advocates engaged positively with Islamic scholars and animal rights activists in Muslim nations, animal welfare could be improved significantly. Muslims have the dictates of their faith as a strong motivation to obey the shari’a. Surely it must be appealing to every believing Muslim man or woman that saving an animal from hell on earth can result in their own salvation from hell.

For the broader Australian community, it seems that prejudice from both the left and the right have clouded the ability to use, and encourage the use of, the humane aspects of the shari’a. In turn, it has been too easy for Muslims to become wilfully blind, and to avoid the development of humane practices.

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128 Such attitudes may be observed in the discourses of visitors to Australia such as David Irving or Geert Wilders.
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