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*The Editor*
*Macquarie Law Journal*
*Macquarie Law School*
*Macquarie University*
*NSW 2109 AUSTRALIA*


This issue may be cited as *(2014) 14 MqLJ*

**ISSN 1445-386X**

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Design by Macquarie Law School, Macquarie University
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MACQUARIE LAW JOURNAL

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This 14th volume of the *Macquarie Law Journal* is a general publication which features a collection of very interesting, topical and, in some cases, highly original contributions to legal scholarship. We are pleased to present articles from a number of Australian law schools and other sources that traverse a range of research areas, including international war crimes trials, human rights law, discrimination law, commercial law and comparative jurisprudence. If one of the aims of a university law journal is to showcase its own research capacity, this edition is also a fitting reflection of work being undertaken at Macquarie Law School, with four contributions on a variety of significant topics.

The Annual Tony Blackshield Lecture for 2014 was delivered by Emeritus Professor Upendra Baxi, who has had a distinguished career in comparative law and human rights law, and a long association with Macquarie Law School. His insights into the judicial review process in India and its development in the context of the complex relationship between the various branches of government in the world’s largest democracy, provided a fascinating speech for the receptive audience. The speech also included some intimate reminiscences about the evening’s eponymous special guest Emeritus Professor Tony Blackshield AO.

The articles, although presented alphabetically by author name, may be mentioned here thematically. With the recent and often highly visible public dialogue about Section 18C of the *Racial Discrimination Act 1975* (Cth), it is noteworthy that this edition has attracted two provocatively titled contributions on that issue. Francesca Dominello asserts that the recent apology to Australia’s Indigenous population has not resulted in concomitant reforms which such an apology necessarily entails, as witnessed by the apparent defence of a right to bigotry in the context of the s 18C debate. On the other hand, Augusto Zimmermann and Lorraine Finlay argue for a robust conception of freedom of speech, and a repeal of s 18C, as the most effective way of responding to bigotry in public discourse.

In the related field of discrimination law, and again on an issue that has attracted considerable public comment recently, Greg Walsh argues for an opt-in approach to the regulation of employment in religious schools under Australian anti-discrimination legislation. The article contends that the opt-in model has the potential to more appropriately regulate such employment decisions, and maintain religious freedom and autonomy, in comparison with other approaches currently utilised in Australian jurisdictions.

Reflecting some highly original field work, Lyma Nguyen and Christoph Sperfeldt have made a very valuable contribution to our understanding of the capacity of international criminal tribunals to capture the experience of minority groups in post-conflict transitional mechanisms. Their article focuses on the experience of the Vietnamese minority in Cambodia before, during and after the Khmer Rouge period, and the participation of Vietnamese civil parties in the proceedings before the Extraordinary Chambers in the Courts of Cambodia.
Sophie Riley and Grace Li have reported in their piece on their own research with students of Company Law in addressing an important area of teaching and learning – how to develop students’ intercultural skills in the context of contemporary legal education. There are some interesting indicators for legal educators, especially given the extent of student diversity and the challenge of developing intercultural understanding in meaningful and practical ways.

In an insightful article on ‘domestic promises’, Malcolm Voyce undertakes a genealogical reading of a set of historical cases on the division of family property in Australia to demonstrate how the judiciary prioritises a male-oriented understanding of productive labour, thereby encoding ideas about economics, sexuality and domesticity in the wider context of Australian capitalism and nation building.

Finally, this edition ventures into the broad fields of commercial law as well. Peter Cain offers a carefully crafted and detailed synthesis of judicial approaches to the complex issue of the legal characterisation of the freight forwarder’s role in commercial transportation. It includes a short comparative analysis of the civil law position and is a very useful addition to the current literature on the topic. We are pleased also to present a highly commended Macquarie Law School student contribution by Timothy Lou who addresses the prudential regulation of commercial litigation funders. He seeks to do so through a perspective that has received very limited attention so far, at least in Australia, by characterising litigation funders as shadow banks.

The book review in this edition, a perspicacious account by Denise Meyerson of an original contribution to an understanding of the theoretical foundations of South African constitutional law and jurisprudence by Stu Woolman, is published by mutual agreement with the South African Journal on Human Rights, in which it has also been published.

I wish to 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 hard working and enthusiastic student editors, students of Macquarie Law School, whose commitment and perseverance made its publication possible.

Ilija Vickovich
Editor

***
DEMOSPRUDENCE VERSUS JURISPRUDENCE:
THE INDIAN JUDICIAL EXPERIENCE IN THE CONTEXT OF
COMPARATIVE CONSTITUTIONAL STUDIES

UPENDRA BAXI*

(Annual Tony Blackshield Lecture delivered at Macquarie Law School,
Macquarie University, 21 October 2014)

I

It is a great honour to be asked to deliver this Tony Blackshield Lecture. Succeeding the
inaugural address delivered by Justice Michael Kirby and the lecture by Professor George
Williams is a tall order, indeed. I adopt every warm word that they have said in his honour and
add a few reminiscences of my own. But of course what Tony has achieved in classrooms,
 writings, and administrative chambers goes beyond words and reminiscences. His contributions
to law and jurisprudence have been stunning (there is no other befitting expression for this) and
he has proved a noteworthy successor to Julius Stone, even outdoing this tall presence in several
respects.

The ever-active Macquarie Law School has gone out of its way in accommodating the visit of
Ms Prema Baxi. I am aware of the imposed financial constraints on the universities and I have
therefore borne the substantial additional expenses on my meagre pension account. I wish
especially to thank Ms Eleanor McGhee for all her patient and dignified work. And I wish to
thank Dr Shawkat Alam for his ‘hot pursuit’ of me; I know how difficult it is to maintain a live
lecture series.

I am very glad to be back at Macquarie Law School. The last time I visited was decades ago but I
still recall the urbane reception given to me at a seminar which I initiated on ‘Marx and Justice’.
It feels good to be associated with the Macquarie Law Journal, although I am aware that I have
contributed little to its fine growth.

II

It is just a coincidence that the current Australian Prime Minister shares the same first name.
While selling uranium and coal-mining, Tony Abbott recently described India as a ‘model
international citizen’. And here I am — speaking about a model Australian scholar of law and
good life.

Tony likes coincidences, and often pedagogically explores these.1 Part IV–A, Article 51–A, of
the Indian Constitution stipulates the constitutional duty, inter alia, of all Indian citizens to

* Emeritus Professor of Law, University of Warwick, UK.
develop ‘the scientific temper, critical enquiry, spirit of reform and excellence in all walks of life’. In teaching as well as writing, Tony imbibed these duties as virtues; he made mediocrity the enemy of excellence; he simply refused to be the second best. In the USA — the land of constitutionalism as well as ‘Constitutionalism and Comstockery’ he, much to his chagrin, would be known as an ‘achiever’ or a ‘triple A’ man. Incidentally, he was referred to in whispered conversations as the ‘Black Sheep’ by their Lordships of the Supreme Court of India: this was their way of paying tribute to his contributions to Indian constitutional law at a time when they followed the common law tradition of not acknowledging any living jurists. My straightforward translation in Hindi as well as Sanskrit is Kaladhal!

I have a confession to make: I simply love Tony! And that is why I am here. Tony is, I know, a difficult person but he is also loveable. In fact the more difficult he is, the more loveable he is! He is prone to tantrums and even mighty rage; it is only when you realise how adorably calm he is beneath the surface that you begin to love this impossible man!

I spent my first lovely time with him as a colleague in the Department of Jurisprudence and International Law, where I began teaching and learning law. I discovered very many virtues which have made him what he is. He is nothing if not a perfectionist; any task that he takes up, he attends with loving care; the care he bestows on details is indeed remarkable; working with him you learn that no detail is trivial and that the difference between detail and design is perhaps overstated. A great thing about virtue is consistency in method, and this Tony achieved early in his LLM dissertation on judicial decision-making at Sydney University and continues all his life, including the great contribution to the treatise on Australian constitutional law and gifted stewardship of the Oxford Companion to the High Court of Australia.

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1 Tony often began his Sydney jurisprudence class with a list of events that happened on a particular day one hundred years ago! He brought alive the continuity of life and law across three generations, the links between past, present, and future, though his views on social history of Australian law have still to be archived. But see, A R Blackshield, ‘Damadam to Infinities! The Tourneyold of the Wattarfalls’ in M Sornarajah (ed), The South West Dam Dispute: The Legal and Political Issues (University of Tasmania, 1983) 37; George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’ (2000) 38 Osgoode Hall Law Journal 643. For a survey of Commonwealth law, see J N Matson, ‘The Common Law Abroad: English and Indigenous Laws in the British Commonwealth’ (1993) 42 International and Comparative Law Quarterly 753.


He is also a man of passionate intellectual attachments. These attachments vary. At one time he was very fond of jurimetrics (so much so that you had to struggle, both in his spacious old office at Phillip Street and his commodious car against empty egg shells and containers on which he did jurimetrics). At another time he was a votary of existentialism. Some other examples are his enthusiasm (with Gary Packer) to found a third Australian party and for its early vehicle called Reform (which he edited and stencilled); his interests in Aborigines and the law, the Indian Supreme Court’s early wonders, and his abiding interest in the judges and law, epically with the High Court of Australia. But his attachments were impassioned: they seemed larger than life and seemed to consume him till, phoenix-like, he rose to attend to others.

Tony is a true jurist in every sense of that word. He has worked for the love of law but the soul of law is ever changing jurisprudence, which aims at certainty where uncertainty prevails, order where chaos reigns, uniformity where diversity is on rampage and consistency where inconstancy is the rule. Tony restlessly quested for a foundation-less jurisprudence, although too many legal theories seem to have all too solid (and by the same token soiled) foundations. It is difficult to name the best of his writing and even more difficult in this address to silhouette my reasons for fondness; but my favourites, even today, remain ‘The Enclaves of Justice: The Meanings of a Jurisprudential Metaphor’ and ‘The Importance of Being: Some Reflections on Existentialism in Relation to Law’. If Tony had written nothing else (and that was simply impossible), these two articles would have sufficed as evidence of deep scholarship. The prolific Tony of the 70s beckons special attention. As the Onida TV ad has it, Tony is the ‘neighbour’s envy’ and the ‘owner’s pride’, though I must add that it will require a lot of courage to own him!

Since Tony is insufficiently vain, I do not think that he will ever write an autobiography. But he deserves to be written up. He should have several biographers and they should in particular deal with his contribution to the great Stone trilogy, his relationship to Julius Stone, his difficult deanship and stormy life at Macquarie Law School, and the varied jurisprudential themes he expounded at home and abroad.

Many memories crowd me on this occasion. But while I am a connoisseur of memory, I will be its assassin as well if I do not recall Pierre Nora’s distinction between ‘lieux de memoire, sites of memory’ and ‘milieux de memoire, real environments of memory’. Nora observes:

> The remnants of experience still lived in the warmth of tradition, in the silence of custom, in the repetition of the ancestral, have been displaced under the pressure of a fundamentally historical sensibility. Self-consciousness emerges under the sign of that which has already happened, as the fulfillment of something always already begun. We speak so much of memory because there is so little of it left.

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In case of Professor A R Blackshield, may I suggest that we speak to memory, while there is much of it left to us?

III

In general, I wish to deal with ‘constitutional hegemony’, the justified true belief that constitutional interpretation has a social effect and is politically important, if not also decisive. This is something that Tony critically adored. I dedicate this address to so many of its Avatars, and Tony’s too!

Constitutional hegemony is a logically essentially contested concept; among all its variations, interpretive or hermeneutical leadership is often conflated with interpretational judicial hegemony. However, the supermajorities in the legislature and the relatively autonomous executive also interpret the constitutional text and the intent. Constitutional interpretation is also undertaken by the civil society, market, media, armed opposition insurgent groups and other non-state actors. Hegemony is the function of a hegemonic bloc and the name that we give to the salient contemporaneous viewpoint. A study of Indian constitutional interpretation from the perspective of all these actors alone, I believe, can give a full view of constitutional hegemony in action.

An abiding message of Antonio Gramsci, who invented this complex term for social theory, has been that any account of hegemony has to be tentative and partial; the hegemonic is an attempt to describe the appearance of, not the actual, production of political consent or consensus. How that appearance is constructed and achieved is a real problem in studying hegemony. Liberal constitutional theory that insists on ‘separation of powers’, and counsels that the ‘rule of law’ is best attained by distributing powers among the legislature, executive, and the judiciary, is just one important mythical device for securing constitutional hegemony.

Instead of looking at adjudicatory leadership this way, I propose to study three forms of prudence, or bodies of thought which determine the province of constitutional hegemony. These are: *legisprudence* (the principles or theory of legislation that take it beyond the contingency of politics)

\[9\]

*jurisprudence* (that determines the principles, precepts, standards, doctrines, maxims of law and the concept of law)

\[10\]

and *demosprudence* (judicial review process and power that enhances life under a constitutional democracy). While we think that law persons know best the second, we have to look at all three forms working together to achieve some grasp of law in late modern society. Doubts attach to, even assail, each of the three concepts. One may despair about


\[10\] Usually thought of as a body of knowledge that takes seriously the prudence of jurists — or the judge and the jurist.
legisprudence if one were to think (with Niklas Luhmann) that positive law entails nothing more than a ‘positivization’ of arbitrary will.\textsuperscript{11} Or one may doubt that legislation as an affair of politics may ever aspire to rise to ‘theory’. All that we have, as Jeremy Bentham offered us a long while ago, is practical advice or a manual of instructions to legislators.\textsuperscript{12} Similarly, one may revisit the notion ‘jurisprudence’ with a postmodern suspicion that it is nearly impossible to know whether the ‘law’ may be said to exist.\textsuperscript{13} Demosprudence may be held conceptually vulnerable if one were to think that, in an electoral and representative democracy, judges should strictly decide cases and controversies coming before them, maintain a distinction between juristic and political reasoning, and leave the task of re-constituting demos to the elected public officials, who are accountable to the ‘people’. However, taking these and related anxieties into account is not the same thing as repudiating in advance the possibility of a theory of legislation and jurisprudence.

How have the three bodies of wisdom, these ‘different multiplicities’ (as James Tully called constitutional pluralism)\textsuperscript{14} played out in the making and working of the Indian Constitution, especially through the dynamics of the Supreme Court of India (‘the Court’) is the question worth pursuing. But we mainly explore here the demosprudence of the Court. The task is limited but historical contexts are large, as well as shifting, and the social meanings of the original 1950 Constitution are indeed all but legible. In particular, I revisit the notion of adjudicatory leadership and rework the notion of demosprudence in the context of the Court and the changing relation between jurisprudence and demosprudence. I also raise briefly the problematic of judging the judges, and the problematic of socially responsible criticism of justices and courts. My argument is simple: the Court now is markedly inclined towards demosprudence, though its early jurisprudence was also tinged with it. The Court has practised demosprudence since its inception, though it was a novel conception recently introduced in American literature by Lani Guinier. Guinier is initially concerned with the phenomenon, rare in US judicial history, which of course is rather pointless for comparative constitutional studies, which I briefly call COCOS, unless we overgeneralise the claim of John Rawls that the US Supreme Court is an exemplar of ‘public reason’\textsuperscript{15}.

The more general argument of Guinier is that ‘oral dissents, like the orality of spoken word poetry or the rhetoric of feminism, have a distinctive potential to root disagreement about the meaning and interpretation of constitutional law in a more democratically accountable soil’.\textsuperscript{16} Disagreement in dialogue is the heart of democracy and judicial dissents ‘may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process’ as ‘[o]ral dissents can become a crucial tool in the ongoing dialogue between constitutional law and

\textsuperscript{11} Niklas Luhmann, \textit{A Sociological Theory of Law} (Martin Albrow ed, Martin Albrow and Elizabeth King trans, Routledge, 2\textsuperscript{nd} ed 2014); Niklas Luhmann, \textit{Law as a Social System} (Fatima Kastner et al eds, Klaus A Ziegert trans, Oxford University Press, 2004). This observation may also hold of divine natural law or divine positive law where the law is perceived to be based on God’s will, rather than reason.


\textsuperscript{13} I discussed this very question in Upendra Baxi, ‘How do We Know that the Law Exists?’ (Speech delivered at Seminar on Legal Reality, Nirma University, Ahmedabad, 26–27 September 2014).


constitutional culture’. Professor Guinier moves to the more general argument about ‘demosprudence’ as ‘a democracy-enhancing jurisprudence’ both for law and social movements.

Unlike traditional jurisprudence, demosprudence is not concerned ‘primarily with the logical reasoning or legal principles that animate and justify a judicial opinion’. Rather, it is ‘focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites’. Demosprudence ‘attempts to understand the democracy-enhancing potential implicit and explicit in the practice of dissents’. Put another way, it ‘describes lawmaking or legal practices that inform’, and are informed by ‘democracy-enhancing jurisprudence’ — practices that inform, and are informed by, the ‘wisdom of the people’. All this raises several concerns. Does demosprudence explain the evolution of the American constitutional common law? If Dred Scott was a denial of demosprudence, was Brown v Board of Education its affirmation and acclaim? What are the possible extensions of the notion in the COCOS? Or is its rich potential for the UN and supranational regimes, in construction of demos? Further afield lies the question: how far does Guinier embrace both legisprudence and demosprudence? These are important issues, but I focus on the Supreme Court of India, which discovered demosprudence much before American constitutional scholars invented the term!

As innovated by the Indian Supreme Court, demosprudence speaks to us severally. It serves as a marker of the emergence of a dialogic adjudicative leadership between/amidst the voices of human and social suffering. The Court does not merely relax the concept of standing but radically democratises it: no longer has one to show that one’s fundamental rights are affected to move the Supreme Court or the High Courts, but it remains sufficient that one argues for the violations of the worst-off Indian citizens and persons within India’s jurisdiction. Other-regarding concern for human rights has now become the order of the day and this concern has prompted a creative partnership between active citizens and activist justices. New human rights norms and standards not explicitly envisaged by the original constitutional text stand judicially invented.

IV

Before I turn to the Indian Supreme Court, let me say that the High Court of Australia also occasionally practises demosprudence, although it does not seem to explicitly engage any reconstruction of demos. The nearest to that happening are of course the decisions that pertain to

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17 Ibid.
19 Guinier, above n 16, 16.
20 Ibid.
21 Ibid.
23 Scott v Sandford, 60 US (19 How) 393 (1857) (‘Dred Scott’).
Aboriginal rights — *Mabo* and its normative progeny. The problematic of ‘judicial ontology and constitutional hermeneutics’ has indeed surfaced in post-9/11 Australian jurisprudence. “‘Islamic’ asylum seekers, “enemy combatants” and “terrorism suspects”, and certain classes of criminal offenders in spaces beyond the doctrines, paradigms, and institutions of the criminal law, now crowd the Australian High Court, as Penelope Pether demonstrates. She brings alive the creative dissents of Justice Michael Kirby. Especially, with and since *Al Katab*, Justice Kirby declared the theory of ‘unenumerated rights’ and the supremacy of international law. A very recent unanimous decision of the High Court is said to have ended the executive practice of the federal government to grant other temporary visas which blocked asylum seekers from applying for permanent visas.

It is true that Justice Kirby’s ‘militant judicial intervention’ praxis, of post-9/11 constitutional judging, ‘marks a distinctive break with comparative constitutional law’s orthodoxy of proportionality, a break that is “capable of redressing the fundamental dislocation” of existing discourses and practices’ and ‘that his “enquiries” constitute a “generic procedure of fidelity.”’ I agree with Pether, (who quotes Oliver Feltham in the different setting of the worlds of Alain Badiou) that Justice Kirby’s ‘genuinely philosophical account of Chapter III duty “thinks local thoughts of justice”’.

But it is a common impression that adjudicative leadership in Australia generally leaves intact the paradigm of common law of constitutional justice and, like everything, the common view becomes dominant unless it is radically challenged. Even so, pending further specific studies, it remains arguable that what occurs is a ‘long slow process of supplementation’ — the development of ‘the jurisprudence of what is proper to courts’ — not ‘Romantic or avant-garde invention’. This is not quite the same with the Supreme Court of India, with its frank and increasing recourse to ‘people’, a move away from *jurisprudence* and towards *demosprudence*.

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31 Pether, above n 27, 2302.


34 Pether, above n 27, 2312.

35 Badiou, above n 34, xxvi.

36 Pether, above n 27, 2311.

37 Ibid, 2312, citing Badiou, above n 34, xxvii.
Indeed, on this score at least, the conceptual distance between Canberra and New Delhi is vaster than the sheer geographical one.

V

Envisaged by the makers of the Indian Constitution (IC), the Supreme Court of India as an apex adjudicative bureaucracy, a final arbiter of the ‘doings’ of other courts in the hierarchy, has now fully emerged as an institutional political actor. This I suggest is the work of demosprudence. The IC makers conferred vast jurisdiction but contemplated a modest role for the Court: its task was to produce a stable pattern of a centralised production of juristic meaning of the Indian Constitution; whereas the production of its social meaning — the tasks of governance, development, and redistributive justice — lay entirely within legisprudence, the province and function of the elected public officials.

The world’s largest ever written constitution, providing a ‘flexible’ democratic constitution with liberal powers for its amendment, the 395 Articles of the IC (not mentioning various clauses and sub-clauses) stand divided in 23 Parts (each comprising several chapters and expanded further by subsequent constitutional amendments), and detailed further now in 12 Schedules, not to speak of over 100 amendments. It is a huge exercise in the elaboration of parliamentary (and even executive) supremacy. Indeed, the constitutional text scales some extraordinarily ludic heights in specifying that ‘unless context otherwise requires’, the terms ‘article’, ‘clause’, ‘part’, ‘schedule’ mean what the IC so designates (Article 366). Article 367 goes even further to say that a foreign state means a state other than India; that laws include ordinances; more importantly it subjects constitutional interpretation to the colonial General Clauses Act 1868 (Imp) (as from time to time amended by Parliament)! Indian experience and development suggests the futility of overwriting the constitutional text; an elementary lesson in semiotics may have suggested that verbosity (or indeed brevity as the US constitutionalism suggests) may have little bearing on constitutional interoperation or adjudicatory leadership!

A most-over-worked and under-staffed apex Court, exercises overarching powers of power over (now 28) High Courts’ determinations in civil and criminal matters (Articles 132–4) further reinforced by Article 136 residual jurisdiction, liberally exercised, empowering the Court to grant at its discretion an appeal by way of special leave ‘from any judgment, decree, determination, sentence or order passed or made by any court or tribunal in the territory of India’. Understandably, then, even dated statistics tell their own story — it has as of July 2009, 53 000 pending cases (as compared with the overall pendency of 400 000 before High Courts and 20.7 million before district and local courts).

Many structural and procedural features contribute to the situation. Thus there are unwarranted delays in judicial appointments and unprincipled Bench-size given its vast jurisdiction. The Court today comprises 31 justices (from an initial count of 8 Justices in 1950) servicing about

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1.2 billion Indian citizens. The iron law of superannuation (age of 65 years) has further aggravated things because the average tenure of individual justices at the Court is about 2–3 years. Further, very few Chief Justices of India had the constitutional luck to serve the Court for long periods. Supreme Court Justices stand elevated from (now 28) State High Courts (with a retiring age limit of 62 years). The Court sits rarely as a ‘full Court’; most of the work is done by two–three judge Benches/Panels constituted by the Chief Justice of India (CJI). Often a Panel of five justices (named the ‘Constitution Bench’) is resorted to and at times larger Benches of 7 or 9 justices stand empanelled to resolve conflicts over prior precedents. Fragmented and fluctuating Bench/Panel structures accentuate the loss of institutional cohesion in myriad ways. Yet, some quantitative methods provide fresh starts in understanding the summit judicial conduct. Asymmetries in the Bench–Bar relationships further signify the fact that the Court remains relatively powerless in controlling its own proceedings. The practices of frequent adjournments and prolix argumentation (often lasting for weeks, even months) still remain the ‘dis-order’ of the day! The national adjudicative time thus remains at the sufferance of a politically fractionalised Supreme Court Bar, resting on an egregiously erroneous assumption that adjudicative reforms assault the independence of the Indian legal profession.

In the Indian context, jurisprudence, as placing some substantial demands of adjudicatory discipline, remains a casualty; the discipline of stare decisis suffers a tissue rejection; often, smaller Benches act without respect for larger Bench decisions. Diversity of concurring opinions, even functioning as disguised partial dissents, and the practices of retroactive explanation of what a particular justice meant in an earlier decision, make difficult the discovery of the law declared by the Court as binding on all courts (and other judicial authorities: Article 141). And yet the Court produces demosprudence and jurisprudence, making adjudicatory leadership (a better notion than judicial activism) an enormously complex task, directing attention to ‘organisational’ and ‘hermeneutic’ leadership and the ‘political’ (as sites of constitutional striving by the Court producing changing meanings of rights, development, governance, and justice) — in sum, ‘India’s living constitution’. At stake also remain the shifting bases of the legitimation of the Court as political institution, assuming fully the responsibility for the co-governance of the nation.


Organisational leadership begins when the Court assumes self-directing powers. In a remarkable feat, the Court seized the power to appoint justices and transfer (High Court) justices since 1993 by holding in the ‘Judges Case’ that the constitutional requirement of ‘consultation’ meant the same thing as ‘concurrence’ of the CJI. It then proceeded to subject the primacy of the CJI by inventing a collegium of five senior most (including the CJI) deciding with unanimity, whose say on judicial appointments will be final.

This adjudicative feat stands notably ‘justified’ in Subhas Sharma, a three judge Bench decision, speaking of the virtue of a ‘non-political judiciary’ as ‘crucial to the sustenance of our chosen political system’, ‘the vitality of the democratic process, the ideals of social and economic egalitarianism, the imperatives of a socio-economic transformation envisioned by the Constitution as well as the Rule of law and the great values of liberty and equality’. The justifications offered for this adjudicative coup d’état do not fully withstand analytical scrutiny, as even the first decade produced an independent Court.

The Bills on National Judicial Commission do not improve the opacity of judicial elevations. Even some distinguished incumbent CJI and some superannuated justices, the active grapevine constituted by some incumbent justices as well as by the leaders of highly politicised and fractal leadership of the Indian Bar, who criticize the functioning of the judicial collegium, do not want a return to the days when a Union Law Minister may repeat his story of having ‘judges in his pockets’. The Constitution Amendment Bill (still to be ratified by half of the states) is about the power of Parliament to modify the Constitution (not so much about transparency and accountability of justices) and will eventually (already petitions are before the Court) be tested on the touchstone of the preservation of judicial preview power as an essential feature of the Basic Structure of the IC.

Further, a constitutional custom that elevates the senior-most judge of the Court as the CJI, thus removing the vice of political patronage, stands judicially endorsed. Indira Nehru Gandhi explicitly breached the custom during the Emergency Rule (1975-76) by superseding the seniority rule. This raised considerable public discussion concerning her justification of an inchoate doctrine of ‘committed judiciary’. However, the custom also means some spectacular short tenures of CJI (at times from 18 days to a few months)! Concerns about social diversity and plurality in the composition of the Court have insistently emerged, and more subtle forms of court-packing have ensured that women justices on the Court remain as few as possible, although a woman justice may be available as CJI. However, a constitutional custom as regards the elevation of Muslim and Dalit justices seems to have evolved.

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41 Supreme Court Advocates-on-Record Association v Union of India [1993] 4 SCC 441 (‘Judges Case’).
42 Subhash Sharma v. Union of India [1990] SCR Supp (2) 433 (‘Subhash Sharma’).
43 Ibid 448 (emphasis added).
44 See Upendra Baxi, ‘Valedictory Speech: The Ways Ahead’ (Speech delivered at the High Level Committee on Gender Justice, 15 December 2013).
VII

There is no doubt, however, that hermeneutic adjudicative leadership (HAL) is centrally involved in resolving the tangle of the self-organisation of the Court. Should we for that reason alone collapse the two is a question worth considering; the organisational leadership speaks to much wider contexts than judicial elevations (for example, the Court has acted as a pay commission for ‘subordinate’ judiciary). Organisational leadership involves HAL and yet is distinct, because HAL directs interpretive energies beyond the institution of judiciary itself or its self-directed collective composition to governance itself.

The Court has now assumed the power of co-governance of the nation and enshrined it in the Basic Structure doctrine. Socially responsible criticism (SRC) may no longer pose the concern jurisprudentially — that is, by recourse to some pre-existing conceptions about the judicial role and function. Rather, the commentariat and the proletariat that primarily constitute the ‘social’ ought to address the quality of demosprudence, the issue of how justices talk about and listen to the worst-off peoples and strive to realise (in Hannah Arendt’s difficult terms) ‘the right to have rights’. Who do the justices listen to when they refer to ‘people’ or the ‘demos’? Are they better listening posts in a plebiscitary democracy than the legislators?

Clearly, the earlier rules of jurisprudence no longer apply to the Court. *Stare decisis*, for all its indeterminacies, was an engine for the growth of common law jurisprudence; the Indian demosprudence bids an ‘adieu’ to it even in terms of daily jurisprudence of the Court, let alone the realm of Social Action Litigation (SAL). The ‘gravitational force’ (to deploy Ronald Dworkin’s terms) of precedent no longer governs the demosprudence of the Court; the construction of demos is not precedent-minded but regards the doing of justice or mitigation of injustice as its prime task.

Is this aversion to precedent by the Court both (and here to use Robert Cover’s distinction) jurispathic and jurisgenerative? How far may it refuse to follow any institutional rule or discipline laid down by other institutions of co-governance and how far may it reshape these? And if the Court is thought of in the immortal image of Justice Goswami as the last recourse for the ‘bewildered and oppressed’ Indian humanity, may it find liberation or conformity to judicial self-discipline (jurisprudence) as a way of attaining the best for the worst-off (demosprudence)? And how far may its successful demosprudence erase the public memory of the fact even when the Court presents itself as an aspect/visage of new social movement, it must also remain at the end of the day an assemblage of state sovereignty/suzerainty? In order to retain the promise of constitutionalism in all its senses, we need to answer some hard questions both of constitutional demosprudence and jurisprudence.

No bright lines between legal and constitutional interpretation seem to exist now. Nor do the complex genealogies of constitutional and legal cultures: if ‘civil’ law cultures classify private and public law, its common law counterpart often articulates the traditions of constitutional common law. Whereas the continental cultures celebrate a strict discipline of the ‘proportionality’ test, common law constitutionalism leans towards ‘balancing’ competing and conflicting interests. The Indian experience offers a more complex and ambivalent instance.
As a state ideological and coercive apparatus, the Court has sustained overall not just the colonial laws (such as the Official Secrets Act 1923 (Imp) and the offence of sedition entailing forms of official love for duly elected governments) but has upheld against human rights-based challenges some dragnet and draconian post-independence, frankly ‘neo-colonial’ laws. The Court now downgrades ‘legalism’ (an ethical virtue of following rules even when they produce undesirable results) and ‘restraintivism’ (even when they have the power they should not enter the ‘political thicket’) as tools for judging. Instead, it frankly resorts to ‘pragmatism’ (even as they expand the scope of their power, justices ought to respect some institutional limits and act always with regard to the overall acceptability and effectiveness of their decisions) and ‘activism’ (justices ought to so act as to protect and promote human rights and constitutional conceptions of justice).

Confronted with a mélange of socially and culturally grounded expectations, the Court has not engaged as fully as it may with taking the rights of women, sexual minorities, children and First Nations as seriously as human rights. Even so, and increasingly since the 60s, the Court has tended to assume a visage of a new social movement, especially via SAL. Further, it has also emerged as a discursive platform for governance transparency, bordering on the verge of an enunciation of constitutional rights against corruption in high places. Thus the Court today assumes full judicial powers of directing and monitoring State investigative and enforcement agencies such as the CBI (Central Bureau of Investigation) and the constitutionally established CVC (the Central Vigilance Commission). SAL has survived legislative supermajorities in the past and has grown because of coalitional forms of national governance although now with the 16th Parliament this trend is interrupted.

The Court goes beyond these, for example, straddling the conventional distinctions of judicial activism/restraint, and it invents a contrast between juristic activism/restraint, relatively unknown to the received wisdom of Anglo-American prescriptions of judicial role and function. Styles of ‘juristic activism’ comprise a genre in which justices elaborate future decisional pathways without applying the judicial reasoning in an instant case to its own specific outcome. For example, Olga Tellis\textsuperscript{45} enunciates the future of a new constitutional right to shelter for Mumbai pavement-dwellers, though in the instant result condemning them to acts of executive discretion to uproot them from their necessitous habitats! This disrupts a ‘universal’ notion of the very idea of judgment as marking the unity of judicial reasoning and result. Yet, at the same moment, it also births the practices of ‘suggestive jurisprudence’.

To offer a momentous example, the anxious murmur articulated by Justice Hidyatullah, in Sajjan Singh,\textsuperscript{46} while sustaining the 17th Amendment, leads to a radical transformation of Indian constitutionalism. He there said that the IC did not intend Part III rights to be mere ‘play things of a special majority’,\textsuperscript{47} paving the way for the momentous decision in Golak Nath\textsuperscript{48} (immunising these rights from the runaway viral powers of constitutional amendment). The 1973 Kesavananda\textsuperscript{49} decision proceeds farthest in judicially re-writing the constitution: Article 368

\textsuperscript{45} Olga Tellis v. Bombay Municipal Corporation [1985] SCR Supp (2) 51 (‘Olga Tellis’).
\textsuperscript{46} Sajjan Singh v. State of Rajasthan [1965] SCR (1) 933 (‘Sajjan Singh’).
\textsuperscript{47} Ibid 962.
\textsuperscript{48} I C Golaknath v. State of Punjab [1967] SCR (2) 762 (‘Golak Nath’).
The powers of constitutional amendments are now fully subject either to the practices of eventual judicial endorsement or even the power to declare amendments ‘unconstitutional.’

Kesavananda,50 in some wafer-thin ‘majority’ outcomes and via a thousand page decision, riven with some indecipherable putative concurring and dissenting plurality of opinions, still enunciates the doctrine of the IC personality subject to constitutional judicial power. The reach of amendatory power may now not any longer offend the ‘Basic Structure’ of constitutional governance nor its ‘essential features’ — severally described as ‘democracy’, ‘equality’, ‘federalism’, ‘rule of law’, ‘secularism’ and ‘socialism’. What is not realised is the decisional core — the notion of judicial power — a core that results in a co-sharing with Parliament of constituent power by the apex justices. It is this power that would decide the essential features. If there is no power in the Court to adjudge the validity of an amendment, no judicial quest for essential features of the Constitution, or its personality, will be either ‘legal’ or ‘legitimate’.

Initially politically opposed, even in Parliament, this articulation of adjudicatory leadership no longer remains today an affair of contentious polities. The doctrine of Basic Structure has been judicially adapted and politically accepted in India and is even fully followed in most of the South Asian adjudicature, notably Bangladesh, Nepal and Pakistan.51

The Kesavananda constitutional ‘bootstrapping’ interestingly accomplishes further its constitutional and political legitimation; its Basic Structure doctrine now further extends beyond the implied limits on the amendatory powers; thus in Bommai53 the Court outlaws the Presidential powers to suspend or dissolve duly elected state legislatures under Article 352. Further still it now even transforms the Basic Structure doctrine into a canon of constitutional interpretation reaching out almost fully to judicial deliberation/invigilation of the quotidian exercises of state legislative and executive/administrative powers.

VIII

The Article 368 powers and procedures of constitutional amendment were all too frequently deployed in the Nehruvian era (1950–64), marked by ascendency of parliamentary supremacy with a constitutionally unbecoming hostility towards adjudicatory leadership. Some early amendments led no doubt to a superior understanding of Indian constitutionalism; thus the very First Amendment expands the Part III equality rights as empowering the State to pursue percentile quota-based reservations (affirmative action policies) for the millennially disadvantaged Indian citizenry, especially in terms of admission to state-aided educational institutions and government employment. Thus, in turn, arises a new sphere for adjudicative

50 Ibid.
53 S R Bommai v. Union of India [1994] 3 SCC 1 (‘Bommai’).
leadership in pursuit of the tasks of ‘complex equality’ or ‘competing equalities’. Parenthetically, all I may say here is the following: the Court: (a) legitimates demands of social justice (group-differentiated equality), yet remains anxious about horizontal equality of all eligible citizens; (b) limits the scope of differential treatment overall as not exceeding 50% of the Indian population; (c) seeks thus to exclude ‘creamy layers’ (the already constitutional haves) from capturing distributive monopolies to the disadvantage of the actually worst-off citizen-peoples, both in terms of ‘equality of opportunity’ and ‘equality of outcomes.’ Hermeneutic leadership of the Court offers a complex realm and in some notable ways differently from the US jurisprudence—a theme that this paper may scarcely pursue.

Unlike the US counterpart, the Indian First Amendment, far from enshrining the ontological robustness of the right to freedom of speech and expression, marks an era of ‘reasonable restrictions’ enacted on various grounds, including even the ‘friendly relations with foreign states’! Judicial acquiescence with these also marks various interpretive styles/patterns that question the ‘reasonableness’ of the power to prescribe ‘restrictions’ on fundamental rights. Summarily put, it evolves various standards of strict constitutional scrutiny to ‘balance’ competing constitutional policy considerations that may otherwise entirely ‘trump’ Part III rights.

Low-intensity constitutional warfare begins in relation to the Article 31 private property rights. Only a few justices took an ideological hard line on the notion of private property as the very foundation of freedom and human rights. Rather, as Justice Koka Subba Rao insisted, the issue was ‘statism’, which may govern India as if rights did not matter. More consistently here emerges a form of constitutional legalism underscored with the conviction that the justices should have the final say in interpreting the Bill of Rights.

The collision over Article 31 property rights occurs variously (and Tony I have narrated this in different strokes). Presenting this in a few sentences, Parliament amends the Constitution by deleting the word ‘just’ from the phrase ‘just compensation’ hoping that the Court may not be able to further insist on market value plus solarium. In response, the Court maintains that the word ‘compensation’ may only signify ‘just compensation’. A yet further amendment replaces the term ‘compensation’ altogether by simply saying ‘any amount’ as ‘determined’ by appropriate legislation. The Court strikes back by saying that the word ‘determination’ carries with it the constitutional burden of principled compensation for takings!

Was the Court too far wrong in suggesting basic constitutional rights may not be taken away or abrogated under the title of distributive justice? If this puts the matter too widely, was it too far wrong in insisting that the State may not acquire castles for a bag of cashews, or palaces for a handful of peanuts? In a wise move, the Court did indeed relax its insistence on market value compensation by accepting instead that systematic under-compensation for takings must at least be based on some showing of principled determination. Moreover, the Court acquiesced for a long time with the ouster of its jurisdiction by the 9th Schedule. Furthermore the 4th amendment (1955) yields to the Court’s leadership via the principle of market value compensation for the

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state taking of land ‘under personal cultivation’.\(^{55}\) Did all this achieve or accelerate any serious-minded pursuit of agrarian reforms? Empirical studies of the political economy of the reforms suggest otherwise. All this lays the groundwork for shaping a subsequent epic struggle over the scope and legitimacy of constitutional amendments.

Indira Nehru Gandhi, the third Prime Minster of India ascended to high political power, marking India’s major experimentation with state finance capitalism — in effect nationalising banks and insurance service industries. The constitutional rationale was articulated under her leadership via the 24\(^{th}\) and 25\(^{th}\) amendments. The latter in 1971 introduced Article 31C, a provision that sheltered fulfilment of Part IV rights if the takings law stood accompanied by a statement that it furthered the pursuit of these rights. The Court may not ever question the law ‘on the ground that it does not give effect to such policy’. The \textit{Kesavananda} Court invalidates this amendment on the ground that it may shield ‘colourable’ exercise of such a power.\(^{56}\)

In moving the First Amendment, Nehru was quick to say that constitutional legalism was an act of theft of the Constitution and to justify the 9\(^{th}\) Schedule — listing agrarian reform laws from judicial paper, even when manifestly violative of Part III rights — as a way of preventing this ‘magnificent edifice’ from being ‘purloined’ by lawyers and judges.\(^{57}\) Justice M Hidyatullah (among India’s most gifted justices) said memorably that ‘ours is the only constitution that needs protection against itself!’ This Schedule was used in the Emergency days (1975–76) to protect other laws, including dragnet security legislation, from judicial paper. It is incidentally as late as 2009 in \textit{Coelho} that the Court assumes the power to paper and invalidate the entries in the schedule.\(^{58}\)

This summary narrative at least suggests entailments of some Foucauldian labours as yet not in sight, whether in qualitative (doctrinal) or quantitative (institutional) Indian or expatriate studies of constitutional jurisprudence. The latter genre does in particular a great disservice to the ways of constitutional legalism, Indian-style, but may not be pursued here. There is a constitutional necessity prescribing that a constitutional ‘amendment’ may only proceed via a law made by Parliament rather than by referendum or the convening a new constituent assembly. As legislation, it may remain subject to the constitution-saying power of the Court. The ‘heroic’ 24\(^{th}\) Amendment contests this perspective by insisting that constitutional amendments articulate

\(^{55}\) See Upendra Baxi, ‘State of Gujarat v Shantilal: A Requiem for “Just Compensation”?’ (1969) 9 \textit{Jaipur Law Journal} 29. This is the first, and as far as I know, only article to examine contemporary theories of distributive justice to Article 31 jurisprudence.

\(^{56}\) [1973] 4 SCC 225 [1913].


‘constituent power’ — put differently, the expressions of legislative will, not amenable at all to acts of hermeneutic adjudicative leadership. In *Kesavananda* the Indian State even argued that the amendatory power may thus constitute an economy of excess in which it may reconstitute the constitutional idea of India from a ‘republic’ into a ‘monarchy’, from a ‘federal’ to a ‘unitary’ form of governance, and from a ‘secular’ form to a ‘theocratic’ one. The Court returns this ‘compliment’ by insisting upon an order of Basic Structure limitations on the amendatory power and in turn presenting itself as a co-equal regime of adjudicatory constituent power.

In any event, *Kesavananda*\(^59\) inaugurates a new constitution of India, if only because it now marshals a new political consensus that the Court may act as a co-equal branch of State. I do not quite know how far, if at all, the Indian ways of plebiscitary competitive party politics/machines may have evolved differently outside the play of Indian adjudicatory leadership with and since *Kesavananda*.\(^60\) Going far beyond some staple studies of ‘juristocracy’ (led eminently by Ran Hirschl),\(^61\) the question, shortly put, is whether this daring articulation of the Basic Structure doctrine merely marks an affair of judicial will to power or serves a whole lot better a profound difference for the futures of Indian constitutionalism and human rights. Whatever be the careful response, demosprudence has already arrived in the battle for judicial last say on all constitutional matters.

**IX**

Indira Nehru Gandhi, whose rise to supreme power was marked by India’s triumph in the creation of Bangladesh, and her socialist agendum that ushered in an era of state finance capitalism via the nationalisations of the banking and insurance industries, also ushered in the only explicit act of constitutional authoritarianism in the internal emergency. The trigger for this was provided by the Allahabad High Court decision ‘unseating’ her as a Member of Parliament and finding her ‘guilty’ of ‘corrupt’ electoral practice in only two of 67 counts. Her response was a 39\(^{th}\) constitutional amendment that rendered this decision as void and all pending appeals against it as fully infructuous. At the height of constitutional dictatorship, the Court in *Raj Narain v Indira Nehru Gandhi* invalidated this amendment,\(^62\) yet in the infamous *Shiv Kant Shukla Case*\(^63\) (and world-celebrated dissent by Justice H R Khanna) four leading justices of the Court proceeded to uphold a complete and total denial of the venerated right to habeas corpus, even against arrests based on mistaken identity.

This low point of hermeneutic leadership was soon to be reversed in the early post-Emergency period (1977–80). Thus begins the long itinerary of a normative judicial restoration, even a revolution, by way of cathartic and populist acts of revival of an autonomous apex court. This short period marks an extraordinary articulation of adjudicative leadership. Above all, via

\(^{60}\) Ibid.
\(^{62}\) [1972] SCR (3) 841.
\(^{63}\) *Jabalpur v. Shivkant Shukla* [1976] SCR 172 (‘Shiv Kant Shukla Case’).
Maneka Gandhi, the Court amends Article 21 rights to life and liberty as assurances of substantive due process specifically excluded by the IC authors. Since the late 80s, a different but related rights revolution unfolds that I insist on naming as the juridical invention of SAL as against PIL (public interest litigation) with a view to highlighting its distinctive Indian origins and characteristics.

In and via SAL, the Court has democratised access to constitutional remedies as a basic human right. SAL began as an epistolary jurisdiction in which rightless people or their next of kin, and human rights and social activists, write letters that are regarded as writ petitions to the Court and may appear before the Court as petitioners-in-person. Since the Court is itself not a fact-finding authority, it has devised the method of ‘socio-legal enquiry commissions’ to establish facts and make recommendations on which it proceeds to issue interim orders and directions (a kind of continuing mandamus). It has further developed a new partnership of learned professions with social and human rights movements and investigative print and electronic journalism.

Overall, all this has inaugurated a new form of constitutional litigation but also developed judicial powers of superintendence over governance institutions and constrained them for the most part to observe their statutory obligations and respect towards constitutional/human rights, thus also expanding its power and prowess over the national policy agenda.

In so doing, the Court has shifted the bases of legitimation of adjudicative power by invoking a notion that high judicial power is not merely an affair of ‘governance’ comity among the leading state-formative apparatuses but rather an insistence that all forms of public power should be read as constituting a code of ‘public trust’. In turn, this fiduciary notion of judicial power has deeply questioned the notion that elected public officials may justify their everyday acts of power and policy-making on the grounds of electoral mandate; rather, these remain liable to adjudicative deliberation. Some major decisions of the Court have directly appealed to the people of India, from whose acquiescence the Court itself derives some extraordinary quotient of judicial power — forms of ‘judicial populism’ that question some core notions of representative democratic governance, without entirely devaluing these. In the process, all this has enhanced not merely the role of the Indian State High Courts but also the relative autonomy of constitutional agencies such as the Election Commission of India, and the associated human rights institutional networks.

In the spheres of normative leadership, the Court devised ways of monitoring and disciplining the runaway exercises of constitution-amending powers, initially solely entrusted to the Parliament and the Executive, via the invention of the doctrine of the Basic Structure and essential features of the IC. Soon enough the originative limits of this doctrine confining the Court’s jurisdiction only to constitutional amendments proliferates variously as a canon of constitutional construction, thus further disciplining the sway of executive and legislative powers. No longer, then, do the conventional theoretical/ideological narratives of ‘separation of powers’ crib and confine the performatives of the Court.

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Thus, in a few decisions, the Court has engaged in tasks of explicit legislation. For example, it has laid down a fully-fledged judicial legislation concerning sexual harassment in workplaces, and the unconscionable practices of campus violence and ‘ragging’, in turn entailing variously national norm-setting in the conduct of student elections. These explicitly detailed judicial legislative acts are nominally subject to any eventual national legislation whose conformity with such acts also remains a matter for judicial power. Further, the creeping jurisdiction of the Court now stands directed to some acts of national policy-making, such as the protection of the environmental commons, national rivers water-sharing arrangements, disaster management, and rehabilitation and recompense for developmental project-affected Indian citizens.

This daring of adjudicatory leadership is further at work: not merely has the Court has restored rights deliberately excluded by the constituent assembly of India (such as right to speedy trial, bail, and adequate legal representation) but more crucially created a right to substantive ‘due process’. In this way, it has further read into the right to life and liberty (Article 21, IC) an unending regime of enunciation of human rights to livelihood, shelter and housing, food and nutrition, education, health, and the environmental well-being.

In sum, the Court has in the last quarter century been steadily converting human needs into human rights. In the process, it has also mutated the discourse of judicially unenforceable (as originally enacted) Directive Principles — mostly by incorporating these in Article 21, now interpreted as importing substantive due process.

In the area of affirmative action for socially disadvantaged groups, the Court has insisted that the identification of beneficiaries be based on scientific studies, and that the overall reservation/quota (mostly for educational and state employment) should not exceed 50%. It has also provided for the exclusion of ‘creamy layers’ among the disadvantaged peoples. More recently, the Court, in a further pursuit of SAL power and process, has welcomed mass media sting exposés to render corruption in high public places as a violation of constitutional morality, human rights, and the fiduciary obligations of decent democratic administration.

X

These complex patterns of adjudicatory leadership have not gone unchallenged both within and outside the Court. Almost at every step of this development, dissident justices have contested the emergence of judicial supremacy in the governance of the nation, and the partially concurrent justices have issued stern caution on what is thought to be an extravagant assertion of judicial power. Yet, over time, and with some residues of internal dissensions, most such judicial actors have shed their initial ambivalence — an unsurprising phenomenon given the judicial will to power.

Some leading lawyers, and academics, who admirably condense the Court’s decisional law into treatises on constitutional law, have persistently questioned the expanding realms of adjudicative
leadership. Many leading law and political theory scholars continue to address the ‘anti-majoritarian’ aspect of judicial power.

On the other hand, activist academics, while critical of this or that decisional trend/formation, overall embrace the fiduciary notion of the judicial role. So do specific agenda-driven human rights and social action movements, amidst many a profound moment of disappointment. For the 24/7 hyper-globalising news and views of mass media and the related commentariat (that now functionally displaces the proletariat), ad hoc criticism of the Indian judicial action remains a lucrative business. Overall, the problem of judging the judges emerges in the public, rather populist, deliberative sphere, as always inviting the question of socially responsible forms of criticism (SRC).

What SRC consists of is indeed a vexed question. The bases of SRC are often unarticulated. Nor is any distinction made between episodic and structural criticism and even critique. I do not insist on the binary, if only because we are all postmodernists in our dislike of binaries! But I do suggest that the ways in which we proceed to deconstruct these do matter. If structural change is a long term affair, for example, we may not be led to criticising courts for not changing the structures of power or domination by a single or even a line of decisions; indeed, then the question is not so much what judicial power does (or does not) do but is the way in which the courts are mobilised by insurgent actors and the ways in which the outcomes are incrementally used. Talking about outcomes is also to take seriously the problematic of ‘symbolic’ and ‘instrumental’ outcomes and impact studies. What ‘structural’ critique may learn from the ‘episodic’ — the triumphal narratives of the successful and the disappointments of the losing party — is also as yet an open question, not yet foreclosed by any science of narratology.

In a form of adjudication governed by the principle of parliamentary ‘sovereignty’ the Basic Structure doctrine seems out of place. The winner-takes-all principle stands now replaced by the postulate — the judicial innovation — of ‘hope-and-trust’ jurisdiction (notably by Justice P N Bhagwati). This displaces the view that justices ought not to be directing executive policy or shaping a legislative policy; rather than ‘overreach’ or trespass of ‘separation of powers’, a new jurisprudence entails a democratic dialogue between the judiciary and the legislature/executive combine. Some adjudge the rising judicial sovereignty as undemocratic in principle as it lowers the bar of representative intuitions. The wider point, of course, is that adjudicative leadership should not ignore state differentiation; the Court is best seen as working through such institutions rather than singularly or alone.

The problematic merits further discussion, yet indeed the suggestion that scholarly critics of courts state their own ideology in broad daylight and articulate the general principles animating their critique seems a legitimate one. SRC is a species, if you will, of careful criticism of the judicial performances and ways in which judges, lawyers, and jurists think.

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The response of the parliamentary/executive combine to adjudicatory leadership has varied over time. The initial outcries of judicial usurpation still continue though in an increasingly feeble voice. This is partly due to the fact that, ever since its inception, leading political actors have gone to the Court for judicial and constitutional protection of their basic rights against their incumbent adversaries. Even a bare reading of the parties in the leading decisions of the Court reads like a ‘Whose Who’ of Indian politics. No matter how justices may proceed to decide constitutional contentions, the outcome becomes a politically appropria

Bush v Gore\(^{66}\) may provide a rare moment of adjudicative politics in the United States Supreme Court; in contrast, the Indian Supreme Court would be simply unimaginable this way!

Do the questions then confronting the Court provide a different context, marking the distinction between judicial role and function in developing constitutional democracies and some bicentennial forms of constitutional adjudication? This in turn frames contestation between a historical (and therefore abstractly universalising) view of what may be said, after all, to be the province and function of apex courts and the historically new formations of postcolonial (and now of course post-socialist) constitutional justicing.

XI

How the Court shapes and reshapes the demos is an all-important question. Perhaps the earlier justices, during 1950-1973, did not regard themselves as social entrepreneurs and constitutional activists preoccupied as they were with laying the foundations of judicial review, a model of rule of law, and of adjudication, and guiding the colonial Bar into a constitutional profession. They were not unmindful, in so doing, of the wider question of social legitimation of the Constitution. However, they thought and acted primarily as legalists rather than as legatees of constitutional democracy. The scene and scenario since 1973 is very different: in the main it is an era of substantive due process.

The distinctive political role carries with it the loss of constitutional legal certainty. This is, for example, shown dramatically in the decisions in *Lily Thomas*\(^{67}\) and *Kaushal v Naz* (2)\(^{68}\). *Lily Thomas* cancelled a 60-year plus tradition of doing politics in India by reversing the settled principle of innocence until proven guilty, and the LGBT decision denied substantive due process to sexual minorities by the failure to reverse a legislative precedent of even longer standing. On the administrative side, the Court’s own ambivalence in sexual harassment situations by retired judges has given the impression that even then substantive due process is hard and male in nature!

That a substantive due process court may err and be inconstant is scarcely a novel finding. That such a court may fail the fundamental human rights of sexual minorities, be unmindful of the constitutional presumption of innocence, and tolerate sexual harassment by judges is a matter of

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\(^{66}\) 531 US 98 (2000).

\(^{67}\) *Lily Thomas v. Union of India*, [2013] INSC 674 (10 July 2013) (‘*Lily Thomas*’).


deep concern. Yet any verdict on demosprudence is premature; is it true to say that in the absence of collective judicial self-discipline and in the full absence of a degree of judicial consistency, substantive due process may amount neither to jurisprudence nor to demosprudence?

Thank you all and Tony may you be amongst us forever.

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**COMPLEXITY, CONFUSION AND THE MULTIFACETED LEGAL ROLES OF THE INTERNATIONAL FREIGHT FORWARDER**

**PETER CAIN**

The freight forwarder is a critical service provider in world trade and transport. As the ‘architect of transport’, the freight forwarder offers transport and logistics solutions characterised by efficiency, value and flexibility. The freight forwarder performs a variety of service roles, depending on the specific needs of the client shipper. As almost a corollary to the flexibility of these service roles, the legal roles that may be occupied by the freight forwarder are varied. This article provides an overview of the various legal roles of the freight forwarder with respect to its client shipper. The two primary classifications of legal roles identified are that of agent (for the shipper) and principal. The sub-classification of those two primary roles reveals further complexity, particularly in the role of principal (for example, performing carrier, contractual carrier or pure principal). Beyond the base of contractual roles and responsibilities, the law of bailment provides additional legal obligations. Case law and legal commentators provide examples illustrating the confusion and complexity in defining the true legal role of the freight forwarder. A taxonomy of legal roles is identified. As a conclusion, it is recommended that care be taken in drafting freight forwarders’ terms of engagement and associated contracts of carriage to clearly specify the role, responsibilities and obligations of the freight forwarder in an entire freight movement.

**I INTRODUCTION**

This article is centred on the international freight forwarder, a specialist transport intermediary who operates in the space between those with cargo interests (‘shippers’), performing carriers and non-carrying intermediaries. The international freight forwarder specialises in efficient

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*Peter Cain, LLB (QUT), is a lecturer with the National Centre for Ports and Shipping of the Australian Maritime College, a specialised institute of the University of Tasmania. The author wishes to thank Professor Gino Dal Pont and Dr Jiangang Fei, both of the University of Tasmania, for their considered and helpful suggestions for changes to the article.

1 A ‘freight forwarder’ is a specialist transport intermediary (that is, an intermediary as between shippers and carriers) which provides a wide range of services in relation to the carriage of goods. The previous common name of the intermediary was that of a ‘forwarding agent’. The common contemporary change in name to ‘freight forwarder’ reflects the broader and deeper involvement in the freight movement, which forms the base of much of the content in this article.

2 A ‘shipper’ has an interest in cargo required to be transported to meet the obligations of an overarching sale of goods contract. For the purpose of this article, it is assumed that some international transport is required to meet the obligations under a sale of goods contract.

3 A ‘performing carrier’ is a carrier who physically acts to carry goods, no matter the mode of transport.

4 A ‘non-carrying intermediary’ is a transportation intermediary who, while not carrying goods, performs a physical function during the course of an entire freight movement. Examples may be a warehouse or a stevedore. The collective term ‘performing parties’ is used in this article to encompass any or all of the
door-to-door multimodal cargo transportation by providing a broad portfolio of services to shippers. This article identifies, describes and classifies the varying legal roles of the international freight forwarder as a crucial intermediary in contemporary world trade and transport.

Courts and commentators have identified uncertainties and a lack of clarity in the legal roles of freight forwarders. The lack of clarity is most evident upon loss or damage to cargo of the shipper, and the diverse range of parties that may be pursued to meet that loss or damage. A shipper may commence a legal action against a freight forwarder and one or more performing carriers or non-carrying intermediaries. This may lead to cross-claims being initiated between defendants. The claims pleaded by a shipper can be as diverse as in contract, tort (negligence or a property-based tort), bailment and/or breach of statute. While it can be appreciated that plaintiffs are cautious and wish to incorporate all possible claims, were the legal role of the freight forwarder relatively clear, such actions would be streamlined. The key in any case is to ascertain the legal role of the freight forwarder. Uncertainty of the legal role has a cost for all participants in international transport, including the direct cargo and carrying interests, but also rippling outwards to encompass insurers, financiers and law/policy makers.

II INTRODUCTION TO THE LEGAL ROLE OF THE FREIGHT FORWARDER

The most obvious role of the freight forwarder — the service role(s), being the actual specific functions carried out by a freight forwarder for the shipper — has a historic background performing carriers and non-carrying intermediaries who perform functions within an entire freight movement.

For examples of claims, see Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd [2001] NSWCA 281 (In this case, the shipper took action against the freight forwarder under a ‘contract of bailment’, and against a road carrier in negligence. The road carrier counterclaimed for indemnity or contribution against the freight forwarder. As to the question of characterisation, the court found that the freight forwarder had contracted as principal with the shipper); The Assets Venture (2002) 192 ALR 277 (In this case, the shipper took action against the freight forwarder under contract, bailment and in negligence, and against the sea carrier in bailment and in negligence. The freight forwarder gave notice to the sea carrier of its intention to seek an order for contribution or indemnity if it was found liable to the shipper. The sea carrier counterclaimed against the freight forwarder for damages, indemnity or contribution if found liable to the shipper. Ultimately, the court held that the freight forwarder had contracted as principal with the shipper); Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd; The Cape Comorin (1991) 24 NSWLR 745 (‘Carrington Slipways’) (In this case, the shipper took action against four parties/defendants. The freight forwarder was sued in contract under its house bill of lading. The time charterer of the carrying ship, the Cape Comorin, was sued in contract under the ocean bill of lading. The owner of the Cape Comorin was sued in bailment. The stevedore was sued in negligence. On the question of characterisation of the freight forwarder, the court found the freight forwarder had acted as the agent of the shipper).

See, eg, East West Corporation v DKBS 1912 [2003] QB 1509; [2003] EWCA Civ 83. In that case, the shippers took action against carriers under a combined transport bill of lading in tort (negligence and conversion) and in contract.

Indeed, a failure to plead all material facts underlying all potential causes of action (either directly or in the alternative) may ultimately prove fatal to an overall claim.

extending back at least to the 13th century. An exhaustive characterisation of the modern service roles of the freight forwarder is not an easy task, but a useful broad descriptor is that of an ‘architect of transport’.

The introduction of the container, and its fundamental part in modern combined transport (that is, a door-to-door delivery service), has broadened the scope of the service role of freight forwarders. Before the container, the most critical mode of transport was the maritime leg. The maritime transport mode was commonly international, often the longest in duration and the riskiest in terms of possible catastrophic loss. The commercial imperative has since moved away from the seaports and from the loading of break bulk cargo dockside. Prepacked and secured containers enclosing valuable goods are nowadays the vital tool that allows for multimodal transport. The modern shipper’s justified expectation is for efficient, timely and regular door-to-door transportation.

The chain of carriage in a contemporary door-to-door cargo movement can be complex. The individual freight forwarder, depending on the terms of its engagement, can be involved in many disparate and critical activities. Dr Hans-Joachim Schramm usefully categorises twelve broad potential service functions of a freight forwarder: ‘consultancy, packaging, clearance, documentary, affreightment, consolidation, insurance, logistics, fiduciary, supervision, quasi-banking and transport’.

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9 The practice in the 13th century of the ‘frachter’ acting as a combination of guide, forwarding agent and provider of an armed guard is discussed well in Donald James Hill, Freight Forwarders (Stevens, 1972) 4.
11 This description is attributed to the International Federation of Freight Forwarders Associations (FIATA), the peak international industry association representing freight forwarders: FIATA, About FIATA: Who is FIATA (2014) International Federation of Freight Forwarders Associations <http://fiata.com/about-fiata.html>.
12 The containerisation revolution began in 1956 when, as Marc Levinson describes, ‘the Ideal-X, a war-surplus oil tanker with a steel frame welded above its deck, loaded 58 aluminium containers at a dock in Newark, New Jersey. Five days later, the ship steamed into Houston, Texas, where trucks took on the metal boxes and carried them to their destinations’: Marc Levinson, ‘How a box transformed the world’, Financial Times (online), 24 April 2006 <http://www.ft.com/intl/cms/s/1/4bdb14b2-d3b7-11da-b2f3-0000779e2340.html#axzz3HtR0OnCe>.
15 Even a relatively straightforward container movement might involve the following steps: container loaded at factory in export country, container collected and moved to ‘dry port’ (an inland intermodal terminal), container loaded and moved by rail to export port, container loaded onto ship, international sea carriage, container unloaded at port in import country, container carriage by road to importer’s distribution centre and container unloaded. Beyond the actual cargo carriage, there are manifold other dealings with the cargo — dealings with transport/security documentation, obtaining insurances, export/import licence compliance, customs declarations and clearances, quarantine clearances, payment of ports fees and charges, payment of government taxes and charges, etc. See discussion in Brian Harris, Ridley’s Law of the Carriage of Goods by Land, Sea and Air (Thompson Reuters, 8th ed, 2010) 388.
Beyond the service role, it is necessary to inquire into the legal role of the freight forwarder. Though there is clearly a close relationship between the two, they are nonetheless distinct. The primary determinant of the legal role of the freight forwarder is the entire course of dealings between the freight forwarder and shipper, including the contractual terms of the engagement. This means that in any specific claim against a freight forwarder following cargo damage or loss, a court will very likely consider a general or overarching agreement(s) between the shipper and freight forwarder and specific contract(s) of carriage involved in the subject freight movement. A freight forwarder may be acting under contract as principal, agent, carrier or some other legal amalgam or hybrid.

In addition to the contractual role, a freight forwarder may assume responsibility in tort (negligence) or as a bailee of the shipper’s goods. There may be liability for the freight forwarder acting as a carrier under an international cargo carriage regime. There may, moreover, be liability for the freight forwarder under domestic legislation. The nature and extent of the legal role is evidently one of some complexity and is heavily reliant on individual cases.

An examination of the specific legal roles identified by case law, conventions and commentators ensues, with the aim of creating a taxonomy of legal roles.

II FREIGHT FORWARDER AS AGENT FOR SHIPPER

A Agent for Shipper as the Traditional Legal Role

The ‘traditional’ or ‘historic’ role of the freight forwarder is as an agent for the shipper. In this role, freight forwarders are engaged as experts in cargo transport to determine and execute the most efficient transport strategy. As an agent, the prime work of the freight forwarder is to enter its principal (the shipper) into contracts with performing parties. The entire freight movement is then carried out by the performing parties who have privity of contract with the

17 It may be that, from a shipper’s perspective, the question of the legal role of the freight forwarder is only likely to receive any real consideration if there is loss or damage to the goods being transported, and a claim then needs to be made.
23 See, eg, Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd (1993) 113 ALR 677 (‘Comalco Aluminium’) (liability of freight forwarder under the (then) Trade Practices Act 1974 (Cth)).
24 The transport strategy may involve a consideration of different possible modes of carriage, different carriers within a single mode, time and cost of different carriage alternatives, recommendations as to level of insurance, advice as to risk minimisation, trade financing alternatives, etc.
shipper. An examination of the legal roles of freight forwarders typically commences with the oft-quoted words of Goddard LJ in the 1939 English case *C A Pisani and Co Ltd v Brown, Jenkinson and Co Ltd*.

His Lordship characterised a ‘forwarding agent’ as

willing to forward goods for you … to the uttermost ends of the world. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract.

The common terminology of the time (‘forwarding agent’) gives more than a hint as to the status of the freight forwarder. Prior to the 1950s container revolution, the legal role of the freight forwarder as a forwarding agent was the industry norm and quite clear. The imperative was for the forwarding agent to find space on a ship and to enter its principal into a contract of carriage. The loading and unloading of unconsolidated break bulk cargo was a long and laborious process. The shipper had much greater control over this critical process as direct principal with the sea carrier.

Though the legal role of the freight forwarder as forwarding agent persists, it has been significantly overtaken by the other roles discussed below.

**B Freight Forwarder Acting as a Dual Agent**

Professor Jan Ramberg observes that freight forwarders can position themselves so they have ‘dual’ agency functions — for the shipper, but also for the carrier. The immediate impression, from someone operating outside of the maritime industry, may be one of surprise at an agent positioning themselves on both sides of an onerous and possibly contentious transaction. It is well accepted that the agent–principal relationship ordinarily exhibits indicia that attract fiduciary duties superimposed on the contract engaging the agent. Fiduciary duties, which are almost invariably more onerous than those imposed by agreement, are directed to fostering ‘undivided loyalty’, in this context reflected in the proscription that an agent must avoid conflicts

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25. (1939) 64 Ll L Rep 340.
27. See *Jones v European and General Express Co Ltd* (1920) 4 Ll L Rep 127, 127 (Rowlatt J): ‘It must be clearly understood that a forwarding agent is not a carrier… All he does is to act as agent and make the necessary arrangements, as far as is necessary, between the ship and the railway or anywhere else’.
28. This is explained in the following: Traditionally, freight forwarders offer their services in connection with international transport by contracting with carriers as agents for the customer. They could also be retained by carriers in soliciting cargo for their benefit and as their agents. In ports served by liner shipping companies, freight forwarders are often appointed as liner agents. Consequently, they would have a dual function representing both parties in the contractual relationship that they have arranged as agents.

between duties owed to two principals. Yet this dual agency role occurs, and is accepted, as a daily feature of maritime transport and commerce.

C ‘Agency Plus’

In his 2012 book on freight forwarding law, David Glass identifies an agency role that could be described as ‘agency plus’. This is where the freight forwarder acts in the traditional role of shipper’s agent, but voluntarily takes on additional legal responsibilities and obligations (such as warranting a maximum price for carriage). There is nothing to preclude an agent from voluntarily accepting this additional legal obligation, in addition to its main role as agent. The drivers for this particular role appear to be the increasing complexity of transport and logistics, coupled with the willingness of freight forwarders to expand their role as specialist transport advisers and consultants. The broadening and deepening role of the freight forwarder is discussed under the following heading.

IV Freight Forwarder as Principal

A The Many Permutations of the Freight Forwarder as Principal

While the traditional role of the freight forwarder is that of agent, increasingly its contemporary role is as a principal. The core reason for this is the common business strategy for freight forwarders to seek a much broader and deeper involvement in freight transport, and in their shippers’ logistics systems. There are many drivers for this business strategy, four of which will be discussed briefly. These are related in that the pace of change of modern transport has greatly strengthened the role of the freight forwarder as a specialist consultant and advisor in modern transport.

The first driver is the container revolution from the late 1950s, which enabled great efficiencies in loading and unloading vessels and allowed for the reality of efficient multimodal transport. In particular, it allowed the freight forwarder to expand its services to the shipper, such as the packing and consolidation of cargo pre and/or post carriage. The second driver is the

31 In this respect, Glass states:

... it is perfectly possible on principles of agency for a forwarder to give a guarantee to his principal while additionally having authority to create privity of contract between his customer and the actual carrier.

Conversely it is possible for a forwarder, as an agent, to create privity but additionally to accept a personal responsibility to the actual carrier.
information technology revolution from the 1970s, which opened the door to efficiencies such as information transfer, electronic document processing, and real time tracking and tracing of shipments.\textsuperscript{34} The ability to effectively use these critical systems afforded freight forwarders an opportunity to further promote themselves as specialist transport consultants and advisors.\textsuperscript{35} The \textit{third} driver is the rise of logistics as a fundamentally important part of the effective planning and operations for a modern business. Logistics is a discipline derived from military roots, where the flow of materials and information within the company–customer relationship are studied.\textsuperscript{36} In a commercial sense, a logistics system comprises all of the activities that determine the flow of materials and information within a business involved in the supply of goods and/or services to a customer.\textsuperscript{37} As almost a natural progression from offering door-to-door solutions, freight forwarders increasingly seek to be actively involved within the logistics systems of their client shippers.\textsuperscript{38} The first three drivers are from the freight forwarder’s perspective (the supply side). The \textit{fourth} driver derives from the perspective of the shipper (the demand side). In a world of increasing competition and specialisation, the services of a freight forwarder are generally welcomed by shippers. The promise is to carve off the complexities of transport to an expert in that field.

Acting as principal usually allows the freight forwarder (depending on its contract with the shipper) considerable freedom in how it moves goods, and in its relationship with third parties involved in the overall freight movement.\textsuperscript{39} The cases identify a range of possible subcategories of principals, depending on the terms of the relevant engagement.\textsuperscript{40} A principal may be the performing carrier for all or part of the overall freight movement.\textsuperscript{41} A principal may be the contractual carrier (that is, assume the responsibility as carrier to the shipper, and subcontract out all or parts of the carriage and associated dealings with the goods).\textsuperscript{42} A principal may take on an amalgam role, as principal for one mode of the carriage, and as agent for another mode (or

\textsuperscript{34} Schramm, above n 16, 45.
\textsuperscript{35} Ibid 62.
\textsuperscript{36} Gianpaolo Ghiani, Gilbert Laporte and Roberto Musmanno, \textit{Introduction to Logistics Systems Management} (Wiley, 2\textsuperscript{nd} ed, 2013) 1.
\textsuperscript{37} Ibid 1–2.
\textsuperscript{38} Glass, above n 31, 1. Indeed, freight forwarders are increasingly seeking to position themselves as third party logistics providers (3PLs) and fourth party logistics providers (4PLs), providing services to meet the logistics needs of shippers (offering a broad range of services such as warehousing, product assembly and labelling, pick and pack, order fulfilment, inventory management, reverse logistics, etc). For definitions of 3PLs and 4PLs, see Council of Supply Chain Management Professionals, \textit{Supply Chain Management Terms and Glossary} (August 2013) Council of Supply Chain Management Professionals 86, 195 <http://cscmp.org/sites/default/files/user_upfiles/resources/downloads/glossary-2013.pdf>.
\textsuperscript{39} Typical bills of lading or contracts of carriage issued by freight forwarders allow significant liberty in favour of the freight forwarder, including liberty to subcontract all or part of the actual performance of the entire freight movement. A ‘liberty to subcontract clause’ within a bill of lading is one of a commonly claimed suite of liberties in favour of the carrier. The liberty to subcontract clause allows the carrier substantial freedom to engage third parties to perform part or whole of the contractual carriage. See related discussion in Craig Neame, ‘Who Contracts with Whom? An Analysis of Chinese Exports to the United Kingdom’ in Baris Soyer and Andrew Tettenborn (eds), \textit{Carriage of Goods by Sea, Land and Air: Uni-Modal and Multi-Modal Transport in the 21st Century} (Taylor and Francis, 2013) 113, 118–119.
\textsuperscript{40} See discussion of principals’ roles in Holloway, above n 14.
\textsuperscript{41} Singer Co (UK) Ltd v Tees & Hartlepool Port Authority [1988] 2 Lloyd’s Rep 164.
\textsuperscript{42} Salsi v Jetspeed Air Services Ltd [1977] 2 Lloyd’s Rep 57.
modes) of the carriage.\textsuperscript{43} Or a freight forwarder may be a ‘true’ or ‘pure’ principal, undertaking no part in the carriage of goods, whether as a performing carrier or as a contractual carrier.\textsuperscript{44} A freight forwarder may be liable as a bailee of goods.\textsuperscript{45} Each of these subcategories is examined below.

\section{Freight Forwarder as Performing Carrier}

Professor Jan Ramberg usefully characterises an undertaking by a freight forwarder to carry goods as one that may be done as a \textit{performing} carrier or as a \textit{contracting} carrier, who then subsequently subcontracts out all or part of the actual cargo movement.\textsuperscript{46} The real catalyst for the need to discern the true nature of the shipper–freight forwarder legal relationship, and the role of the freight forwarder, is often damage or loss of goods. Depending on all of the circumstances, it may be argued that the freight forwarder was acting as a shipper’s agent, as principal, or as a carrier (or indeed as a ‘hybrid’).\textsuperscript{47}

The difference between the possible conclusions is no dry academic argument. For example, faced with a claim for cargo loss or damage, a sea carrier can usually invoke the benefit of a long list of exemptions/defences available under the applicable cargo liability regime.\textsuperscript{48} If the exemptions do not apply to the individual circumstances, a sea carrier may be able to claim very restrictive package limitations\textsuperscript{49} to greatly reduce the quantum of its liability for loss or damage. In other words, being classified as a carrier invokes greater responsibility, but also makes available the (typically) beneficial provisions of cargo liability regimes.

The freight forwarder may actually perform part or whole of the overall freight movement.\textsuperscript{50} This may be particularly apt for performing carriers whose core business is the performance of a particular mode of transport, but who wish to expand their scope of overall service to offer a door-to-door delivery service. It is not uncommon for the terms of engagement between a shipper and a freight forwarder to allow substantial liberty to the freight forwarder in performing

\begin{itemize}
\item \textsuperscript{43} The Maheno [1977] 1 Lloyd's Rep 81.
\item \textsuperscript{44} M Bardiger Ltd v Halberg Spedition Aps (Unreported, Queens Bench Division, Evans J, 26 October 1990) (‘Bardiger v Halberg’).
\item \textsuperscript{45} Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd [2001] NSWCA 281.
\item \textsuperscript{46} Ramberg, ‘Unification of the Law of International Freight Forwarding’, above n 13, 6.
\item \textsuperscript{47} The Maheno [1977] 1 Lloyd's Rep 81, 86 (Beattie J).
\item \textsuperscript{48} Such regimes include the \textit{International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading}, opened for signature 25 August 1924, 120 LNTS 155 (entered into force 2 June 1931) (‘Hague Rules’).
\item \textsuperscript{49} A package limitation being a limitation of liability provision within a contract of carriage, whether contractually-based or incorporated through the operation of a cargo liability regime.
\item \textsuperscript{50} See Singer Co (UK) Ltd v Tees & Hartlepool Port Authority [1988] 2 Lloyd's Rep 164 (in this case the freight forwarder crated and delivered the goods to a port by road, and then acted as a principal with a port authority for stevedoring activities). Compare and contrast The Maheno [1977] 1 Lloyd's Rep 81 (a similar situation, but in this case, the freight forwarder, after performing the land segment of a movement, was held to act as an agent for the shipper for the balance of the freight movement).
\end{itemize}
the carriage itself, or subcontracting all or part of the carriage and associated activities to third parties.\footnote{[1977] 2 Lloyd’s Rep 57, 60.}

\section*{C \hspace{1em} Freight Forwarder as Contracting Carrier}

A freight forwarder may have accepted responsibility as contractual carrier for the entire freight movement when, in fact, the freight forwarder may perform none of the actual carriage or associated activities. In \textit{Salsi v Jetspeed Air Services Ltd},\footnote{Ibid.} Donaldson J, in construing an air freight contract, found the freight forwarder to be a contracting carrier. The contractual role as principal was not to carry the goods, but to ‘personally procure that the goods were carried’.\footnote{Westrac Equipment Pty Ltd v ‘Assets Venture’ (2002) 192 ALR 277.} In \textit{Assets Venture},\footnote{Ibid [36].} Lee J examined the case of a freight forwarder who delivered goods between mainland Western Australia and the Cocos (Keeling) Islands. His Honour found that in the circumstances, the freight forwarder ‘contracted personally to effect delivery of the machine; not to use its skills as an agent to obtain a carrier or carriers for the plaintiff’\footnote{See generally Martin Davies, ‘The Elusive Carrier: Whom do I Sue and How?’ (1991) 19(4) \textit{Australian Business Law Review} 230, 232; Gillian Bristow, ‘Freight Forwarder: Principal or Agent? What Difference Does it Make?’ (1999) 27 \textit{Australian Business Law Review} 196, 203.}

\section*{D \hspace{1em} Freight Forwarder as Contracting Carrier and Cargo Liability Regime Carrier}

The next possible step, beyond the freight forwarder accepting responsibility as a contracting carrier, is for domestic legislation to compulsorily apply a cargo liability regime to the contract of carriage.\footnote{This reality is reflected in the drafting of standard bills of lading and contracts of carriage. Standard contractual drafting practices recognise and allow for the application and operation of international cargo conventions. As an example, standard forms of bills of lading provide for paramount clauses that clearly acknowledge the potential compulsory application and operation of maritime cargo conventions to the bill/contract.} Under this sub-category the freight forwarder has responsibilities under contract as a ‘carrier’, but also holds additional responsibilities as ‘carrier’ under one or more cargo liability regimes.\footnote{[1994] 1 Lloyd’s Rep 669.}

In \textit{Aqualon (UK) Ltd v Vallana Shipping Corp},\footnote{Convention on the Contract for the International Carriage of Goods by Road, opened for signature 19 May 1956, 399 UNTS 189 (entered into force 2 July 1961).} the issue was whether a freight forwarder was a road carrier in terms of United Kingdom (UK) legislation (which applied the \textit{Convention on the Contract for the International Carriage of Goods by Road},\footnote{[1961] 1 Lloyd’s Rep 669.} the ‘CMR’, to certain road carriage contracts). After examining the dealings between the parties, the Queen’s Bench Division found that a Dutch freight forwarder (Nilsson) was the CMR carrier. Nilsson was thereby both the contractual carrier and the CMR (cargo liability regime) carrier.

\begin{footnotesize}
\footnote{In theory and in practice, this subcategory of principal may not be that different from the following subcategory of principal (as being the contractual carrier). The only difference may in fact be that the principal actually undertakes some part of the carriage themselves.}
\end{footnotesize}
In *Siemens Ltd v Schenker International (Australia) Pty Ltd*, the High Court of Australia considered an air freight case involving Siemens as shipper, Schenker as freight forwarder and Singapore Airlines as actual carrier from Berlin to Melbourne. Both Singapore Airlines and Schenker issued air waybills. Valuable equipment belonging to Siemens was lost when it fell from a truck located outside the boundary of Melbourne Airport. The Court accepted that Schenker was a carrier for the purposes of the Australian air cargo liability regime. Schenker, as freight forwarder, was thereby both the contracting carrier and the cargo liability regime carrier.

### E  The Pure (Non-Carrying) Principal

There is yet another legal role that the principal freight forwarder may occupy. This is an intermediate role, probably best described as that of a pure principal or 'pure forwarder'. The leading case is the unreported decision of *Bardiger v Halberg*. It considered the unfortunate loss of raw mink skins by theft from a truck. The skins had been transported from Copenhagen and were lost a short distance from their ultimate intended delivery point in East London. There were five plaintiffs and 11 defendants. The first plaintiff (Bardiger) purchased the skins and appointed the ‘speditorer’ (forwarder) Halberg to arrange their transport to two street addresses in East London. The skins were packed in 18 cartons, 12 of which were stolen. A major issue was to determine which of the 11 defendants were CMR carriers. Evans J saw nothing in principle to compel a finding that Halberg was either an agent or carrier. Evans J discerned a third possibility, that is, that the freight forwarder acts as a true intermediary between the shipper and the carrier(s), and in this role is obliged ‘to make suitable arrangements for the carriage, at his own expense’. His Lordship found Halberg to occupy this role. The distinction between this role, and that of the contracting carrier considered above, is that the freight forwarder as contracting carrier takes responsibility for the whole freight movement.

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61  Ibid [7] (McHugh ACJ), [87] (Gummow, Callinan and Heydon JJ).  
62  Ibid [18]–[21], [36] (McHugh ACJ), [87] (Gummow, Callinan and Heydon JJ). The applicable Australian air cargo liability regime was the *International Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)*, opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933), as amended by the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 28 September 1955, 478 UNTS 371 (entered into force 1 August 1963), as applied by the *Civil Aviation (Carriers Liability) Act 1959* (Cth) s 11(1).  
63  This is the description used by Mance J in *Aqualon (UK) Ltd v Vallana Shipping Corp* [1994] 1 Lloyd’s Rep 669, 673.  
64  (Unreported, Queens Bench Division, Evans J, 26 October 1990).  
66  *Bardiger v Halberg* (Unreported, Queens Bench Division, Evans J, 26 October 1990) 16.  
67  Ibid.  
68  The court determined that Halberg ‘was limited to that of procuring carriage by another person’: Ibid, 19.
In *Aqualon (UK) Ltd v Vallana Shipping Corp*, the Dutch freight forwarder (Nilsson) argued, on the basis of *Bardi ger v Halberg*, that its true role was as pure principal. Mance J nonetheless found Nilsson to be a carrier, reasoning as follows:

> I would accept that it must be possible for a contractor to undertake an intermediate role such as that described by Mr Justice Evans in *Bardi ger*. This does not mean that such a role is either likely or lightly to be inferred. It represents an intermediate position between the responsibilities of a carrier and an agent.

These cautionary words seem apt and appropriate, and the likelihood of a court finding a freight forwarder as a pure principal will likely be low. It appears that no English court has followed *Bardi ger v Halberg* and found a freight forwarder to be a pure principal. It may, accordingly, be that it is a decision largely confined to its own particular factual and legal matrix.

### F Amalgam of Roles — Principal and Agent

A freight forwarder may occupy a ‘hybrid’ legal role, being both an agent and a principal within an overall freight movement. In *The Maheno*, the New Zealand Supreme Court held that the freight forwarder acted as principal/carrier for one mode of the overall freight movement, and as an agent for the balance of the movement. There seems to be no principle of law precluding parties from organising themselves with the freight forwarder in an amalgam role. This may occur if the freight forwarder is the performing carrier for one mode of carriage, and does not wish to take any further responsibility in the overall freight movement. This could be described as a ‘modal’ or ‘spacial’ amalgam of roles.

Another form of amalgam of roles has been identified in United States (US) jurisprudence. This is where a freight forwarder, in clearly adopting a role as principal/contracting carrier, also acts as an agent for its shipper for a limited purpose. The leading exposition is found in the Supreme Court’s reasons in *Norfolk Southern Railway Co v James N Kirby Pty Ltd*. Kirby, an Australian company, sold machinery loaded in ten containers to be delivered from Sydney to the purchaser in Huntsville, Alabama. An Australian freight forwarding company (‘ICC’) was engaged to

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70 (Unreported, Queens Bench Division, Evans J, 26 October 1990).
72 (Unreported, Queens Bench Division, Evans J, 26 October 1990).
73 This includes the complex facts with many parties, the operation of Danish civil law, the status of the ‘speditor’ under Danish law, and the combined operation of the CMR Convention and UK statute.
75 Beattie J of the New Zealand Supreme Court stated:

> … the liability of the defendant is restricted to its position, first, as a carrier and bailee for reward for the land segments of the journey, and secondly, that its liability for the sea leg is simply that of a ship forwarder or shipper’s agent. It follows that in my opinion, the consignment note should not be regarded as a ‘through’ bill of lading, covering the whole transit.

76 Although, to protect themselves and to avoid uncertainty, the parties should reflect that arrangement clearly in the contract of carriage(s) and associated materials.
78 Ibid 19.
arrange the through transport. ICC issued its own bill of lading (‘ICC bill’) encompassing the whole through transport. The ICC bill provided for package limitation provisions from the US Carriage of Goods by Sea Act 46 USC App (1936) (‘COGSA’) regime for the sea leg of the transport. The ICC bill provided for a different (and more generous to the shipper) package limitation regime for the land transport mode within the US. It also contained a form of a Himalaya clause seeking to extend the benefits of the bill of lading to independent contractors performing under the bill. ICC was not a performing carrier and engaged carriers to perform the freight movement. ICC contracted Hamburg Sud to transport the containers for the entire movement. Hamburg Sud issued a bill of lading to ICC (‘Hamburg Sud bill’). The latter acknowledged the statutory application of the COGSA package limitation for the sea leg of transport. It also incorporated a Himalaya clause and a paramount clause contractually extending the COGSA package limitation regime to encompass the land leg of the freight movement.

Through a subsidiary, Hamburg Sud contracted with the petitioner, Norfolk Southern Railway Company (‘Norfolk’), to carry the containers from the Port of Savannah to Huntsville. Kirby

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79 Ibid.
80 Ibid. The ICC through bill encompassed the whole intermodal freight movement. On terminology, the better strict legal view is probably that a ‘through bill of lading’ refers to transport by two or more separate sea legs, whereas a ‘combined bill of lading’ has an expanded scope, being a bill of lading designed to encompass an entire freight multimodal movement of goods, no matter the modes involved, and typically being for door-to-door carriage. However, elements of industry conflate the two terms to describe a bill covering the entire multimodal transport of goods. See D Rhidian Thomas, ‘Multimodalism and Through Transport — Language, Concepts, and Categories’ (2011–2012) 36(2) Tulane Maritime Law Journal 761, 769–70.
83 Ibid 20.
84 A ‘Himalaya clause’ is a specific provision in a bill of lading, or other contract of carriage, which is designed to extend benefits, under that contract with the carrier, on to performing subcontractors involved in an entire freight movement. The contractual benefits can include defences, limitations upon claim and time bar provisions. A Himalaya clause avoids the problem of third parties enjoying the benefits of a contract to which they are not privy, by providing that the carrier acts as agent and trustee of the performing subcontractors when contracting with the shipper. See discussion in William Tetley, Marine Cargo Claims (Thomson Carswell, 4th ed, 2008) 1853–55.
86 Ibid.
87 Ibid 21.
88 Ibid.
89 Ibid.
90 A ’paramount clause’ is a clause very commonly (if not universally) used in bills of lading or in other contracts of carriage. A paramount clause may also be known as a ‘period of responsibility clause’. A paramount clause is a contractual mechanism by which a cargo liability regime is selected by the parties to apply to the whole or part of the international carriage of goods. A paramount clause, being a contractual mechanism, must give way to the application of a cargo liability regime applied by force of domestic statute. See discussions in Brian Harris, Ridley's Law of the Carriage of Goods by Land, Sea and Air (Thompson Reuters, 8th ed, 2010) 258–9; John Wilson, Carriage of Goods by Sea (Pearson Longman, 6th ed, 2008) 226–7.
92 Ibid 21.
insured the cargo with an insurance company for its true value. During the US land carriage, the carrying train derailed causing damage at an alleged US$1.5 million. Kirby’s insurance company paid Kirby under its policy. This led to the claim, and ultimately to the appeal to the United States Supreme Court. The dispute was essentially about the applicability of package limitations. In addressing this issue, the Supreme Court considered the true characterisation of the two bills and of the legal relationships between the parties.

The Hamburg Sud bill package limitations were much stricter (that is, much more beneficial to Norfolk) than the ICC bill package limitations. Could Norfolk rely on the terms of the Hamburg Sud bill as against Kirby? The Supreme Court found in the affirmative. This required the court to take a bold step with the recognition of a limited and special form of agency. While the ICC–Kirby relationship did not have ‘traditional indicia of agency, a fiduciary relationship and effective control by the principal’, the court found ICC to be Kirby’s agent ‘for a single, limited purpose’. In this respect, it held:

In holding that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers, we do not infringe on traditional agency principles. We merely ensure the reliability of downstream contracts for liability agency principles.

The Court dredged back to its 1918 decision in Great Northern Railway Co v O’Connor as the prime support for this statement, and in any case maintained that the result ‘tracks industry practices’ and also ‘produces an equitable result’. Applying the principle, in entering into the contract with Hamburg Sud, ICC did so on its own behalf as principal, save for acting as a special limited agent of Kirby for the purposes of binding Kirby to a limitation regime for on-land transport. Norfolk could thus legally assert the very restrictive package limitations contained in the Hamburg Sud bill as against Kirby. Norfolk v Kirby has stirred vigorous debate among commentators. The Norfolk v Kirby amalgam role does, however, seem to be confined to the US at the moment.

93 Ibid.
94 Ibid. Note that Kirby had also sued ICC in an Australian court: see Norfolk v Kirby, 543 US 14 (2004), 35.
95 Ibid.
96 Ibid 34.
97 Ibid.
98 232 US 508 (1918).
100 Ibid.
101 Ibid.
The primary cause of action for a shipper’s claim against a freight forwarder is typically for breach of contract. No matter the legal role of the freight forwarder, there is a contract between the freight forwarder and shipper. However, the freight forwarder may also be liable to the shipper in tort (negligence) and/or bailment. A shipper/plaintiff can, of course, plead as many causes of action against the freight forwarder that are potentially sustainable on the facts.

When the freight forwarder acts as principal, the shipper will likely lack a contractual relationship with the performing parties. The shipper’s contract is with the freight forwarder. The performing parties are subcontractors to the freight forwarder. There is therefore no privity of contract between the shipper and the performing parties. In those circumstances, if the shipper wishes to take action against the carriers and/or intermediaries, the options are a claim in tort (negligence, and perhaps, conversion, trespass, and/or other exotic property torts) and/or bailment. The freight forwarder may then itself be liable under an indemnity given to its subcontractor. This was the result in *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd*. In that case, after major damage was caused to a motor cruiser being transported, the road transporter was found liable in bailment to the shipper. In its contract with the freight forwarder, the road transporter had an indemnity which the New South Wales Court of Appeal upheld as against the freight forwarder (who would have otherwise escaped liability).

The great variety of potential dealings between the shipper, freight forwarder, and the carrying and non-carrying intermediaries involved in an entire freight movement brings with it an extensive range of potential responsibilities/liabilities in bailment. The law relating to claims in bailment, in carrying cases, is considered below briefly, from the perspectives of relevant parties.

Consider, from the perspective of the law of bailment, a multimodal freight movement involving a freight forwarder and multiple performing parties, being carrying and non-carrying intermediaries. Under bailment law, the shipper is the head bailor. The goods of the shipper are entrusted to others as bailees. A bailee may be liable to the head bailor if the goods are lost or damaged in transit. A claim in bailment is not based on contract, but on the bailor’s possession (or right to immediate possession) of the goods. From the perspective of the shipper, possession, or a right to immediate possession, can found an action in bailment. For the shipper/bailor who lacks actual possession, but has a right to immediate possession (described as a ‘reversionary proprietary right’), a claim under bailment is an ‘ancillary or parasitical’ right to the primary tort that is claimed as a cause of action (whether in negligence, conversion or trespass).

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106 *Morris v CW Martin and Sons Ltd* [1966] 1 QB 716, 736–737 (Diplock LJ), 738, 740 (Salmon LJ).
107 *East West Corp v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83, [27].
108 Ibid.
109 Ibid [32].
110 Ibid.
The freight forwarder is the head bailee. The freight forwarder is liable in bailment for loss or damage to the shipper’s goods while they are in its possession, unless it can establish that such loss or damage occurred without its fault.\(^{111}\) However, the shipper’s goods will often be in the possession of the performing parties engaged by the freight forwarder to carry out the freight movement. The pivotal question is therefore: what is the freight forwarders’ liability under bailment once the goods have left its possession (or, alternatively, if the goods were never in its possession)? The answer depends on the nature of the overall dealings between the shipper and the freight forwarder and, in particular, the legal role of the freight forwarder. If the freight forwarder is acting as an agent for the shipper, its responsibility is discharged once possession is given to a carefully selected performing party.\(^{112}\) If, however, the freight forwarder has assumed the role of contracting carrier, it is liable as bailee to the shipper/head bailor throughout the entire freight movement.\(^{113}\) The fact that the performing parties are also personally liable to the shipper/head bailor does not release the freight forwarder from its own obligations.\(^{114}\)

The perspective of a performing party under bailment law is very much reliant on the entire dealings between the parties. A performing party may hold the shipper’s goods on a sub-bailment (including a sub-bailment on terms), as a bailee under a bailment by attornment, as a bailee under a ‘springing’ or substitutional bailment, or as a bailee under a quasi-bailment. These four possible bailments are all species of constructive bailment, where there is no direct contractual relationship between the shipper and a performing party.\(^{115}\) A bailment by attornment is the substitution of a current bailee directly by a second bailee, with the immediate release of the first bailee at that point.\(^{116}\) In terms of freight forwarding practice, a quasi-bailment occurs when a freight forwarder, without possession of the goods, procures a subcontractor who receives the goods.\(^{117}\)

Of particular relevance in decided cases is the doctrine of sub-bailment on terms. If a claim in bailment is the ‘sword’ by which a shipper may take action directly against a freight forwarder’s subcontractor, the doctrine of sub-bailment on terms can be seen as a ‘shield’ that can commonly

\(^{111}\) Ibid [28].


\(^{113}\) *East West Corp v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83, [37].

\(^{114}\) Ibid. David Glass discusses this in his 2012 book where he states:

> The forwarder who has undertaken to perform throughout the transit retains his responsibility (whether as a bailee or quasi bailee). The forwarder who acts as bailee for part of the transit and then hands the goods to another under arrangements made by the forwarder or otherwise may well be considered to have relinquished his liability for the remainder of the transit… Even if a continuous liability is relinquished the disposition to a secondary must nevertheless be authorised and the secondary bailee must be chosen with reasonable care.

Glass, above n 31, 61.

\(^{115}\) Palmer, above n 112, [23-001].

\(^{116}\) Ibid.

be deployed by the subcontractor in answer to the claim.\textsuperscript{118} A performing party who receives the shipper’s goods, from either the freight forwarder or another performing subcontractor, holds the goods as a sub-bailee.\textsuperscript{119} The performing party is thereby liable to the shipper, but this exposure may be conditioned or mitigated by the terms under which the shipper contracted with the freight forwarder. In \textit{The Pioneer Container},\textsuperscript{120} the Privy Council advised that a sub-bailment on terms required the consent of the bailor.\textsuperscript{121} On the facts in that case, the consent of the bailor was found in the bill of lading where the freight forwarder was given substantial liberty to engage subcontractors.

The English Court of Appeal in \textit{East West Corp v DKBS 1912},\textsuperscript{122} held that a series of sub-bailments of cargo between successive possessors does not relieve the original bailee’s responsibilities to the head bailor.\textsuperscript{123} The significance of the terms of bailment are that those terms can include exemption clauses, exclusive jurisdiction clauses and other advantageous clauses that can then be claimed by a performing party in answer to claims against it by the shipper.\textsuperscript{124} The Court also envisaged scenarios involving bailment obligations outside a direct bailment or sub-bailment, for instance, a springing (or substitutional) bailment.\textsuperscript{125} This is where a freight forwarder relinquishes possession to a subcontractor, and is thereby released from liability under bailment, and will occur if the freight forwarder is acting purely as an agent.

\textbf{H \quad Indicia Used by Courts to Determine the Legal Role of the Freight Forwarder}

As is apparent from the above, a fundamental issue for any court lies in ascertaining the true legal role carried out by a freight forwarder. This requires enquiry into the circumstances of each individual case, including the dealings between the parties.\textsuperscript{126} H Edwin Anderson III, in the US context, describes the tests used by courts to determine the true legal role of the freight forwarder, in particular, as to whether it is a carrier:

\begin{quote}
There is no bright line test to determine carrier status either under US or English law. U.S. Courts considering the issue generally have utilized four factors in order to determine carrier status:
\begin{enumerate}
\item the way in which the obligations are described in the relevant documents. However, a party’s self-description is not controlling;
\item the history of dealing between the parties;
\end{enumerate}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item The doctrine of sub-bailment on terms was founded in the English Court of Appeal decision of \textit{Morris v CW Martin and Sons Ltd} \textsuperscript{[1966]} 1 QB 716.
\item \textit{The Pioneer Container} \textsuperscript{[1994]} 2 AC 324; \textit{Singer Co (UK) Ltd v Tees and Hartlepool Port Authority} \textsuperscript{[1998]} 2 Lloyd’s Rep 164. See discussion of \textit{Singer Co (UK) Ltd v Tees and Hartlepool Port Authority} \textsuperscript{[1998]} 2 Lloyd’s Rep 164 in Clive M Schmitthoff, ‘Sub-Bailee’s Standard Conditions Operate Against Exporter’ \textsuperscript{[1998]} \textit{Journal of Business Law} 254.
\item \textit{East West Corp v DKBS 1912} \textsuperscript{[2003]} QB 1509; \textsuperscript{[2003]} EWCA Civ 83, [30].
\item \textit{East West Corp v DKBS 1912} \textsuperscript{[2003]} QB 1509; \textsuperscript{[2003]} EWCA Civ 83.
\item Ibid \textsuperscript{[37]}. 
\item \textit{East West Corp v DKBS 1912} \textsuperscript{[2003]} QB 1509; \textsuperscript{[2003]} EWCA Civ 83 involved an exclusive jurisdiction clause.
\item Ibid \textsuperscript{[26]}. Although Mance LJ did not provide an example, a likely example would presumably be if the freight forwarder exhausted its role under the contract with the shipper, and is passing over possession to a well-chosen subcontractor without any further obligation.
\item \textit{Salsi v Jetspeed Air Services} \textsuperscript{[1977]} 2 Lloyd’s Rep 57; \textit{Aqualon (UK) Ltd v Vallana Shipping Corp} \textsuperscript{[1994]} 1 Lloyd’s Rep 669; \textit{The Assets Venture} \textsuperscript{[2002]} 192 ALR 277.
\end{enumerate}
\end{footnotesize}
(c) the issuance of a bill of lading, although a document described as a ‘bill of lading’ is not
determinative;
(d) the method of charging for the services, especially if the forwarder charged a commission. 127

Each of those factors is now briefly discussed. As Anderson notes with regards to the first factor, the parties’ self-description, although it is hardly irrelevant, is not determinative of status.

The second factor assumes greater importance to the ultimate question as to the role of the freight forwarder. The cases reveal the need, in this context, for a court to examine (often in great detail) the dealings between the parties involved in the entire freight movement. 128 The very flexibility of the freight forwarder in its service roles carries with it a variety of potential dealings between the parties.

The third factor is the issuance by a freight forwarder of a bill of lading. The issuance of a bill of lading is very significant per se, albeit to be assessed in full light of the dealings. 129 Two contrasting Australian cases are particularly apt as illustrations. In Carrington Slipways, 130 two bills were issued with respect to the carriage of diesel engines. One bill was a house bill of lading, the other an ocean bill of lading. 131 The first defendant was a freight forwarder who issued its own (house) bill. On the same day, a subsidiary of the time charterer of the carrying ship issued its own (ocean) bill of lading. One of the engines was badly damaged in unloading operations. The plaintiff was the shipper. The plaintiff pursued various claims, including in contract under each bill of lading. The New South Wales Court of Appeal, having considered in detail the dealings between the plaintiff and the first defendant, 132 concluded that the house bill issued by the freight forwarder was not a bill of lading, 133 ‘was not a document of title and was not within the Bills of Lading Act 1855 or its New South Wales equivalents’. 134 The freight forwarder was therefore not the carrier.

In Comalco Aluminium, 135 the plaintiffs were a number of related Comalco companies (collectively ‘Comalco’). The first defendant (‘Mogal’) was a freight forwarder. 136 The cargo
consisted of 46 aluminium coils which were packed in containers by Mogal as part of their overall service for Comalco. The entire freight movement incorporated sea carriage from Sydney to Auckland. The coils arrived in New Zealand after the sea carriage in a badly damaged state. The principal content of the contract between Comalco and Mogal was a document called a ‘consignment note’ issued under the Mogal name and insignia. Within the consignment note, Mogal was described as the ‘carrier’. There was also a bill of lading issued by the ship’s agent for the sea carriage from Sydney to Auckland.

Two separate categories of claim were pursued by Comalco against Mogal. The first, described by the Court as ‘contractual claims’, included claims for breach of contract, breach of a bailee’s obligations and negligence. The second category of claims was brought under the (then) Trade Practices Act 1974 (Cth). The cause of damage was established to be insufficient packing by Mogal. Essentially the contractual claims failed as the consignment note exempted Mogal from liability for faulty packing. The Federal Court of Australia found Mogal liable for breaching the proscription against misleading or deceptive conduct under s 52 of the Trade Practices Act 1974 (Cth).

The court nonetheless considered the identity and nature of the Mogal consignment note, albeit in obiter, because much time at trial had been devoted to pursuing the contractual claims. It found that Mogal had acted as principal in engaging a sea carrier. It then considered the character of house bills of lading issued by freight forwarders. The judge presiding, Sheppard J, decided that the Mogal consignment note was a bill of lading as it was a receipt, a document of title and evidence of a contract of affreightment.


138 Ibid.
139 Ibid.
140 Ibid.
141 Ibid 677, 678.
142 Ibid 677, 679.
143 Ibid 677, 683.
144 Ibid 677, 686.
146 Ibid 694.
147 Ibid 695.
148 Sheppard J determined that Mogal could rely on its consignment note (conditions three and four) as an exemption to the claim against it. Conditions three and four exempted liability for its packaging of the goods: Ibid 680–1. His Honour went on to find that the cause of damage was improper or inadequate packaging: Ibid 688. So the consignment note conditions/exemptions applied. This was a result of contractual construction. It was then found that even if the Hague Rules applied with compulsory effect to the consignment note, the result would not change, as the parties were free under art VII of those rules to contract as to carrier’s liability prior to the loading of the goods: Ibid 695. His Honour ‘felt obliged’ to consider the nature of the consignment note due to the extensive submissions of counsel on the issue: Ibid 700.
149 Ibid 700.
150 Ibid 694.
151 Ibid 698–9.
Professor Martin Davies is of the view that *Carrington Slipways*\(^{153}\) can be distinguished on its facts from *Comalco Aluminium*\(^{154}\) on the basis that the freight forwarder’s bill of lading in *Comalco Aluminium*\(^{155}\) was for the door-to-door carriage, while the ocean carrier’s bill was for only the sea carriage.\(^{156}\) In other words, the freight forwarder’s bill was the only bill covering the whole carriage, supporting the view that it was a true bill. In contrast, the two bills in *Carrington Slipways*\(^{157}\) were for the same sea carriage and supported the view that the true bill in that case was the ocean bill.\(^{158}\) Delving deeper, Davies maintains that the conclusion in *Comalco Aluminium*\(^{159}\) (that the house bill was a true bill) best reflected commercial practice, noting, in particular, that a house bill is typically the only bill seen by the shipper.\(^{160}\) Ultimately, consideration by a court of a similar matter would provide welcome guidance.

The fourth element identified by Anderson is the freight forwarder’s method of charging the shipper. Is it an ‘all-in’ price, or a commission? The former is a factor indicative of a freight forwarder acting as principal; the latter is a factor indicative of a freight forwarder acting as agent.\(^{161}\) These four factors are certainly not exhaustive in the quest to determine the status and legal role of the freight forwarder.\(^{162}\)

### V Freight Forwarder Under Civil Law Systems

Adding to the already complex and expansive possible legal roles of a freight forwarder discussed above is the reality of the civil law position on agency. David Glass teases apart fundamental differences between common law systems and civil law systems in this context.\(^{163}\) Glass explains that, in so far as freight forwarding is concerned, civil law systems adopt a different (and more nuanced) acceptance of indirect representation.\(^{164}\) As an indirect representative, a freight forwarder under a civil law system will act as an agent towards its client, the shipper, but can be the principal in its dealings arranging carriage with performing parties.\(^{165}\)

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\(^{154}\) (1993) 113 ALR 677.

\(^{155}\) Ibid.

\(^{156}\) Davies, above n 136, 379–80.

\(^{157}\) (1991) 24 NSWLR 745.

\(^{158}\) Davies, above n 136, 379–80.

\(^{159}\) (1993) 113 ALR 677.

\(^{160}\) Davies, above n 136, 380.


\(^{162}\) For instance, the significance of the issue of a combined bill of lading by the freight forwarder (in particular, the standard form of FIATA’s FBL) may be a strong indication that the freight forwarder is acting as a carrier: *James N Kirby Pty Ltd v Norfolk Southern Railway Co*, 300 F 3d 1300 (11th Cir, 2002), 1306.

\(^{163}\) Glass, above n 31, 49.

\(^{164}\) Ibid:

A separate, though connected issue, arises from the ambiguity inherent in the concept of agency. An agent in the strict sense at common law is a person empowered to affect his principal’s legal relations. In civil law countries the concept of indirect representation is more commonly accepted. While the internal relationship remains posited on agency principles, in the external relationship the agent acts as principal.

As an example, French law accepts freight forwarders acting as an indirect representative (commissionaire de transport) or as a true agent (transitaire). The acceptance of indirect representation is said to contrast with common law systems of law which constrain the role of agent to be true agent, thereby affecting their principal’s legal relations.

A question for further exploration is whether the developing freight forwarder law, discussed earlier in this article, provides examples of common law systems accepting indirect representation. The editors of Bowstead and Reynolds on Agency pose the general question of the possible acceptance, by the common law, of indirect representation, by analysing the role of agencies recognised by the common law, including factors, commission agents and commission merchants. Each of those analysed roles exhibit indirect representation. The editors drill down further to consider the specific position of freight forwarders, and explain the ‘agency plus’ role identified and described above (at C ‘Agency Plus’) by analogy to the role of a freight forwarder as agent under French civil law. They also consider the ‘pure (non-carrying) principal’ role identified and described above (at E The Pure (Non-Carrying) Principal) to be an example of the acceptance of indirect representation. This begs the question as to whether common law systems might adapt to accept indirect representation.

VI CONCLUSION

It is submitted that the weight of cases and the sheer complexity of the legal roles of the freight forwarder, as discussed above, are sufficient in and of themselves to highlight legal uncertainty surrounding the legal role of the freight forwarder. Beyond that, the uncertainty of the role of the freight forwarder has not been lost on practitioners and prominent legal commentators. Based on the case law and the commentary, there seems to be little doubt that there is confusion about the legal roles of freight forwarders — and extending from there — to their attendant legal obligations and responsibilities. In the particular context of US law, H Edwin Anderson III states:

However, as status of a forwarder has been the source of much confusion within the jurisprudence with one court recognizing that ‘[t]he precise status of a forwarder is a matter not free from doubt.’

The confusion is partly due to the many functions which a freight forwarder may perform and the fact that the role of the freight forwarder in ocean transportation can be described in many different ways

166 Tetley, above n 84, 1734–43.
167 Glass, above n 31, 49. Note that Jan Ramberg explains that common law systems tend to recognise the intermediate stage between principal and agent (typically termed ‘commission agency’) indirectly by applying the doctrine of the undisclosed principal: see Ramberg, ‘Unification of the Law of International Freight Forwarding’, above n 13, 7.
168 Watts and Reynolds, above n 165, [1-021].
169 ‘Alternatively, the freight forwarder may act as agent of the consignor but also warrant due performance of the contract of carriage or the safe arrival of the goods, as with French commissionaire de transport’: Ibid [9-024].
170 Ibid.
171 Against this, the status quo of the common law view of an agent is difficult to change. See the case of Royal & Sun Alliance Insurance plc v MK Digital FZE (Cyprus) Ltd [2006] 2 Lloyd's Rep 110, as discussed in Harris, above n 15, 390.
172 Anderson, above n 10, 122.
depending on the particular duties or responsibilities that the forwarder has undertaken. The courts have attempted to generally categorize freight forwarder status and the holdings of the relevant cases do not always comport either with the language of the applicable statutes or with the specific, actual duties or legal obligations of the freight forwarder at issue.

Professor William Tetley paints a picture of freight forwarders seeming to want to have their cake and eat it too: in the good times, to be paid well as a carrier; in the bad times, or upon loss or damage to cargo, to claim to be a mere shipper’s agent. In this context, Tetley states:

Freight forwarders, despite or perhaps because of their newfound fortune, are faced with a dilemma — will they present themselves as ‘principal contractors’ or as ‘agents’? At times they even flirt with the term ‘carrier’. Their solution to the problem has been new standard trading conditions which admit equivocally that they may be principal contractors, but the terms are so evasively wrapped in conditions, limitations and exclusions that there is little clarity as to their responsibility at law. Much of this uncertainty is the fault of freight forwarders, who contest any legislation or court decision which would find them as responsible parties to the contract of carriage. On the other hand, they do not want to be paid a percentage as agents.

Yet the true measure of actual uncertainty is arguably camouflaged by likely industry attitudes and practice. First, even if there is a lingering uncertainty as to the true legal position of the freight forwarder, if the shipper is happy with the price paid and service of the freight forwarder, and the goods are received on time and undamaged, there is no effective problem. Second, even if there is delay, loss or damage to the goods, there is often insurance for the shipper to turn to. In that case, the shipper is paid out and it effectively becomes the insurer’s problem. Third, in an intensely commercial industry, claims by the subrogated shipper’s insurer may often be settled with the insurer for the freight forwarder and/or performing parties. The settlements may be negotiated and finalised without the need to initiate (or at least prosecute to a great extent) litigation in the courts.

A lesson for legal practice is the need for care and clear language in drafting the terms of engagement of freight forwarders and of associated contracts of carriage. The need is to clearly specify the role, responsibilities and obligations of the freight forwarder.

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Tetley, above n 84, 1745. Relatedly, see also the comments of Professor Jan Ramberg, who light-heartedly has described the freight forwarder as a ‘Pimpernel’:

As has been seen, the development from the freight forwarder’s traditional role as agent towards his voluntary or compulsory role as operator with carrier liability rather adds to than diminishes the difficulties encountered in applying the law of international freight forwarding. I have stated in the foreword to my presentation of “The Law of Freight Forwarding” that this difficulty to distinguish between the freight forwarder as agent and the freight forwarder as carrier makes it tempting to regard him as a “legal Pimpernel Smith” when — at times — he attempts to avoid the status of carrier, requiring his customer to seek the carrier elsewhere.

PROTECTING THE RIGHT TO BE A ‘BIGOT’ IN THE WAKE OF THE
‘APOLOGY TO AUSTRALIA’S INDIGENOUS PEOPLES’

FRANCESCA DOMINELLO*

The recent debate over the Abbott government’s proposed amendments to the Racial Discrimination Act 1975 (Cth) raise pertinent questions about Australian values and the Australian national identity. In support of the amendments and the right to free speech they were intended to protect, Attorney-General George Brandis unashamedly declared our right to be bigots. But is this a right worth protecting in Australian law? In the absence of a bill of rights, the issue becomes one that may only be resolved by reference to prevailing social values. As it will be contended in this article, official apologies made in response to past wrongs could help illuminate the values of the societies in which they are made. In the case of former Prime Minister Kevin Rudd’s ‘Apology to Australia’s Indigenous Peoples’ there was the opportunity for the government to commit to the values of equality and freedom from discrimination — values that are completely at odds with the proposed amendments. The first part of the article examines the main functions of an interpersonal apology and how these functions could translate in political and legal terms and advance the claims of Indigenous peoples for justice. In view of this discussion, the second part of the article examines some of the shortcomings of the Apology. In exploring these aspects of the Apology, the article will consider how they have severely limited the potential of an apology to stimulate change in the treatment of Indigenous peoples and to promote the values of equality and freedom from discrimination in Australia.

I INTRODUCTION

In the last 25 years we have witnessed the rise of official apologies as a popular mechanism used by governments and their leaders in responding to revelations of human suffering caused by injustices of the past. In the year 2008 alone, apologies were delivered in Australia,1 Canada,2 the US3 and Italy.4 Though the overall number of official apologies delivered in the last few decades

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* BALLB (Macq); LLM (Research) (UNSW); Lecturer in Law, Macquarie University; PhD Candidate, Faculty of Arts and Social Sciences, UNSW. The author would like to thank Steven Larocco, Denise Meyerson and Sarah Maddison for their comments on earlier drafts of this article. She also acknowledges the comments of the anonymous reviewers in assisting in fine-tuning the argument advanced in the article.

1 Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008 167-71 (Kevin Rudd, Prime Minister) (‘Apology to Australia’s Indigenous Peoples’; ‘the Apology’).
2 Canada, Parliamentary Debates, House of Commons, 11 June 2008, 6849-51 (Stephen Harper, Prime
Minister) (‘Apology to Former Students of Indian Residential Schools’).
4 Berlusconi’s apology to Libya for damage inflicted during the Colonial Era: Treaty of Friendship, Partnership and Cooperation between the Republic of Italy and the Grand Arab Libyan Popular Socialist Jamahiriya, signed 30 August 2008, 150 GU No 89 of 17 April 2009 (entered into force 2 March 2009). For
is small by comparison to the vast number of violations that have been committed against humanity throughout history, the extensive attention that these apologies have received in recent times illuminates their importance on the world stage.

However, as significant as these apologies may seem to be at the time they are made, the zeal and conviction with which some are offered and received are often short lived. For instance, it has been six years since the Apology was offered to Australia’s Indigenous peoples. At the time it was made it was heralded as a watershed moment in the history of the nation. Insofar as the Apology was focused particularly on acknowledging the injustice of forcibly removing Indigenous children from their families (which created what is now commonly known as the ‘Stolen Generations’), its significance could be said to lie in upholding the principle of equality. This principle had been infringed by the operation of racially based laws and policies that had supported the practice of removing Indigenous children in the first place.

But as time has passed it would appear that this understanding of the Apology has faded in the collective memory of the nation. This seems no more obvious than in the recent debate over proposed amendments to the Racial Discrimination Act 1975 (Cth) (‘RDA’) that would have weakened the protection provided to racial minorities from actions that are ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate ... because of ... race, colour or national or ethnic origin’. The amendments had been proposed by the Abbott government in 2014 and were a direct response to the successful civil action claim brought in 2011 against journalist Andrew Bolt for breaching the RDA when he published disparaging comments about a number of prominent Indigenous individuals. Though Prime Minister Tony Abbott has recently

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the full text of the treaty in Italian, see ‘Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008’, Atti Parlamentari, Camera dei Deputati, 2041/XVI (presented to the Parliament on 23 December 2008).


6 Racial Discrimination Act 1975 (Cth) s 18C(1)(a)–(b).


(i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

(ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

Moreover, Bolt had failed to prove that what he had written about the applicants was reasonable and in good faith according to s18D of the RDA. The relevant provisions in s18D state that:

Section 18C does not render unlawful anything said or done reasonably and in good faith: ...
taken the amendments ‘off the table’ in response to community concerns,\(^8\) if they had become law, the new provisions would have made it difficult for Indigenous peoples and other racial minorities to succeed in making claims, like the one made in the *Bolt Case*, in the future.\(^9\)

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(c) in making or publishing:

...  
(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

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In the proposed Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) (Exposure Draft), the government proposed to amend to ss 18C and 18D of the *RDA* as follows:

Section 18C is repealed.
Sections 18B, 18D and 18E are also repealed.

The following section is inserted:

(1) It is unlawful for a person to do an act, otherwise than in private, if:
(a) the act is reasonably likely:
   (i) to vilify another person or a group of persons; or
   (ii) to intimidate another person or a group of persons, and
(b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.

(2) For the purposes of this section:
(a) vilify means to incite hatred against a person or a group of persons;
(b) intimidate means to cause fear of physical harm:
   (i) to a person; or
   (ii) to the property of a person; or
   (iii) to the members of a group of persons.

(3) Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.

(4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

The effect of the changes would have been to narrowly define prohibition of racist speech by removing the protections against offending, insulting or humiliating groups or individuals on the basis of race, colour or national or ethnic origin. Only acts that are reasonably likely to vilify (defined as inciting hatred) or intimidate (defined as causing fear of physical harm) on the basis of race, colour or national or ethnic origin would have been unlawful. At the same time the proposed amendments would have broadened the exceptions allowing vilification or intimidation if it is ‘in the course of participating in the public discussion’. Shadow Attorney-General Mark Dreyfus criticised the proposed exception claiming:

One could drive a truck through that provision ... It is a provision of such breadth that just about anything ... said in the course of a public discussion ... would come within this exception to the prohibition, meaning that what we’re left with is something of very little meaning.

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\(^9\) In the proposed Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) (Exposure Draft), the government proposed to amend to ss 18C and 18D of the *RDA* as follows:

(c) in making or publishing:

...  
(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

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The proposed amendments to the RDA and the responses they garnered raise pertinent questions about Australian values and the Australian national identity. In support of the amendments and the right to free speech they are intended to protect, Attorney-General George Brandis unashamedly declared that ‘[p]eople do have the right to be bigots’. But is this a right worth protecting in Australian law? In the absence of a bill of rights, the issue becomes one that may only be resolved by reference to prevailing social values. As will be contended in this article, official apologies made in response to past wrongs could help illuminate the values of the societies in which they are made. In Australia this could have meant that the government’s proposed changes to the RDA were completely at odds with the Apology, to the extent that it was aimed at upholding the value of ‘human decency’, the notion of the ‘fair go’ and the principle of equality that such a notion implies. However, making that claim would be to assume that the Apology was actually aimed at upholding the values of equality and freedom from discrimination, signalling the end of laws and policies that support the racial discrimination of Indigenous peoples. It is dubious whether such an assumption can be made, especially when we consider that, at the time former Prime Minister Kevin Rudd delivered the Apology, the RDA had been suspended as part of the Northern Territory Intervention.

The fact that Australian law could continue to be used to support discriminatory policies and practices against Indigenous peoples raises troubling issues about the role of the Apology and the way that government apologies made in settler-colonised nations function generally. As will be argued in this article, apologies should convey ‘other-oriented moral regret’ to those to whom they are addressed and, if not already in place, the making of an apology should lead to the introduction of measures aimed at overcoming past injustices and ensuring against their repetition in the future. In particular, an official apology to Indigenous peoples would acknowledge that discriminatory laws and policies, legitimised on the basis of their supposed racial inferiority were wrong and have caused immense suffering and innumerable harms to them. Colonisation and the implications that foreign settlement has had for their sovereignties, the maintenance of their laws, customs and traditions, and their connections to land, family, language and culture, would be among the range of harms acknowledged in an apology. In accepting responsibility for these harms, an apology would uphold the principle of equality and commit to ensuring the equal protection of Indigenous peoples before the law and the protection of their rights as Indigenous peoples. Reconciliation in settler-colonised nations such as Australia would depend on the maintenance of these commitments in the future.

The first part of the article examines the main functions of an apology as understood in moral philosophy and how these functions could translate in political and legal terms and advance the claims of Indigenous peoples for justice. In view of this discussion, the second part of the article examines some of the shortcomings of the Apology. In exploring these aspects of the Apology, the article considers how they have severely limited its potential to stimulate change in the treatment of Indigenous peoples and to promote the values of equality and freedom from discrimination in Australia.

10 Commonwealth, Parliamentary Debates, Senate, 24 March 2014, 1797 (George Brandis, Attorney-General).
11 Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008 169 (Kevin Rudd, Prime Minister).
II WHAT IS AN APOLOGY AND WHAT DOES IT DO?

A The Interpersonal Apology

Discussions about apologies often start by recounting the genesis of the modern-day act of apologising as a speech act which is constituted by the expression of sorrow in response to a wrong.\(^{12}\) For instance, sociologist Nicholas Tavuchis’ influential work in the field classified an interpersonal apology as a ‘speech act’ whereby the speaker expresses sorrow and regret for moral wrongdoing and seeks forgiveness from the wronged party.\(^ {13}\) In his view, the sincere expression of sorrow is essential for making a genuine interpersonal apology.\(^ {14}\) In making a genuine apology the relationship between the parties may be restored. The ‘wider social web’ in which the parties are enmeshed may also benefit from an apology.\(^ {15}\) Essential to achieving these ends is forgiveness. According to Tavuchis, a striking feature of an apology is its power to inspire forgiveness on the part of the person wronged: ‘the helpless offender, \textit{in consideration for nothing more than a speech}, asks for nothing less than the conversion of righteous indignation and betrayal into unconditional forgiveness and reunion’.\(^ {16}\) Notably, according to this understanding of the workings of an apology, the victim is positioned as the central figure of the apology. Only the victim can decide whether to forgive or not, and it is not always certain that an apology will be greeted with forgiveness. According to Martha Minow, an apology

grants power to the victims, power to accept, refuse or ignore the apology. The victims may in addition seek punishment, offer forgiveness, or conclude that the act falls outside domains eligible for forgiveness. In any of these instances, the survivors secure a position of strength, respect, and specialness.\(^ {17}\)

To apologise, Govier claims, involves a shift in power. The ‘one who had power to harm is now opening himself or herself to the other’, leaving him or her ‘vulnerable to the responses of the other’.\(^ {18}\) Forgiveness then should not be understood as mandated by an apology. However, insofar as it is held up to be the ideal response, the question becomes one of just how forgiveness can be achieved?

As Govier and Verwoerd have explained, if an apology is to work its power and achieve ‘forgiveness and a restored relationship between two parties’,\(^ {19}\) it would essentially be by making \textit{moral amends}: ‘To make moral amends, we may apologize, expressing other-oriented moral regret and appealing for forgiveness from the person whom we have injured’.\(^ {20}\) A sincere ‘I’m


\(^{13}\) Tavuchis, above n 12, 22.

\(^{14}\) Ibid 109.


\(^{16}\) Tavuchis, above n 12, 35 (emphasis in original).

\(^{17}\) Martha Minow, \textit{Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence} (Beacon Press, 1998) 115 (citations omitted).


\(^{19}\) Govier and Verwoerd, above n 12, 68.

\(^{20}\) Ibid (emphasis in original).
“sorry” expressed by the wrongdoer may evoke ‘an emotional shift from resentment to acceptance on the part of the victim’, creating the conditions for the resumption of the relationship based on ‘moral equality’. Govier and Verwoerd further argue that a sincere ‘I’m sorry’ is indeed a sign of acknowledgment: first, the offender is acknowledging that the act was wrong and they are responsible for it; second, the offender is acknowledging ‘the moral status of the victim(s), the primary person(s) to whom he apologizes’, namely, that the victim did not deserve to be ill-treated by the offender; and third, the offender is acknowledging the legitimacy of the victim’s feelings of resentment and anger. As Govier and Verwoerd have pointed out:

It is because saying ‘I am sorry’ or ‘I apologize’ in this kind of context primarily implies this acknowledgment of the human dignity and moral worth of victims as well as respect for their feeling of resentment that an effective apology provides reason for an emotional shift toward forgiveness.

Notably, however, of all the things an apology can do, Govier and Verwoerd place most significance on the power of an apology to ‘unsay’ the original message of insult. No apology can undo a wrongful act. However, an apology can ‘unstate’ the implicit claim that the wronged person has no moral worth and merits no moral consideration. … For one who has been humiliated or treated as worthless, such acknowledgment of dignity and human worth is profoundly significant.

But to succeed in this aim, the offer of an apology would need to be motivated by the offender’s empathy with the person wronged and seeing the wrongful actions in the same way. As Govier and Verwoerd have put it:

[A]pology presupposes moral agreement between the wrongdoer and the [wronged person]: the act or acts were wrong. By renouncing his own act, the wrongdoer joins the victim in condemning it and others of its kind. One might think here of the wrongdoer as taking the initiative, moving to stand next to the victim so as to look through his eyes at the wrongful actions.

The remorseful acknowledgment of wrongful acts in an apology has moral value for victims by helping them restore their sense of self-worth and self-respect. In return, the victim may become open to forgiving the wrongdoer, improving, if not restoring, relations between them. Indeed, though there is no obligation for victims to forgive, they may in fact develop a sense of moral duty to respond positively to the apology and accept it.

Viewed in this way, the importance of the role of the victim in the apology process comes clearly into view. In making moral amends through an apology, the wrongdoer is seeking the victim’s forgiveness. The potential for forgiveness is made possible by the apologiser’s demonstration of

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22 Govier and Verwoerd, above n 12, 69 (emphasis in original).
23 Ibid.
24 Ibid (emphasis in original).
25 Ibid 72.
26 Ibid 70.
27 Ibid (emphasis in original).
29 Coicaud above n 15, 106; Gill, above n 28, 17.
remorse for the wrong — through the expression of other-oriented regret the victim becomes the primary consideration.

And yet it is important to point out, as some have done, that words alone may not be enough to appease the victim. Even the most sincere ‘I’m sorry’ will not be the end of the matter. Particularly in cases of serious wrongdoing an offer of repair has also been considered a necessary component of an apology.\(^{31}\) As Govier and Verwoerd have observed, any attempt at making moral amends must be supported by ‘practical amends’ if wrongdoers are to really mean they are sorry.\(^{32}\) An apology that is not backed by concrete measures of reparation would, at best, seem hollow and insincere and, at worst, likely add further insult to the original wrongdoing. So understood, an apology is more than a speech act if by that phrase it is understood as a ‘one-off’ event. Instead, an apology may be better understood as initiating a process of transformation that will extend into the future. As Govier has explained, an apology ‘looks backward to what has been done and forward to commitment to reform, practical amends, and a better relationship’.\(^{33}\) Thus, in summary, the central aspects of a ‘full-fledged moral apology’ are: ‘acknowledgment to the person harmed that one is responsible for doing something that was wrong, the expression of sorrow, and a commitment to reform and practical amends’.\(^{34}\) The sincere acknowledgment and acceptance of responsibility for past wrongs, and the promises for reform and forbearance in the future are the key elements of a moral apology.\(^{35}\)

B The Political Apology

Turning now to consider official apologies made by governments for past injustices, it is not uncommon to find analyses of interpersonal apologies (especially of the ‘moral apology’ as discussed above) preceding discussions on official apologies.\(^{36}\) Most notably, the reconciliation of relationships has been identified as a key function of official apologies, as it has been for interpersonal apologies. For instance, in their discussion of group apologies, Elazar Barkan and Alexander Karn hark back to Nicholas Tavuchis’ seminal work in the field to illuminate how political apologies — ‘these delicate “speech acts”’ — ‘could repair damaged social relations and allow the parties to past injustices to go on with their lives’. In their view, an apology may help bridge the gap ‘between the victim’s need for acknowledgment and the perpetrator’s desire

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\(^{31}\) This is a conclusion that has been reached in the research across the social sciences and the humanities. See Steven J Scher and John M Darley, ‘How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act’ (1997) 26 Journal of Psycholinguistic Research 127; Govier and Verwoerd, above n 12, 72; cf Taft, above n 21, 1140.

\(^{32}\) Govier and Verwoerd, above n 12, 72.

\(^{33}\) Govier, above n 18, 69 (emphasis in original).

\(^{34}\) Ibid (emphasis in original).

\(^{35}\) These appear to be the central elements of an interpersonal apology. However, different researchers have found some variation in the sorts of things that can be included in an apology. Compare Govier, above n 18, 68–9; Gill, above n 28, 12–15; Nick Smith, I Was Wrong: The Meanings of Apologies (Cambridge University Press, 2008) 140–2.

\(^{36}\) See generally, Coicaud, above n 15; Gill, above n 28; Govier, above n 18, ch 4; Govier & Verwoerd, above n 12; Smith, above n 35; Tavuchis, above n 12; cf Danielle Celermajer The Sins of the Nation and the Ritual of Apologies (Cambridge University Press, 2009); Janna Thompson, ‘Apology, Justice, and Respect: A Critical Defense of Political Apology’ in Mark Gibney et al (eds), The Age of Apology: Facing up to the Past (University of Pennsylvania Press, 2008) 31.
to reclaim his humanity’. Furthermore, they have claimed that the sincere expression ‘I’m sorry’ in an official apology may be appropriate in cases where conflict, distrust and misunderstanding can continue to impede the development and maintenance of co-operative partnerships. As they have argued:

A sincere expression of contrition, offered at the right pitch and tenor, can pave the way for atonement and reconciliation by promoting mutual understanding and by highlighting the possibilities for peaceful coexistence. … By approaching their grievances through a discourse of repentance and forgiveness, rivals can explore the roots and legacies of historical conflict as a first step toward dampening the discord and frictions they produce.

The effects could be far-reaching: ‘[i]n the best cases, the negotiation of apology works to promote dialogue, tolerance, and cooperation between groups knitted together uncomfortably (or ripped asunder) by some past injustice’.

Similar to the way that interpersonal apologies can function, it is evident that in Barkan and Karn’s view a sincere expression of remorse in response to past wrongs in an official apology can engender mutual healing between groups, inspiring forgiveness amongst victims and reconciliation of the relationships between victims and wrongdoers. Support for these claims can be found in the responses of Indigenous peoples to the Apology in Australia. Stolen Generations survivor, Murray Harrison, remarked: ‘[i]t’s been absolute closure. I was taken when I was 10… This apology was something I really needed to hear’. Similar sentiments were expressed in Canada in response to Prime Minister Harper’s Apology to Former Students of Indian Residential Schools. For instance, prominent Residential School survivor, Willie Blackwater, wept through much of the 10 minute speech made by Harper: “If I am able to forgive my perpetrator, I can forgive Canada”, Blackwater said after the apology he felt was sincere and very moving.

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38 Ibid 7.
39 Ibid.
And, like interpersonal apologies, the effects of official apologies may extend beyond the individuals involved and be felt throughout the broader community. An official apology delivered at the right pitch may soften the broader public’s attitudes towards victim groups and vice versa. Indeed, the potential of official apologies to assist in promoting reconciliation is of particular importance in settler-colonised nations as far as race relations between Indigenous and non-Indigenous peoples are concerned. As Lise Balk King has observed in response to the Apology to Native Peoples of the United States, which was signed into law by US President Barack Obama in 2009, an apology ‘could provide a much-needed shift in public attitudes toward tribes in the country, as well as attitudes of Native people toward the federal government’.  

But, in spite of the overlap in understanding of how interpersonal and official apologies can function, many factors have been identified that can make them distinct from one another, leading some to question the extent to which analyses of interpersonal apologies can effectively enhance our understanding of state apologies. As will become clearer below, their differences are explicable in terms of the functions they serve: the moral functions of an interpersonal apology on the one hand and the political functions of a state apology on the other. In this sense, the value of official apologies rests on the functions they serve to enhance the political life of the nations in which they are made.

In examining the political aspects of official apologies it is first important to recognise that they are made in the political context where both the ‘apologiser’ and ‘apologisee’ are collective subjects. The apology itself is responding to a public wrong or wrongs committed against specific members of a group in the past. As a public act, the political nature of the apology has implications for the nation as a whole. In this respect the potential scope of the functions of a state apology could extend further than that of an interpersonal apology: not only relationships but the histories of entire nations are at stake. As Kathleen Gill has noted, these apologies have ‘a role to play in the struggle to create history, to establish a certain version of events as the “official story”’. Others have gone so far as to claim that we live in ‘a time that seeks to establish political truth … [and] apology has become the West’s own version of a truth commission’.

Thus, if one of the functions of a state apology is to promote reconciliation, that may be as much about improving relationships marred by conflict as it is about reconciling the perpetration of past injustices in the present history of the nation. An apology for past injustices serves as acknowledgment of those injustices. As Tavuchis remarked, the ‘principle function of [a

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43 See generally, Celermajer, above n 36; Smith above n 35; Thompson above n 36.

44 Celermajer, above n 36, 14–5.

45 Gill, above n 28, 22.


collective apology] has little, if anything, to do with sorrow or sincerity but rather with putting things on a public record’. In that regard, the official acknowledgment of historic injustices in a state apology may contribute to reconciling the past in the present and correct the historical record of a nation. Interconnected with this function is a state apology’s ability to raise awareness in the general population of the facts of history as those who have suffered harm experienced them. Present generations of the survivors of historic injustices may also feel vindicated when their understanding of historical events — their truth about history — is officially honoured in an apology. As Jan Löfström has claimed: ‘historical apologies for the previously unacknowledged suffering are to the victims a confirmation of their symbolic inclusion in the (national or other) community — their painful memories are institutionally incorporated in “our shared memory” and “our history”’. However, it has generally been accepted that an official apology should not merely function to correct the historical record. And, if all that an apology did was raise awareness of events in a nation’s history that up until that time had been repressed within the nation’s collective memory then an apology may not be an appropriate gesture. Public statements of acknowledgment of these events would adequately fulfil this function. Given the severity of the wrongdoing that these apologies are acknowledging, there can (and should be) more to a public apology than ‘putting things on the public record’.

In this respect, it is important to recall that a significant feature of an apology (whether at the interpersonal or political level) is the acceptance of responsibility for the harm done. As Minow put it: ‘[f]ull acceptance of responsibility by the wrongdoer is the hallmark of an apology’. However, this may prove to be the most challenging feature of an apology. In the case of an official apology for historic injustices, the acceptance of responsibility would entail nothing less than the acceptance of trans-generational responsibility for past wrongs, which may not be immediately forthcoming, as the history of the apology movement in Australia shows. Moreover, the acceptance of responsibility for past wrongdoing implies acceptance of a duty to make amends for any harm caused, giving governments even more reason to resist the calls for an apology as the Australian context also shows. But when these obstacles are overcome the true value of official apologies in contributing to the just resolution of past wrongs may be finally realised. According to this understanding it is their capacity to do justice which is the basis for
their contribution in advancing national reconciliation — not the sincere expression of remorse as is the case for interpersonal apologies.\textsuperscript{56}

So understood, an official apology can be viewed as functioning as a measure of reparative justice in accordance with the international norms relating to the making of reparations for gross violation of human rights abuses.\textsuperscript{57} According to these norms, apologies are listed among those measures of reparation aimed at satisfaction and the non-repetition of harm. The way these measures have been separated from the other measures of reparation, such as restitution, compensation and rehabilitation, suggests that each measure fulfils different aims and expectations. As Thompson has claimed, drawing on Govier and Verwoerd’s analysis of the ‘moral apology’: ‘apology as part of reparative justice answers to the harm that injustice causes to the dignity of the victims’.\textsuperscript{58}

Danielle Celermajer has offered an even broader understanding of the role of apology as a measure of reparative justice that takes account of the political context in which these apologies are being made. In her view, the reparative justice that an apology performs is connected ‘to address the damage to the identity of the victim and more broadly the social and political messages about history, identity and right’.\textsuperscript{59} As Celermajer has explained, the inclusion of ‘apology’ in the list of measures aimed at satisfaction and non-repetition of harm suggests these measures ‘operate within the symbolic or discursive dimension of harm’.\textsuperscript{60} Thus, for instance, providing an official forum for the revision of national history and acceptance of the victims’ version of historical facts, which (as noted above) had almost been forgotten in the nation’s history, could be understood as one of the symbolic or discursive effects of making an apology.

However, the significance of Celermajer’s observations may relate more to how an official apology could function politically as a discursive strategy for reconceptualising the identities, not only of survivors, but also of the group or institution making the apology and the relationship that exists between them. From the standpoint of victims, an interpersonal apology may, through the demonstration of other-oriented regret, vindicate their moral worth, but a state apology could go further. Understood as a strategy for identity transformation in the sphere of politics, an official apology

makes clear that past treatment of the group never was morally justified. In an official apology, the highest political authorities acknowledge that the culture of the victim group is not now, and never was, morally inferior to that of the offender group. The very identity of the victim group may be reshaped in this process.\textsuperscript{61}

For Indigenous peoples in particular, a political apology may reaffirm their subjectivity: it legitimises their experience of suffering and being wronged, thereby according them a full

\begin{itemize}
\item \textsuperscript{56} See generally, Thompson, above n 36; cf P E Digeser, \textit{Political Forgiveness} (Cornell University Press, 2001) 4–6.
\item \textsuperscript{58} Thompson, above n 36, 34.
\item \textsuperscript{59} Celermajer, above n 50, 175.
\item \textsuperscript{60} Ibid 174–5 (emphasis in original).
\item \textsuperscript{61} Gill, above n 28, 23.
\end{itemize}
subject position, as against a history of marginalising and silencing them in the mainstream. So understood, an apology enacts respect and recognition. The acknowledgment of the victim in an apology is an act of respect: the respect shown to the victim in an apology may make up for the disrespect shown to the victim at the time of the wrong. This recognition may to some extent satisfy their need for justice by addressing the indignity that had been caused by the harm, contributing to change in the way they are perceived (and treated) by government and in public.

In particular with respect to Western nation states and their treatment of ethnic minority groups, wrongdoing against these groups was often legitimised on the basis of Western superiority and the corresponding inferiority — as the Other — of the non-Western cultural groups. Apologies for wrongdoing committed against these groups would signal that the superiority–inferiority dichotomy is no longer tenable. In the case of Indigenous peoples, an apology for past injustices would signal that it had been wrong to legitimise violent, unequal and racially discriminatory treatment on the basis of their ‘purported cultural deficiencies and racial inferiority’. An apology for past injustices would mean they can no longer be perceived as the pre-destined victims of natural selection. Instead, Indigenous disadvantage can be directly traced back to the operation of past state policies and laws that were paternalistic and racist, and that looked forward to the day when Indigenous peoples would be eradicated forever. In this regard, an official apology would link the wrongdoing experienced by victims to the racist political (and legal) culture of the society in which the wrongs occurred.

This could have flow-on effects for race relations in these nations. Specifically, with respect to settler-colonised nations, race relations between Indigenous and non-Indigenous peoples could be completely transformed. When once the state depended on ‘the category of the uncivilised native to affirm its own claim to civil and sovereign legitimacy’, the revelations of past injustices experienced by Indigenous peoples and acknowledged in an apology could provide a new foundation for the legitimacy of the nation. In these respects, the apology functions as a symbol of political inclusion — of belonging — for those to whom it is being addressed, with the potential of redefining the political membership of the nation.

In theory at least, any scope for change lies in the understanding of apology-making as signalling the acceptance of responsibility for past wrongs, requiring the state to engage in a process of reform and to refrain from repeating the wrongdoing in the future. In accepting responsibility in an apology, the wrongdoer acknowledges and affirms the norms that were breached in causing the harm. In an official apology, the acceptance of responsibility could ‘help reinforce

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62 Celermajer, above n 50, 176.
63 Ibid 175.
64 Thompson, above n 36, 34.
66 Nobles, above n 50, 29.
67 Celermajer, above n 50, 156–62.
68 Ibid 168.
69 Ibid 161.
70 This is the thesis advanced by Melissa Nobles. See generally, Nobles, above n 50.
acceptance of the violated standards’ and ‘raise the moral threshold’ of society more broadly.\(^{71}\) Specifically with respect to Indigenous peoples it has been argued that ‘the apology officially delegitimates a political cultural norm that says that treating Aboriginal people as less than full citizens and human beings is acceptable’.\(^{72}\) So understood, a political apology may lead to ‘re-covenanting’ the nation. According to Celermajer: ‘the apology is … an acknowledgment of a collective failure to live up to an ideal ethical principle and [acts as] … a performative declaration of a new commitment, a new covenant for now and into the future’.\(^{73}\)

The apology process can, in turn, lead to reconsideration of the obligations that states have towards Indigenous peoples now that the history of past injustices has been acknowledged in an apology.\(^{74}\) In moral terms this would mean that from now on they should be treated with respect as full human beings and valued for their cultural differences. Translated into political terms it would also mean re-evaluating the nation’s position on race relations and the individual and communal rights of Indigenous peoples, addressing past and present manifestations of discrimination in law and policy, and ensuring the protection of their cultural rights in the future. Indeed, the understanding of the moral apology as demonstrating other-oriented regret, when translated into the making of a political apology, would entail committing to a course of action whereby Indigenous claims for justice would be upheld. In this regard, the ideal would be for an official apology to signal a break from the past and start a new relationship between Indigenous and non-Indigenous peoples of those nations. An apology is ‘the first step’ — and not the end — of the process of reconciliation and would require future action if it is to be accepted as a genuine attempt at reconciliation.\(^{75}\)

Interpreted in this way, the offer of an official apology may be construed as signalling the state’s commitment to addressing the claims of Indigenous peoples for justice more broadly. Indeed, this was the understanding conveyed by Indigenous leaders Tom Calma and Patrick Dodson in their official responses to the Apology.\(^{76}\) Tom Calma called on the governments across Australia

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\(^{72}\) Celermajer, above n 50, 176.

\(^{73}\) Celermajer, above n 36, 247 (emphasis in original).

\(^{74}\) Nobles, above n 50, 33.

\(^{75}\) From the perspective of many members of the Stolen Generations the apology was seen as the first step on a long journey of healing. This was the message conveyed when, on the evening before the apology, candles spelling the words ‘Sorry — the first step’ were lit on the parliamentary lawn: Stolen Generations Victoria. *Second Step: Engaging Students with the Stolen Generations* (2008), 7 <http://www.stolengenerationsvictoria.org.au/sitebuilder/careers/knowledge/asset/files/42/secondsteppdf.pdf>.

\(^{76}\) Tom Calma, ‘Let the Healing Begin: Response to Government to the National Apology to the Stolen Generations’ (Speech delivered at the Member’s Hall, Parliament House, Canberra, 13 February 2008) <https://www.humanrights.gov.au/news/speeches/response-government-national-apology-stolen-generations>; Patrick Dodson, ‘After the Apology’ (Speech delivered at the National Press Club, Canberra, 13 February 2008) <http://www.sisr.net/apo/dodson.pdf>. Then Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, had been asked to speak on behalf of the National Sorry Day Committee and the Stolen Generations Alliance: the two national bodies that represent the Stolen Generations and their families. In his speech he defined his role as being ‘to respond to the Parliament’s Apology and to talk briefly about the importance of today’s events’. Former Chairman of the Council for Aboriginal Reconciliation, Patrick Dodson, had been invited to speak by the National Press Club.
to implement all of the remaining recommendations contained in the *Bringing Them Home* Report (‘*BTH*’), and he called on the federal government to take the leadership role in developing a national process to make this happen. More specifically, he called on government to commit ‘to a partnership with Stolen Generations groups, … Link Ups and other service providers, with ongoing consultation and participation’ with a view to providing specific assistance tailored to the particular circumstances of those forcibly removed from their families.

In contrast, Dodson drew on the metaphor of turning ‘a new page in Australia’s history’, which Rudd had used to describe the Apology, as a way of re-imagining Australia ‘as a different place’. The new Australia he imagined would be:

[a] place where Aboriginal citizens no longer live in third world conditions. A place where our kids are safe. A place where community rights, of choice, consultation, participation and responsibility matter more than administrative procedures and public sector management guidelines.

In order to make this imagined world a reality, Dodson called for the adoption of a more holistic approach in addressing the unfinished business in Australia which would provide better protection of citizenship and Indigenous-specific rights across a range of social, economic, political and legal areas.

In support of their claims, both leaders drew on the power of the Apology in advancing reconciliation and the new beginning it implied. Both of them based the development of this ‘new’ relationship on a consultative and participatory model where Indigenous peoples would have a legitimate role in the development and administration of Indigenous policies in the future. In this respect, Calma drew on the way the Apology had come about in Australia as providing the model for future dealings between Indigenous peoples and the state. Significantly, in the final lead up to the Apology in Australia, extensive government consultation with Stolen Generations groups had taken place to ensure it was genuine, respectful and meaningful. Calma identified these discussions as the first steps in the new partnership in working towards the implementation of the reforms as recommended in *BTH*.

Pat Dodson also interpreted the Apology as signalling a marked change in direction for relations in settler-colonised nations. His understanding of the Apology ‘as an epic gesture on the part of

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78 Calma, above n 76, 3–4.
79 Ibid 4.
81 Dodson, above n 76, 3–4.
82 Ibid 4.
83 Ibid 3–6.
85 Calma, above n 76, 2.
the Australian settler state to find accommodation with the dispossessed and colonised, translated into the need to develop ‘public policy that recognises the fact that Indigenous society — which draws on thousands of years of cultural and religious connection to Australian lands — has survived’. In these respects he drew on the survival of Indigenous cultural traditions, evidence of broader national support for the recognition of Indigenous peoples in the Australian polity, and the Apology itself, as providing the impetus for change and support for the more far-reaching reforms he wanted implemented. Indeed, he referred to the opening of Parliament by an historic Welcome to Country ceremony the previous day as evidence of how Australia’s institutions, steeped in the Westminster tradition, can change: ‘I look forward to the Usher of the black rod one day carrying a woman’s digging stick, a powerful symbol of sustenance and strength’. 

Though he acknowledged that a great deal of work would be needed to make the necessary changes a reality, he took the government’s talk of building bridges of engagement and building a national consensus as opening the opportunity for dialogue between government and Indigenous peoples. In dialogue with each other, they would negotiate the terms of their evolving relationship: where the ‘appalling historic relationship which is at the heart of today’s apology’ will, in time, be based on trust, transparency, and the highest principles of integrity. In these respects he recognised the importance of Indigenous peoples working in partnership with government and the need for support from non-Indigenous Australians ‘to address the legacy of our shared history, create pathways to reconstruct Indigenous communities and build a consensus for a lasting settlement between Indigenous people and the Australian nation state’.

Notably, in outlining their respective reform agendas, neither Calma nor Dodson spoke in terms of the potential that the Apology could have in inspiring forgiveness. Indeed, in the context of political apologies like those made to Indigenous peoples for past injustices, the possibility of

86 Dodson, above n 76, 6.
87 Ibid.
88 On the day before the delivery of the Apology, Matilda House Williams, Ngamberi-Ngunnawal Elder and a traditional custodian of the land on which the Australian Parliament House stands, addressed members of both Houses of Parliament in the Member’s Hall in Parliament House as part of the Welcome to Country ceremony which marked the opening of the 42nd sitting of Parliament in Australia. The Welcome to Country ceremony began when Matilda House, accompanied by her son and grandchildren entered the Member’s Hall. The grandchildren handed a message stick to the Prime Minister and House delivered her speech to the members of both houses of parliament. The ceremony was accompanied by Aboriginal and Torres Strait Islander dancers and singers from around the country who were there to celebrate the occasion with the Ngamberi-Ngunnawal traditional owners. Notably, House’s interpretation of the Welcome to Country ceremony on this occasion was consistent with the understanding of Calma and Dodson of the Apology as bringing Indigenous and non-Indigenous peoples together:

    Prime Minister, my grandchildren have handed you a gift, a message stick, a tangible symbol of today’s ceremony. The message stick is a means of communication used by our peoples for thousands of years. They tell the story of our coming together. With this renewed hope, our pride and our strength is refreshed.

89 Dodson, above n 76, 4.
90 Ibid 5.
91 Ibid 6.
forgiveness being granted has been questioned on various grounds. The position, taken by some, is that forgiveness — if it is to be granted at all — can only be granted by those individuals who have suffered harm. This understanding seems clearly apparent when Dodson addressed Stolen Generations survivors in his response: ‘[t]o the children of those who were removed I challenge you to find the courage to forgive but never to forget what was done to your families and to take from their stories the commitment and courage to prevail as proud Aboriginal people’. Instead of forgiveness, both Calma and Dodson greeted the Apology with gratitude, particularly for the leadership that Rudd had showed in overcoming the challenges that had stood in the way of making it. Dodson expressed his appreciation for the Apology as a ‘courageous and welcome step’, while Calma expressed his gratitude to Rudd:

Prime Minister, can I thank you for your leadership on this issue. It is far more difficult to try and unite people than to divide them. Your efforts should be praised universally for attempting to create a bridge between the many diverse elements of our society.

The sentiment was echoed by Indigenous peoples in the audience who expressed their gratitude by wearing T-shirts on the day which had the simple message ‘Thanks’ printed on them.

However, the fact that the Apology was received with thanks and not forgiveness is politically significant. The granting of forgiveness could have been interpreted as signalling the end of the matter, which would have undermined claims for additional forms of redress in the future. The effectiveness of this apology (and arguably official apologies more generally) would not then depend on the expression of emotion — the sincerity of the apologiser and the granting of forgiveness by the apologisee — but would be measured by the maintenance of the promises implied in the apology and how they translate into concrete action in the future. In this respect, reconciliation would not depend on the granting of forgiveness, but on the just resolution of past (and present) wrongs.

In summary, it is evident that, in theory at least, moral and official apologies share common traits. An apology understood as expressing other-oriented moral regret — as seeing the

94 Dodson, above n 76, 3.
95 Ibid 2.
96 Calma, above n 76, 3.
98 This was clearly the position adopted by Inuit President, Mary Simon, in response to the Apology to Former Students of Indian Residential Schools in Canada. In a speech in the Senate on the day after that apology was made, Simon remarked:

The Prime Minister, on behalf of Canada and Canadians, also asked us for forgiveness. As individuals, we will all make our own choice in that regard. As leader of the organization representing the Inuit of Canada, I believe that real and lasting forgiveness must be earned. It will only be forthcoming when it is clear that government is willing to act.

wrongdoing and the harm that it has caused through the eyes of the victims — would necessitate that the apologising state accept responsibility for harm done and respond in ways that are consistent with victim demands. But, in contrast to a moral apology, an official apology has distinct political functions with potentially far-reaching consequences for the nation and its peoples. Ultimately, if a moral apology aims to (re)unite the parties on the basis of ‘moral equality’, a state apology to Indigenous peoples would initiate a process that would advance their social, economic, political and legal equality. In this respect, the endpoint of an apology to Indigenous peoples is not usually cast in terms of forgiveness. Instead the fate of an apology, and the process of reconciliation more broadly, would depend on the measures of reform and forbearance implemented in the future to meet the demands of Indigenous peoples for justice.

III THE RIGHT TO BE A ‘BIGOT’ AND THE FAILURE OF THE APOLOGY TO LIMIT THAT RIGHT

However, words alone can only do so much and whether an apology could accomplish more and initiate concrete legal and political reforms aimed at advancing Indigenous claims for justice remains to be seen. Consider, for instance, Attorney-General George Brandis’ defence of the proposed amendments to the RDA, claiming that ‘[p]eople have a right to be bigots’. No one seemed to have considered the Apology as reason enough to refute this claim. This suggests that there has not been a general acceptance of the understanding of the Apology as ‘re-covenanting the nation’ in Australia, if that phrase is to mean that an apology to Indigenous peoples signals the making of commitments to ending racism and embracing the values of equality and freedom from discrimination.

As a Minister of the Liberal-National Coalition government, Brandis’ remark can be explained by his commitment to traditional liberal democratic rights: to protect free speech even when the speech is ‘offensive, insulting or bigoted’. His approach may be understood in moral philosophical terms as aiming to protect the ‘moral right to do wrong’. Support for this right can be found in the liberal tradition that places utmost importance on the protection of individual rights. The right to do wrong is said to protect individual autonomy and choice. In the exercise of this right a person has a choice to do right or wrong and that choice should be protected from the interference of others. However, even liberals accept that this right does not extend to all wrongs. It definitely would not extend to the commission of ‘particularly egregious wrongs’.

According to Brandis, the amendments to the RDA were defensible because they aimed to get rid of a provision that made it illegal to ‘hurt the feelings of others’. So understood, the scope of s18C went too far in curbing attitudes that should be allowed to be freely exchanged in public. Brandis’ basic argument was that the law was an illegitimate interference with the right to free

100 Ibid.
speech to insult others — a right that from a liberal perspective falls within the ambit of the right to do wrong.  

In this regard, Brandis downplayed what was at stake in changing the law — the protection of individuals and groups from actions that are done because of their ‘race, colour or national or ethnic origin’. Members of the Australian community who have been exposed to racism in the past would know all too well that the expression of racist attitudes can cause more than ‘hurt feelings’. Indeed, an important lesson that can be learned from the experience of Indigenous peoples in Australia is how the denigration of their Aboriginality has contributed negatively to their sense of identity, leaving them with feelings of shame and cultural alienation and making it difficult for them to assert their identities as Aboriginal peoples. The same sort of negative attitudes about Indigenous peoples underpinned the laws and policies that Rudd was presumably apologising for in 2008.

But when Brandis declared our ‘right to bigots’ he was evidently unaware that for many in Australia the expression of racist attitudes is a particularly egregious wrong and is not something worth protecting. Indeed, he had previously disparaged anyone who held this view. His approach, grounded in traditional liberal ideology, assumed the existence of an equal playing field in society in which everyone can exercise their right to free speech equally. From Brandis’ point of view, we are all equally capable of expressing our bigoted views (racist or otherwise) in the free market of ideas. However, this understanding does not account for disparity in power that exists in society that laws like the RDA are seeking to address. It is particularly blind to the practical effects the amendments would have had in preserving and protecting the interests of the privileged elite (like Andrew Bolt) who have the power and resources to access a range of media to transmit their racist views, while those targeted by the speech would not have the equivalent means to respond.

In any event, Brandis’ conservative approach in this instance was not surprising. In putting the amendments forward, Brandis was attempting to fulfil an election promise to repeal the so-called ‘Bolt laws’. Though Brandis claimed that the move was aimed at protecting free speech, the proposed change to the law would have undermined the protection offered to racial minorities by Australian law. In this respect, the promise to change the law can be added to a long list of recent examples that demonstrate the Liberal Party’s poor track record when it comes to recognising and protecting the rights of minorities. One need not look any further than Liberal Party policies on Indigenous issues — the amendments to the Native Title Act 1993 (Cth) in 1998, the abolition of ATSIC in 2004–05, the introduction of the Northern Territory Intervention, the vote against the Declaration on the Rights of Indigenous Peoples in 2007, and the refusal to apologise to Indigenous peoples throughout John Howard’s term as Prime Minister — to gain an insight into

104 Herstein, above n 102, 344.
105 This has been well-documented with respect to the Stolen Generations. See Human Rights and Equal Opportunity Commission, above n 77, ch 11. Indeed, the articles by Andrew Bolt where he disparaged ‘fair-skinned’ Indigenous peoples also illuminate these issues well.
the Liberal Party’s poor track record in recognising and upholding the rights of Indigenous peoples in recent years.\(^{109}\)

But what is harder to explain is why those who were opposed to the proposed changes to the RDA, and had a better understanding of what was at stake in changing the law, did not respond to Brandis’ announcement we have ‘a right to be bigots’ by citing the Apology and what it says about Australian values and the Australian national identity. As a source for the articulation of national values and aspirations, the Apology could serve as a symbol of Australia’s commitment to the values of equality and freedom from discrimination. After the Apology, it could be argued that we do not have a right to be bigoted. Indeed, in the Apology itself Rudd reaffirmed ‘a core value of our nation — and that value is a fair go for all’.\(^{110}\) To the extent that ‘a fair go’ has become the catch cry for the promotion of the rights of minorities and disadvantaged groups,\(^{111}\) there is scope for the Apology to be given a similar meaning. However, the fact that no one really articulated this claim in response to the proposed RDA amendments may point to the limitations of the Apology itself.

To begin, it could be argued that the Apology was irrelevant to the proposed changes to the RDA because the amendments would not only have affected Indigenous peoples but peoples of all racial and cultural backgrounds. The Apology was offered to Australia’s Indigenous peoples and not to the many other cultural minority groups that have experienced racial discrimination throughout Australia’s history. For instance, in 2011 members of the Chinese community in Australia called on the former Gillard government to apologise for institutionalised race discrimination experienced by the Chinese that had spanned more than 100 years from the time of the gold rush in the 19th century to the end of the White Australia policy in the 20th century.\(^{112}\) However, their calls for an apology have fallen on deaf ears. An apology addressed to Australia’s Indigenous peoples does not answer the calls of other oppressed racial minorities for acknowledgment of the harms they have suffered in the past. In that regard, the proposed amendments to the RDA may have been better understood as offending the principles of multiculturalism. If enacted, they could have had practical consequences for minority groups by undermining their ability to effectively engage in the political life of the nation.\(^{113}\)

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\(^{109}\) Though Indigenous peoples’ views on these issues are diverse, especially with respect to the abolition of ATSIC and the Northern Territory Intervention, the Liberal-Coalition government’s response to these issues have been far-removed from any attempt at upholding Indigenous peoples’ rights. ATSIC had been an attempt (albeit a failed one) at implementing Indigenous self-determination, but its abolition by the Liberal-Coalition government did not result in strengthening Indigenous self-determination, but in its outright rejection and the introduction of mainstreaming in the delivery of services for Indigenous peoples. The Northern Territory Intervention also garnered a mixed response from Indigenous peoples, however, these reactions do not detract from the general criticism of the Intervention by Indigenous peoples that it was implemented in violation of their human rights: see Northern Territory Emergency Response Review Board, Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *Northern Territory Emergency Response: Report of the NTER Review Board* (October 2008) 8.


\(^{112}\) Esther Han, ‘Chinese Australians Call for an Apology’, *The Sydney Morning Herald*, 30 June 2011, 3.

Nevertheless, insofar as the motivation behind the proposed amendments to the RDA was the *Bolt Case*,\textsuperscript{114} which involved a number of Indigenous claimants, it could be argued that Indigenous peoples were the main target group of the changes. If enacted, the proposed changes could have made publications like those by Bolt lawful, potentially putting any future acts of public denigration of Indigenous peoples beyond the reach of legal redress. In this context then, the Apology could serve as a reminder of Australia’s commitment to end racism against Indigenous peoples. Even so, the main issues for Indigenous peoples that arose from the proposed changes were not framed as contradicting the promises made in the Apology. Instead, the amendments were criticised in broad terms: Patrick Dodson claimed the proposed amendments would undermine reconciliation in Australia and Noel Pearson warned the government that the changes would ‘embolden bigots’.\textsuperscript{115} More specifically, the government was criticised for putting itself in a difficult and contradictory position with respect to the support it had shown for the RDA amendments while also supporting constitutional reforms aimed at the recognition of Indigenous peoples.\textsuperscript{116} At one point, even the head of the Prime Minister's Indigenous Advisory Council, Warren Mundine, ‘warned that the debate over race hate laws could derail the push for constitutional recognition of indigenous Australians’.\textsuperscript{117} Nevertheless, while the amendments to the RDA have been construed as incompatible with the movement for constitutional recognition of Indigenous peoples, no similar claim has been made with respect to the amendments and the Apology. This is in spite of the fact that Rudd had foreshadowed constitutional recognition when he delivered the Apology.\textsuperscript{118}

Thus, while the discussion in the previous section seemed to indicate the potential for an apology to Indigenous peoples to serve as a symbol of Australia’s commitment to bring discrimination against Indigenous peoples to an end, this potential is yet to be realised. One can only speculate as to why this is so.

Ambiguity in the understanding of the functions of official apologies may provide one explanation. The understanding of official apologies as functioning primarily to ‘put things on a public record’ could mean that some might only consider their importance in terms of the contribution they can make to correct the historical record. Indeed, for strong supporters, the Apology may have seemed most significant because of the contribution it made to the resolution of contested issues that existed at the time it was delivered. In that regard, it is notable that, although the Apology was given the title ‘Apology to Australia’s Indigenous Peoples’ and begins by honouring ‘the Indigenous peoples of this land, the oldest continuing cultures in human

\textsuperscript{114} (2011) 284 ALR 114.
history’, it is specifically addressed to members of the Stolen Generations, ‘in particular on the mistreatment of those who were Stolen Generations — this blemished chapter in our nation’s history’. In specifically addressing the Stolen Generations, Rudd declared:

We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.
For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.
To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.
And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

Considering the background to the Apology, its specific references to the injustices experienced by the Stolen Generations seem inevitable. An apology to the Stolen Generations had been one of the 54 recommendations made in BTH. Of these, the recommendation for an apology had generated the most interest and debate among those who supported the idea of an apology, and those who did not. Though many Australians supported the Apology (and Rudd noted in the speech itself that he was fulfilling an election promise in making the Apology that day), it was also true that there were others — particularly political conservatives — who were opposed to it. As noted above, former Prime Minister John Howard had been adamant in his refusal to apologise. Though Howard eventually expressed regret about the disadvantage that exists in Indigenous communities, he vehemently opposed the idea that there was anything in Australia’s past treatment of Indigenous peoples for present generations of Australians to feel guilty or ashamed about.

Considering the heated debate over a national apology which lasted for more than a decade after the release of BTH, the Apology gives the appearance of being a great achievement. As an apology addressed to the Stolen Generations its significance lies in the Australian government finally accepting responsibility for the negative impact that the policy of forcibly removing Indigenous children has had, not only on those who were directly affected by the policy, but also on entire Indigenous families and their communities across Australia. In offering an apology to the Stolen Generations, Rudd effectively presented a version of the historical record which conveyed a strong message to his audience that the state’s former support of a regime of forcibly removing Indigenous children from their families was wrong. But, in the context of its immediate history, the Apology was particularly significant because of the way Rudd finally said ‘sorry’ without any qualifications or excuses. When compared to Howard’s staunch opposition to

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119 Ibid 167.
120 Ibid.
121 Ibid.
123 Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).
an apology, Rudd’s unequivocal statement ‘we say sorry’\textsuperscript{125} in the Apology would have satisfied many supporters that justice had been done.\textsuperscript{126}

Nevertheless, as the discussion above revealed, it is generally accepted that there should be more to an apology than saying ‘sorry’ in addressing victim demands for justice. An official apology provides the opportunity to reaffirm the values underpinning the nation and re-evaluate the obligations owed to those to whom the apology is addressed. In that regard, in order for the Apology to stand as a symbol of Australia’s commitment to the values of equality and freedom from discrimination, there would need to be a clear statement to that effect in the Apology. Condemnation of the erroneous racist assumptions underpinning the laws and policies that supported the forced removal of Indigenous children and a commitment to the elimination of racial discrimination against Indigenous peoples in the future could assist in conveying this message in the Apology. However, a textual reading of the Apology reveals an ambiguous understanding of the harms suffered by Indigenous peoples and of the norms those harms infringed.

The first difficulty is the limited way Rudd framed the harms suffered by Indigenous peoples, primarily focusing on the harms suffered by the Stolen Generations as though these injustices are the only ones requiring acknowledgment in an apology for the advancement of reconciliation in Australia. But even with respect to the Stolen Generations, Rudd confined their losses to the impacts on their familial ties and the personal effects of these losses: ‘the hurt, the pain and suffering … the indignity, the degradation and the humiliation these laws embodied’.\textsuperscript{127} By framing their harms in these terms, Rudd avoided mentioning the more serious social and economic costs of the practice of removing Indigenous children: the malnourishment, maltreatment, emotional, sexual and physical abuse and labour exploitation that the children were often exposed to while in institutional care. The abuse and neglect had a cyclical effect: the impact on one generation would be felt on the next as those traumatised by their experiences have often been unable to cope with adult responsibilities such as looking after their own children. Poor health and a lack of both education and employment opportunities have exacerbated these problems.\textsuperscript{128}

Furthermore, Rudd’s attempt at establishing a shared understanding of the wrongdoing by emotively describing ‘the sheer brutality of the act of physically separating a mother from her

\textsuperscript{125} Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

\textsuperscript{126} Indeed, it could be argued that Howard’s refusal to apologise was seen as unjust by non-Indigenous supporters, not only because it was a refusal to acknowledge that the past treatment of Indigenous peoples was wrong, but more pertinently, because his refusal brought shame on the entire nation. As Sara Ahmed has claimed: ‘what makes the injustice unjust’ is ‘not only a sense that “past actions and omissions” have been unjust, but also … that it has taken the pride away; it has deprived white Australia of its ability to declare its pride in itself to others’. Sara Ahmed, The Cultural Politics of Emotion (Edinburgh University Press, 2004) 112 (emphasis in original).

\textsuperscript{127} Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).

\textsuperscript{128} Human Rights and Equal Opportunity Commission, above n 77, ch 11.
children [as] a deep assault on our senses and on our most elemental humanity, did not sufficiently account for the cultural costs of the removal of children for those Indigenous peoples affected by the policy. The practice of removing children from their families did not only deny these children the love, happiness and support of a stable family life. The practice of removing children often made it impossible for cultural knowledge to be transmitted from one generation to the next. The children were often removed to hostile environments where they were denied knowledge of their Aboriginality or were denigrated because of it. Indeed, the original intention behind the policy of ‘dealing’ with the ‘Aboriginal problem’ was for white Australia to witness the eventual demise of the Aboriginal race in Australia. The widely held view was that the Aboriginal race would eventually die out. The removal of Aboriginal children of mixed parentage from their families was to facilitate their assimilation into the white race. In this respect, the removal of Indigenous children was intended not only to break down their connections to their wider familial structures: in breaking down their family ties their culture — their ‘native characteristics’ as Cecil Cook put it (quoted by Rudd) — would also be eradicated forever. Viewed in this way, the system of removing the children did not only deny Indigenous children the love of their mothers: it was part of a broader process of assimilation, grounded in racist assumptions about the inferiority of Indigenous culture, and focused on the complete elimination of the Indigenous Other.

However, Rudd never explicitly referred to the policy of removing Indigenous children as ‘assimilation’ or condemned it as genocide. In this respect he appeared, at most, prepared to...
concede that the operation of the laws and policies were racially discriminatory: ‘[t]he uncomfortable truth for us all is that the parliaments of the nation, individually and collectively, enacted statutes and delegated authority under those statutes that made the forced removal of children on racial grounds fully lawful’.

In making this claim, Rudd exposed a serious deficiency in Australian law: ‘put simply, the laws that our parliaments enacted made the stolen generations possible ... The problem lay with the laws themselves’. However, as Alex Reilly has claimed, ‘[a]t no point does the apology resile from the power of the State to enact laws of removal or its power to enforce them’. Instead, the Apology may be seen as functioning to confirm the power of the state to pass these sorts of laws and does nothing to ensure against the making of similar laws in the future.

Thus, Rudd’s declaration that ‘for the stolen generations, there was no fair go at all’ did not relate so much to the violation of Indigenous culture embodied in the practice of forcibly removing Indigenous children from their families, as it did to the violation of the value of the family as the fundamental social institution for all of humankind. Moreover, in construing the forced removal of Indigenous children as a moral rather than a legal wrong, Rudd not only maintained the accepted legal position on the lawfulness of the laws authorising the removals, but he also curtailed the potential role of law in addressing the past injustices experienced by the Stolen Generations and Indigenous peoples more broadly. In this way, Rudd paved the way for introducing the ‘Closing the Gap’ welfare package, and stopped short of introducing meaningful law reform.

In view of this reading of the Apology it is doubtful whether it could serve as a symbol of Australia’s commitment to end racism towards Indigenous peoples. Indeed, in the absence of reforms aimed at meeting Indigenous demands — like the glaring failure of the Rudd government to establish a compensation fund for members of the Stolen Generations — it is plaintiffs’ claims of genocide. However, for support of the claim of genocide in Australia see generally, A Dirk Moses, ‘Genocide and Settler Society in Australian History’ in A Dirk Moses (ed), Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History (Berghahn Books, 2004) 3, 29–35.

133 Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 169 (Kevin Rudd, Prime Minister).

134 Ibid.


138 The Human Rights and Equal Opportunity Commission found that many of the harms suffered were the result of actions contrary to the common law (deprivations of liberty, abuses of power, deprivation of parental rights and breach of guardianship rights): Human Rights and Equal Opportunity Commission, above n 77, 253, 255, 257. However, the lawfulness of the removal of Indigenous children was upheld by the High Court in Kruger v Commonwealth (1997) 190 CLR 1 and by the Federal Court in Cubillo v Commonwealth [No 2] (2000) 103 FCR 1. Compare Trevorrow v South Australia [No 5] (2007) 98 SASR 136 where the applicant, Bruce Trevorrow, was awarded $525 000 in damages, including $75 000 in exemplary damages and $225 000, in interest for his unlawful removal from his parents. The decision was upheld on appeal: South Australia v Lampard-Trevorrow (2010) 106 SASR 331.
unsurprising to find general disillusionment and cynicism underlying attitudes to the Apology since it was made. As one Aboriginal woman succinctly put it one year on after the Apology was made: ‘“[s]orry is just a word”’. 139 Indeed, the entire public apology movement has been dismissed in some quarters ‘as nothing more than a cheap effort at assuaging lingering guilt concerning some misdeeds from the past’, while those who make them can ‘feel morally superior to those who came before them’, 140 and can move on ‘with the warm inner glow that will come with having said sorry’. 141 For these critics apologies are symbolic and meaningless gestures which divert attention away from the need for measurable changes to the lives of those who have suffered (and who, like Indigenous peoples, continue to suffer) from the effects of past (and current) wrongs. 142 Understandably, these critics have dismissed official apologies as being seductive, feel-good strategies contrived and promoted by governments to compensate for failing to make appropriate and effective reparations. 143

Evidently then, if the Apology did not come to mind when Brandis declared our inherent ‘right to be bigots’, it may be because the Apology has not come to be associated with the upholding of the values of equality and freedom from discrimination in Australia. The Apology may be remembered as the day Rudd said sorry to the Stolen Generations. However, it would appear that the reasons why this was important were lost in the politics that surrounded the Apology at the time it was made. An apology to the Stolen Generations could have led to reforms that advanced justice for them and for Indigenous peoples more broadly. Acknowledgment in an apology that it was wrong to forcibly remove Indigenous children on the basis of erroneous assumptions about their race and culture could have implications for other laws and policies relating to Indigenous peoples — and not merely the proposed RDA amendments. Indeed, an acknowledgment of this kind could bring into question the entire process of colonisation, legitimised as it was (and is) on racist stereotypes of Indigenous peoples, and thereby unsettle many of the assumptions upon which the legitimacy and pride of the nation rests. But in minimising the extent of harms suffered by Indigenous peoples and confining them primarily to the pain and suffering that the separation of a mother from her child can cause, Rudd successfully undermined the deeper social meanings and political and legal effects the Apology could have. Ultimately, in confining the Apology to these harms, while also appearing to encompass all of the harms suffered by Indigenous peoples, the impression Rudd gave in the Apology was that there was nothing else in the past or present treatment of Indigenous peoples requiring redress. In view of the minimal reforms introduced in its wake, it is no wonder that the Apology has been all but forgotten.

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142 Thompson, above n 36, 32.
INTRO THE SHADOWS: SHADOW BANKING AND THE PRUDENTIAL REGULATION OF LITIGATION FUNDERS

TIMOTHY LOU*

Litigation funding is at the cutting edge of financial and legal innovation, offering powerful ways to access the courts and manage litigation risks. So far, the discussion has focused on how the lack of regulation in the young industry is detrimental to legal practice, leaving financial issues in the dark. As a result, this article takes a law reform approach with an emphasis on the financial regulation of litigation funding. The author begins by defining the scope of the article by examining the forces shaping the definition of litigation funding. Flaws in the current regulatory framework are also examined with a doctrinal approach. The author argues that litigation funding is a form of shadow banking and that the experience of shadow banks during the Global Financial Crisis offers valuable insight for the regulation of litigation funders. In particular, the examination of liquidity risk, externalities and too big to fail concepts illuminate new and largely unexplored issues impacting litigation funders. A comparative approach is then taken to consider different regulatory avenues. Lessons have been taken from both US and UK responses to the GFC. Furthermore, self-regulation by both Australian and UK litigation funders has also been considered. The research culminates with the two regulatory models proposed, the market based ‘Break and Dissolve’ model being preferred. The author concludes that both financial and legal perspectives are required to effectively regulate litigation funding.

I INTRODUCTION

In Shakespeare’s The Merchant of Venice,¹ the evil, self-interested Shylock relentlessly pursues his bond, a pound of flesh from the protagonist Antonio. The heroic Portia then enters the scene, posing as a virtuous and learned doctor of the law. In an ingenious display of legal acuity, she saves the day by arguing that not a drop of blood is to be drawn from Antonio, should Shylock still pursue his pound of flesh. Four hundred years after this differing depiction of the lawyer and the banker, the fine line between these professions is fast becoming blurred as litigation funders gradually enter the judicial temple.

* Thank you to my unit convenor Gabrielle Simm, for going the extra mile answering my AGLC questions and my thesis supervisor Ilija Vickovich for reviewing my draft. Thanks also to my colleagues who helped edit my paper, Emma Gorrie, Jack Oakley, Stuart McCreanor, Elysse Lloyd and countless others. Thank you to my friends Alice, Nicky, Jeremy and my family, Sylvia, Simon and Nathan for their support.

Put simply, litigation funding is the practice of financing litigation on the condition that the loan is repaid from the proceeds of a successful case. This contamination of the courts with the profit motive of lenders has already caused controversy. The costs and benefits are already well discussed. Instead, this article proceeds on the consensus that litigation funding is a necessary development and will focus on the future regulation of the industry. In particular, this article will focus on the encroachment of financial issues on the regulation of litigation funding. A law reform approach will be adopted because the current state of litigation funding regulation is still in its infancy and because financial issues in the business model have largely been sidelined by existing literature.

To understand the basis for reform, a doctrinal exploration of current regulatory issues will be undertaken first. This involves a principled analysis of a possible scope for litigation funding that could be used in further debate. While a legal definition of litigation funding already exists within reg 5C.11.01, there is a paucity of literature examining the elements in that definition. By contrast, there has been a wealth of discussion around developing the regulatory framework. By examining the influences shaping the definition, as well as the wider regulatory development of litigation funding, this article aims to achieve a more robust appreciation of the current legal context.

Secondly, a comparative approach will be taken to evaluate previously unexplored reform opportunities for litigation funding regulation. In particular, the challenges and risks facing financial institutions provide valuable lessons for the future development of the litigation funding industry. Potential solutions to these new challenges will be sought from an analysis of international responses to the Global Financial Crisis (‘GFC’) as well as litigation funding regulation in the United Kingdom. As with any comparative study involving other jurisdictions, it is important to note the differences each litigation funding framework has before drawing conclusions.

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5 Productivity Commission, above n 4, 539.

6 See especially Productivity Commission, above n 4, 535; see generally Legg et al, above n 2; Kalajdzic, Cashman and Longmoore, above n 4; Productivity Commission, above n 4; Morabito, above n 4; Office of the Legal Services Commissioner (NSW), above n 4.

7 *Corporations Regulations 2001* (Cth).

8 See generally Legg et al, above n 2; Jasmina, Cashman and Longmoore, above n 4; Productivity Commission, above n 4; Morabito, above n 4; Office of the Legal Services Commissioner (NSW), above n 4.

9 Kalajdzic, Cashman and Longmoore, above n 4, 95.
Finally, two models of litigation funding regulation will be proposed. Neither of these models attempts to define the specific content of the regulations. This is because the calculation of financial ratios required for financial regulation lie outside the scope of this article. Furthermore, since both models represent radically different approaches to litigation funding regulation, neither is intended to be adopted ‘as is’. Instead, the subsequent analysis of each model confirms the draft findings of the Productivity Commission. That is, that theoretically, the legal professional and financial regimes are best suited to addressing the unique challenges faced by litigation funders together. How differences between the two regimes are to be balanced and reconciled in practice will need to be determined before the solution can be implemented.

II DEFINING LITIGATION FUNDING

As early as 2008, Basten AJ of the New South Wales Court of Appeal had flagged that a definition was necessary for the regulation of the litigation funding industry. To date, the most comprehensive definition of litigation funding is seen within reg 5C.11.01. This was a response to the Federal Court decision of Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd, which characterised litigation funding as a managed investment scheme. This refers to a strategy where money’s worth (of legal actions) is pooled to operate a common enterprise (litigation) producing benefits (quantum), where the members (clients) do not have day-to-day control of the scheme. The purpose of reg 5C.11.01 was to overrule Brookfield Multiplex, exempting litigation funding schemes from the compliance burdens of managed investment schemes.

Regulation 5C.11.01 is a pragmatic solution, reflecting the majority of the litigation funding industry as it is today. For instance, implicit in the context of reg 5C.11.01 as an exception to managed investment schemes, and the use of language such as ‘general members’, is the requirement that funders have to engage more than one client to fall within the present definition of a litigation funding scheme. In practice, the need for multiple clients has caused little controversy, since the industry predominantly funds class actions or insolvency litigation. As a result, the literature so far has not questioned the managed investment scheme lens through which litigation funding is viewed.

10 Productivity Commission, above n 4, 546.
11 Green (as Liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd [2008] NSWCA 148 (20 June 2008) [80] (Basten J) (‘Green v CGU’).
12 Corporations Regulations 2001 (Cth).
13 See generally [2009] 147 FCAFC 11 (‘Brookfield Multiplex’); Corporations Regulations 2001 (Cth) reg 5C.11.01 as inserted by Corporations Amendment Regulation (No 6) (Cth) sch 1 item 1; Explanatory Statement, Corporations Amendment Regulations 2012 (No 6) (Cth).
14 Corporations Act 2001 (Cth) s 9 (definition of ‘managed investment scheme’).
15 Corporations Amendment Regulation (No. 6) (Cth) reg 5C.11.01(1); Explanatory Statement, Corporations Amendment Regulations 2012 (No 6) (Cth).
16 Productivity Commission, above n 4, 535.
17 Corporations Regulations 2001 (Cth) Ch 5C Pt 5C.11 Div 1, reg 5C.11.01(1)(b).
18 Productivity Commission, above n 4, 535.
However, with closer examination, this lens magnifies the need for multiple clients. This is seen with reg 5C.11.01(1)(b), which excludes funding schemes that involve only a single funding client from the definition of a litigation funding scheme. While this may reflect current practice, this dichotomous foundation will create separate sets of regulations for litigation funders, depending on the number of clients involved in the funding arrangements. Apart from adding an extra layer of complexity and opportunity for legal arbitrage, this does not suit the direction of the litigation funding industry. There is already evidence that the industry has grown to include commercial disputes such as contract and patent litigation, which would only involve individual clients. In reality, funders take on cases irrespective of the number of clients, so long as they are able to make a business case out of it. As a result, reg 5C.11.01 fails to provide a cohesive definition of litigation funding. Instead, a more principled definition independent of the managed investment scheme regime is required.

Nevertheless, as a reflection of current practice, reg 5C.11.01 is a useful starting point for a principled examination of the potential elements that could be included in a definition of litigation funding. This is seen with reg 5C.11.01(1)(b)(v), which requires the funder to provide funds to the general members. However it is silent as to how the funds are to be repaid, if they are to be repaid at all. Theoretically this could include funding from friends or Legal Aid, who do not charge interest or require the funds to be paid back in full. Similarly, the location of reg 5C.11.01 within the definition of managed investment scheme also suggests that the Commonwealth Parliament did not have in mind non-profit funders when drafting the legislation.

The issue of commerciality is explored in Green v CGU, which portrays the commercial intentions of litigation funders as relatively harmless by comparing them to creditors owed money for goods sold. In the case of litigation funding, the funder is able to profit by charging a premium for the funds loaned to the client. In the case of goods sold, the creditor is able to profit from retrieving the money owed for goods, which would already contain a profit margin from the sale of the goods. This would suggest that a commercial purpose is irrelevant to litigation funders and that any regulatory regime would apply equally to both commercial and

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19 Corporations Regulations 2001 (Cth) reg 5C.11.01(1)(b).
20 Productivity Commission, above n 4, 535.
21 John Emmerig and Michael Legg, ‘Litigation Funding in Australia: More Swings and Roundabouts as Lawyers Withdraw Application to be Funders’, Mondaq (online), 12 February 2014 <http://www.mondaq.com/australia/x/292544/Class+Actions/Litigation+Funding+In+Australia+More+Swings+And+Roundabouts+As+Lawyers+Withdraw+Application+To+Be+Funders>.
22 Ibid; Productivity Commission, above n 4, 535; Explanatory Statement, Corporations Amendment Regulations 2012 (No 6) (Cth).
23 Ibid Ch 5C Pt 5C.11 Div 1; Explanatory Statement, Corporations Amendment Regulations 2012 (No 6) (Cth).
24 Corporations Regulations 2001 (Cth) reg 5C.11.01.
25 Ibid.
26 Ibid.
27 Ibid Ch 5C Pt 5C.11 Div 1; Explanatory Statement, Corporations Amendment Regulations 2012 (No 6) (Cth).
28 [2008] NSWCA 148 (20 June 2008) [77].
29 See generally Legg et al, above n 2; Office of the Legal Services Commissioner (NSW), above n 4; Kalajdzic, Cashman and Longmoore, above n 4.
non-commercial litigation funding. This seems to be the current approach as adopted by reg 5C.11.01.\textsuperscript{30}

By contrast, the High Court acknowledged that where a person ‘hazards funds’ in litigation,\textsuperscript{31} they would wish to have control over the proceedings. Given the large amounts of money involved in commercial litigation funding portfolios, this desire for control could potentially be detrimental to the administration of justice. In particular, where matters are settled outside of court, away from judicial supervision,\textsuperscript{32} practices such as inflaming damages, suppressing evidence, or suborning witnesses may increase. However with smaller, non-commercial arrangements, this dynamic is unlikely to be present. Given the Commonwealth Government’s intentions to increase access to justice,\textsuperscript{33} these non-profit funders will need to be protected from the heavier regulatory burdens of commercial funders.\textsuperscript{34} Hence, a commercial criterion for litigation funding is justified.

Another potential element in the definition of litigation funding would be the requirement for a third party (other than the lawyer and client).\textsuperscript{35} Unlike the criteria of commercial purpose and multiple clients, which have been based on managed investment schemes, the third party distinction has been imported into the regulations directly from the facts of \textit{Brookfield Multiplex}. Regulation 5C.11.01 expressly draws a distinction between litigation funders and law firms providing conditional fee arrangements (‘\textit{no win no fee}’).\textsuperscript{36} Under a \textit{no win no fee} arrangement, payment of the plaintiff’s legal fees is conditional on a successful outcome.\textsuperscript{37} Even though the law firm essentially funds the action with trade receivables, by paying for the lawyer’s salary upfront, reg 5C.11.01 prevents conditional fees from being considered as litigation funding.\textsuperscript{38}

In this regard, if the differences between third parties and lawyers are examined, two arguments can be made to justify the third party distinction. Firstly, one of the more common concerns raised has been the fact that third parties are not lawyers and therefore have no duty to the court.\textsuperscript{39} This is reflected in the decision making process of third parties, which is based on

\textsuperscript{30} \textit{Corporations Regulations 2001} (Cth).
\textsuperscript{31} \textit{Fostif} (2006) 229 CLR 386, 434 [89].
\textsuperscript{32} Ibid 435 [93].
\textsuperscript{33} Treasury, ‘Government Acts to Ensure Access to Justice for Class Action Member’ (Media Release, No. 039, 4 May 2010).
\textsuperscript{35} \textit{Corporations Regulations 2001} (Cth) reg 5C.11.01(1)(b)(vi).
\textsuperscript{36} \textit{Legal Profession Act 2004} (NSW) s 323; \textit{Legal Profession Act 2004} (Vic) s 3.4.27; \textit{Legal Practitioners Act 1981} (SA) sch 3 item 25; \textit{Legal Profession Act 2006} (ACT) s 283; \textit{In the Marriage of Sheehan} (1991) 104 FLR 57.
\textsuperscript{37} \textit{Legal Profession Act 2004} (NSW) s 323; \textit{Legal Profession Act 2004} (Vic) s 3.4.27; \textit{Legal Practitioners Act 1981} (SA) sch 3 item 25; \textit{Legal Profession Act 2006} (ACT) s 283.
\textsuperscript{38} \textit{Corporations Regulations 2001} (Cth) reg 5C.11.01(1)(b)(vi).
\textsuperscript{39} \textit{Legal Profession Act 2004} (NSW) s 33; \textit{Legal Profession Act 2004} (Vic) s 2.3.9; \textit{Legal Practitioners Act 1981} (SA) s 23A; \textit{Legal Profession Act 2006} (ACT) s 28; Law Society of New South Wales, \textit{Professional Conduct and Practice Rules} (at 1 January 2014) r 21; Office of the Legal Services Commissioner (NSW), above n 4, 5.
expected value.\textsuperscript{40} Expected value calculations rely on the theory that estimates become more accurate as the sample size (the number of plaintiffs funded per case) increases.\textsuperscript{41} As a result, it would be in the best interests of funders to fund class actions, which allow them to manage risk more effectively. Since this approach increases the number of class actions relative to population size,\textsuperscript{42} Australia may potentially become a more litigious society. At no point in a litigation funder’s decision making process is there an obligation to consider any duties to the court.\textsuperscript{43}

Secondly, litigation funders are also more specialised in handling risk than law firms, particularly funders who manage large portfolios. Large portfolios allow litigation funders to take on cases with higher payoffs and higher risks because the impact of losses can be diluted with the rest of the portfolio.\textsuperscript{44} Thus, these intrinsic differences would require a definition that puts third parties in the regulatory spotlight. Yet, while that may be the status quo, the current regulations imposed on third parties are still much lighter than those imposed on law firms.\textsuperscript{45}

Alternatively, a uniform definition encompassing both \textit{no win no fee} law firms and litigation funders may be preferable, especially considering the regulatory arbitrage opportunities that would arise with a third party distinction. Since law firms are subject to the \textit{Legal Profession Act},\textsuperscript{46} they are unable to charge fees that are a proportion of the settlement figure, also known as a contingency fee.\textsuperscript{47} By contrast, there is nothing stopping a lay third party litigation funder from charging a percentage of the settlement figure.\textsuperscript{48} As a result, law firms such as Maurice Blackburn are attempting to access this more lucrative industry through related entities that are not considered a ‘law practice’.\textsuperscript{49} In effect, the distinction between law firm and third party would allow law firms to circumvent the rules and charge contingency fees on a de facto basis.\textsuperscript{50} However, unlike in the United States where lawyers are only paid out of the contingency fee, the

\textsuperscript{40} Legg et al, above n 2, 632.
\textsuperscript{41} Michael Smithson, \textit{Statistics with Confidence} (Sage Publications, 2009) 38.
\textsuperscript{42} John Emmerig and Michael Legg, ‘Securities Class Actions Escalate in Australia’, \textit{Mondaq} (online), 15 May 2014 <http://www.mondaq.com/australia/x/313730/Class+Actions/Securities+Class+Actions+Escalate+in+Australia@email_access=on>.
\textsuperscript{43} Legal Profession Act 2004 (NSW) s 33; Legal Profession Act 2004 (Vic) s 2.3.9; Legal Practitioners Act 1981 (SA) s 23A; Legal Profession Act 2006 (ACT) s 28; Law Society of New South Wales, \textit{Professional Conduct and Practice Rules} (at 1 January 2014) r 21; Office of the Legal Services Commissioner (NSW), above n 4, 5.
\textsuperscript{44} Stephen Ross et al, \textit{Fundamentals of Corporate Finance} (McGraw-Hill, 5\textsuperscript{th} ed, 2011) 356–7; Kalajdzic, Cashman and Longmoore, above n 4, 141.
\textsuperscript{46} Legal Profession Act 2004 (NSW); see also Legal Profession Act 2004 (Vic); Legal Practitioners Act 1981 (SA); Legal Profession Act 2006 (ACT).
\textsuperscript{47} Legal Profession Act 2004 (NSW) s 325; Legal Profession Act 2004 (Vic) s 3.4.29; Practitioners Act 1981 (SA) item 27; Legal Profession Act 2006 (ACT) s 285.
\textsuperscript{48} Productivity Commission, above n 4, 542–3; see especially Emmerig and Legg, ‘Litigation Funding in Australia’, above n 21.
\textsuperscript{49} Emmerig and Legg, ‘Litigation Funding in Australia’, above n 21; Legal Profession Act 2004 (NSW) s 325.
\textsuperscript{50} Emmerig and Legg, ‘Litigation Funding in Australia’, above n 21.
use of two entities allows Australian law firms to charge the client twice: once from the interest rate on the loan, and again as the law firm providing legal services.\(^{51}\) In recognition of this deficiency, the Commonwealth Attorney-General has suggested that the regulatory gap will be closed, with more regulation for litigation funders in the future.\(^{52}\) Implicit in this statement is an understanding by the Commonwealth Government that litigation funding is to involve a third party.

After an analysis of the criteria in reg 5C.11.01, it is evident that the litigation funding industry will outgrow its definition based on managed investment schemes. It is immaterial whether the funding goes to a single proceeding or a class of proceedings. Instead, a definition of litigation funding involving third parties with a commercial purpose will ensure a more sustainable foundation for further regulatory developments. Consequently, references to litigation funding in this article will refer to commercial, third party litigation funding.

III Legal Framework

Traditionally, litigation funding would have been considered maintenance (improperly encouraging litigation) and champerty (funding litigation for profit).\(^{53}\) Thus, only litigation funding in New South Wales, Victoria, South Australia and the Australian Capital Territory, where the offences have been abolished, will be discussed.\(^{54}\) As the first judicially considered case involving litigation funding in Australia, it is not surprising that concerns echoing maintenance and champerty were raised in *Fostif*.\(^{55}\) The facts of *Fostif* concerned a third party commercial litigation funder heading a class action on behalf of tobacco retailers.\(^{56}\) While the case turned on the validity of the class action,\(^{57}\) the obiter highlighted the historical tension between ensuring the due administration of justice and enabling access to justice for the poor.\(^{58}\) While the abolition of maintenance and champerty increased access to justice, public policy concerns about the impact litigation funding would have on the courts threatened the validity of the funding contract.\(^{59}\) Ultimately, the court held that maintenance and champerty did not necessarily offend public policy and therefore upheld the freedom to enter and enforce funding agreements.\(^{60}\) Other general public policy concerns about the administration of justice were limited to matters concerning abuse of process.\(^{61}\)

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51 Ibid; Productivity Commission, above n 4, 25.
52 Emmerig and Legg, ‘Litigation Funding in Australia’, above n 21; Productivity Commission, above n 4, 543.
53 Legg et al, above n 2, 627.
54 *Civil Liability Act 2002* (NSW) sch 2 item 2; *Crimes Act 1900* (NSW) sch 3 item 5; *Wrongs Act 1958* (Vic) s 32; *Civil Law (Wrongs) Act 2002* (ACT) s 221; *Criminal Law Consolidation Act 1935* (SA) sch 11 item 1.
56 Ibid 412, 436, 470.
58 *Fostif* (2006) 229 CLR 386, 444 [125].
59 Ibid 425, 433–6 quoting *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 6, as repealed by *Crimes Act 1900* (NSW) sch 3 item 5; see especially *Civil Liability Act 2002* (NSW) sch 2 item 2(2).
60 Ibid 432 [84].
61 Ibid 435 [93].
Another conception of litigation funding can be seen in *Brookfield Multiplex* which characterises the practice as a registered managed investment scheme. As a result, clients would have been entitled to the protections afforded by ch 5C of the *Corporations Act*. This includes an obligation on the responsible entity (in this case, the litigation funder) to act honestly, to resolve conflicts of interests in the member’s favour, and to comply with its constitution and compliance plan.

Unlike *Fostif*, which only focused on mitigating the risks to the administration of justice, the Federal Court pursued a more proactive approach to protect litigation funding clients. In particular, the Federal Court looked to the legislature’s concern regarding the financial risks scheme members faced. Recognising that litigation funding clients were also subject to such risks, the Federal Court extended the definition and protections of managed investment schemes to include litigation funding arrangements.

However, less than six months after the ruling in *Brookfield Multiplex*, the Commonwealth Treasury convened a round table discussion with key stakeholders. This resulted in a string of Australian Securities and Investments Commission (ASIC) Class Orders starting from 5 May 2010, explicitly carving out litigation funding from the definition of managed investment scheme. The reason for this change was that it reduced regulatory costs for litigation funders, thereby ensuring greater access to justice by small consumers. This lack of access has been confirmed by Morabito, who notes that class actions have never constituted more than 0.74% of Federal Court proceedings, with only 18 being funded actions. The Commonwealth Treasury also noted the lack of harms so far, in order to justify their policies in favour of industry development. However, because the sample size of funded actions is still quite small, this empirical evidence cannot support an inference of adequate industry safeguards.

The idea of a litigation funding contract being a financial product was explored in *International Litigation Partners v Chameleon Mining NL*. In a 2:1 majority, the NSW Court of Appeal held that litigation funding could be used to manage the financial risk of having to pay an adverse

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63 *Corporations Act 2001* (Cth) ch 5C.
64 Ibid s 601FB.
65 Ibid s 601FD(1)(a).
66 Ibid s 601FD(1)(c).
67 Ibid s 601FD(1)(f).
70 Ibid 20.
71 Office of the Legal Services Commissioner (NSW), above n 4, 7.
72 Treasury, above n 33.
74 Treasury, above n 33.
75 Morabito, above n 4, 5.
76 Treasury, above n 33.
78 *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] 50 NSWCA 149 (‘*Chameleon Mining*’).
costs order. As a result, litigation funding contracts would be financial products and funders would be required to obtain an Australian Financial Services Licence. In turn, this affords clients the protections under the licence such as prudent balance sheet requirements, liquidity requirements, and best interest obligations.

Similar to Brookfield Multiplex, Chameleon Mining also used a purposive approach to interpret the Corporations Act. Seeing that the purpose was to protect the investing public, the Court of Appeal was very reluctant to impose a narrow interpretation of the provisions, echoing the earlier Brookfield Multiplex decision. This approach was even followed on appeal in the High Court, which overruled litigation funding contracts being a ‘financial product’. The High Court’s broad interpretation of ‘financial accommodation’ meant that litigation funders were considered ‘credit facilities’. This was because they had financial arrangements in place to accommodate disbursements on behalf of their clients over the course of litigation. As a result, the High Court considered litigation funding contracts to be debt instruments despite the existence of the debt being contingent upon a successful outcome. Since litigation funders were credit facilities, they were to be regulated under the National Consumer Credit Protection Act.

Both of these regimes would increase the regulatory cost for litigation funders. As a result, the Commonwealth Government stepped in again by denying that litigation funding was a credit facility, affirming that it is a financial product, yet exempting funders from holding an Australian Financial Services Licence or being considered a managed investment scheme. Apart from the conflict of interest management obligations, these regulatory changes essentially bring the regulation of the industry back to square one.

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79 Ibid 157 [45], 180 [209]; Corporations Act 2001 (Cth) s 763C; Civil Procedure Act 2005 (NSW) s 98.
80 Corporations Act 2001 (Cth) ss 763C, 911A(1).
82 Ibid item 21.
83 Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth) sch 1 item 23 s 961B(1).
84 [2011] 50 NSWCA 149, 180 [208]; Corporations Act 2001 (Cth)
85 Chameleon Mining [2011] 50 NSWCA 149, 180 [208]
88 Ibid 465 [33].
89 Ibid 463, 465 [33]; Corporations Regulations 2001 (Cth) reg 7.1.06(3); see also National Consumer Credit Protection Act 2009 (Cth).
90 National Consumer Credit Protection Act 2009 (Cth); Corporations Act 2001 (Cth) ch 7.
91 Corporations Regulations 2001 (Cth), as inserted by Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth) sch 1 item 1B.
92 Ibid sch 1 item 1A.
93 Ibid sch 1 item 6, 7.6.01AB(1); Corporations Act 2001 (Cth) s 911A; Corporations Regulations 2001 (Cth) reg 5C.11.01, as amended by Corporations Amendment Regulation (No 6) (Cth) sch 1 item 1.
94 Corporations Regulations 2001 (Cth), as inserted by Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth) sch 1 item 6, 7.6.01AB(2); see generally Australian Securities Investment Commissions, Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest, RG 248, April 2013.
The almost diametrically opposed views of the judiciary and the government reflect the influence litigation funders have as stakeholders in shaping regulation. The common law demonstrates that litigation funders are able to support the creation of favourable precedents by choosing to fund parties whose interests align with the funder’s interests.\(^95\) If that is unsuccessful, funders are also able to exert political pressure on the government by aligning the funder’s interests with the voting public by framing the debate in terms of access to justice.\(^96\) As a result, issues such as financial risks and prudential regulation have been left largely unaddressed by the literature.

IV LITIGATION FUNDING AS SHADOW BANKING

So far, the recent amendments have placed litigation funding in a regulatory black hole.\(^97\) Despite this lack of legal character, litigation funding has an economic fingerprint similar to that of many financial institutions. A path out of this legal void can potentially be illuminated by a comparative analysis of how financial institutions are regulated against systemic shock. In particular, the class of financial institutions that draws the most economic parallels with litigation funders are called shadow banks.\(^98\)

The international body currently monitoring shadow banks, known as the Financial Stability Board, defines shadow banking as non-prudentially regulated institutions that engage in disintermediation.\(^99\) Similar to credit intermediation, disintermediation involves the raising of funds which are then loaned out to borrowers.\(^100\) Yet unlike credit intermediation where funds are raised by banks through deposits, disintermediation involves the use of capital markets.\(^101\)

Using this definition, litigation funders can be classified as shadow banks for two reasons. Firstly, in anticipation of new mutations of shadow banking,\(^102\) the Financial Stability Board recommends a focus on economic impacts as opposed to legal status.\(^103\) In this regard, litigation funders are able to disintermediate by raising funds in capital markets and using the proceeds to provide credit for litigation.\(^104\) This has been confirmed by the High Court with their classification of funding contracts as ‘credit facilities’.\(^105\) By considering ‘matters of substance as

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\(^{96}\) Fostif (2006) 229 CLR 386, 398 (S J Gageler SC) (during argument); Treasury, above n 33.

\(^{97}\) Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth).


\(^{100}\) ‘Shadow Banking’, above n 98, 3; Gerding, above n 98, 6; Schwarz, above n 98, 1781.

\(^{101}\) Schwarz, above n 98, 1797; Gerding, above n 98, 6.

\(^{102}\) ‘Shadow Banking’, above n 98, 2.

\(^{103}\) Ibid.

\(^{104}\) IMF (Australia) Limited, ‘Release to Australian Securities Exchange: Share Placement Plan’ (ASX Release, IMF#1267526, 9 October 2013); Entitlement Issue Prospectus (Hillcrest Litigation Services Limited, 6 December 2010).

\(^{105}\) Chameleon Mining (2012) 246 CLR 455.
well as of form,’ their Honours implicitly included litigation funding into the realm of shadow banking. While *Chameleon Mining* has since been overturned by the legislature, the High Court’s analysis of the facts gives strong support to extending the definition of shadow banks to include litigation funders.

Secondly, litigation funders are not prudentially regulated by the Australian Prudential Regulation Authority (‘APRA’). Since litigation funding does not involve directly taking ‘money on deposit’, the practice is not considered a ‘banking business’ and therefore cannot be considered an Authorised Deposit-taking Institution (‘ADI’). As a ‘Registered Financial Corporation’, litigation funders fall within the definition of shadow banking.

Since litigation funders engage in disintermediation, they also become exposed to the risks faced by shadow banks. In particular, the primary risk is that of the collapse of the litigation funder as seen with the GFC. In 2007, firms held high levels of debt and low levels of equity in order to become more competitive. This made them more sensitive to shocks in the financial system. The subsequent shock, in the form of a property crash, placed pressure on firms to liquidate their assets and use their equity to service the debt. Since equity levels were low to begin with, the shock in property prices caused many firms to become insolvent.

Given a litigation funder’s position between the financial markets and the courts, shocks in financial markets could potentially spread into the justice system. This is because litigation funding clients usually engage funders to manage their disbursements and gain access to the legal system. The industry’s focus on class actions and insolvency cases has in a sense provided justice for the masses. For many plaintiffs, their case may be one of the few experiences they have of the courts and the dispute resolution system. When a funder collapses, leaving plaintiffs standing before the courts unable to proceed, this will have far

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106 Ibid 464 [28].  
108 *Banking Act 1959* (Cth) s 5 (definition of ‘banking business’).  
109 Ibid s 9(3).  
110 Ibid ss 9, 5 (definition of ‘authorised deposit-taking institution’).  
113 *Brookfield Multiplex* [2009] 147 FCAFC 11, 22 [32].  
115 Ibid.  
117 Ibid.  
118 *Bentham IMF Bonds Prospectus* (Bentham IMF Limited, 7 April 2014); *Entitlement Issue Prospectus* (Hillcrest Litigation Services Limited, 6 December 2010).  
119 *Chameleon Mining* [2011] 50 NSWCA 149, 157 [45].  
120 Productivity Commission, above n 4, 539.
reaching impacts on the industry’s reputation. In turn, this will deter potential clients from engaging a funder and accessing the courts despite having meritorious cases. This demonstrates that under the status quo, the current regulations may ironically result in an outcome contrary to the Commonwealth Government’s intention to increase access to justice.\(^\text{121}\)

Furthermore, a collapsed funder would drain court resources and crowd out other proceedings. Each time a class action or insolvency proceeding is commenced, significant judicial and legal resources are required to navigate the complexities of the matter.\(^\text{122}\) Not only does that represent an investment by the funder, it is also an investment by the legal system of its limited labour and time towards resolving the dispute between the parties. Should a litigation funder collapse, the cost is therefore also borne in terms of time and resources wasted by counsel and the courts. This is because discontinuance of proceedings does not bar the plaintiffs from commencing fresh proceedings.\(^\text{123}\) As a result, the time and legal resources used to reach settlement will increase. The cost of a litigation funder’s collapse is borne by the public who have been crowded out of the legal system by all the plaintiffs seeking to re-start discontinued actions. In particular, unfunded litigation, such as human rights or public law litigation, will be affected the most since they will be getting a smaller share of the limited legal resources available.\(^\text{124}\) Thus, the insolvent litigation funder is shielded from the full consequences of their risk taking at the opportunity cost of other stakeholders not getting their day in court.

Given the potentially serious impacts a collapsed litigation funder will have on the justice system, regulators need to have an understanding of the economic issues impacting the business model. The three most pertinent issues for litigation funders, as flagged by shadow banking, are liquidity risk, the government’s approach to externalities and the ‘Too Big to Fail’ mentality.\(^\text{125}\)

V LIQUIDITY RISK

In the disintermediated shadow banking sector, liquidity risk is one of the main culprits for institutional collapse.\(^\text{126}\) This is because both banks and shadow banks profit by being rewarded for taking the risks inherent with maturity transformation.\(^\text{127}\) This refers to the process of raising funds through a liability such as a deposit account, where consumers are free to retrieve all their cash at any time. The sum of these deposits is then transformed into a long-term asset, such as a home loan, where most of the funds cannot be accessed until the home loan is paid off. To


\(^{122}\) Productivity Commission, above n 4, 538.

\(^{123}\) Uniform Civil Procedure Rules 2005 (NSW) reg 12.3; Supreme Court (General Civil Procedure) Rules 2002 (Vic) reg 25.06; Supreme Court Civil Rules 2006 (SA) reg 108; Court Procedures Rules 2006 (ACT) reg 1167.

\(^{124}\) Productivity Commission, above n 4, 540.

\(^{125}\) See generally Lissa Lamkin Broome, ‘The Dodd-Frank Act: Tarp Bailout Backlash and Too Big to Fail’ (2011) 15 North Carolina Banking Institute 69.

\(^{126}\) Schwarcz, above n 98, 1793–4.

service the cash demands of consumers in the meantime, banks and shadow banks ‘roll over’
their short term liabilities. That is, they pay for short term cash withdrawals to the consumer
with any new deposits received. Liquidity is vital.

However, the reliance on ‘rolling over’ short term liabilities to remain solvent gives rise to two
assumptions. First, it is assumed that, combined with any cash reserves, enough new deposits
will be attracted by the bank to enable it to pay customers who wish to withdraw cash from their
accounts. The second assumption is that customers will only want a small fraction of their total
deposits at any one time, allowing the bank to lend out the rest of the funds. When these
assumptions fail, the banks are subject to a bank run. That is, where a bank appears to be about to
collapse, most customers will attempt to withdraw all their funds before they lose everything.
However, since banks lend out most of their money in long term loans, they will not be able to
attract enough new deposits in the short term to cover all the withdrawals. By not being able to
meet its immediate obligations to its customers, the bank defaults and collapses. The banking
business model therefore facilitates a self-fulfilling prophecy. Even rumours of a bank run
occurring will trigger customers to demand payment from the bank, causing otherwise healthy
banks to default.

As a result, a government guarantee on deposits protects consumers, promotes stability and
increases confidence by minimising the chance of bank runs. This guarantee is also one of the
major differences between the banking and shadow banking industries because only traditional
deposit-taking banks have access to the guarantee. This is seen with the Commonwealth
Government’s Financial Claims Scheme, which protects deposits up to $250 000 per account
holder per bank. To be eligible, institutions must comply with the corresponding regulatory
regime for ADIs. However, this comes at the cost of having to meet minimum liquidity
requirements, which limit a bank’s ability to issue profit producing long-term loans. This
makes them less competitive compared to non-guaranteed shadow banks. Accordingly, since
litigation funders are shadow banks, they are free to lend out as much cash as they desire. Absent
any regulations to the contrary, funders are likely to tie up their cash in litigation. Thus, an
unexpected ‘bank run’ scenario, such as higher than expected legal fees or an adverse costs
orders, could potentially end in insolvency.

However in practice, there are two indications to the contrary. Firstly, funders such as Bentham
IMF Ltd recognise the need for a high degree of industry self-regulation and have committed to
keeping a minimum of $70 million in cash on their balance sheet. While this is an honourable
undertaking by the board (perhaps motivated by their legal background), it is unsustainable.

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128 Tobias Adrian and Adam B Ashcraft, ‘Shadow Banking Regulation’ (Paper presented at the Annual Review
129 Schwarcz, above n 98, 1804–6; Corporations Act 2001 (Cth) s 95A.
130 Australian Prudential Regulation Authority, ‘APRA Releases Final Prudential Standard for Financial Claims
Scheme’ (Media Release, No. 13.19, 24 June 2013); Australian Government, Financial Claims Scheme,
Consultation Paper (2011) 1 [1.6].
131 Australian Prudential Regulation Authority, Financial Claims Scheme, APS 910, January 2012.
132 Ibid.
133 Ibid item 2.
134 Australian Prudential Regulation Authority, Capital Adequacy, APS 110, January 2013 items 22–3.
This is seen with the four largest substantial holders of ordinary shares being institutional investors holding a total of 29.49%, a figure dwarfing the 14.4% owned by management. Given the greater voting power of the institutional investors, it is likely that pressure will be placed on the board to increase performance measures by investing more cash into litigation.

Another example of industry self-regulation is seen with the Association of Litigation Funders (‘ALF’) of England and Wales which has established a Code of Conduct for litigation funders in the region. This code imposes specific financial obligations onto litigation funders, such as having access to a minimum of £2 million of capital at all times. Unlike the financial ratios normally used in banking regulation, the static £2 million requirement applies to all members of the ALF regardless of size. In effect, this acts as a barrier of entry to the industry. Furthermore, if compared to the capital of a large funder such as IMF Bentham of $125 million, the £2 million (A$3.6m) requirement gives funders plenty of leeway and legitimises the practice of holding little equity for emergency cash. Such rules will allow the invisible hand of the market to push liquidity down to dangerous levels.

The second argument against a bank run for litigation funders is that empirical evidence suggests litigation funders hold far too little debt for there to be any impact on liquidity. Hillcrest Litigation Services Ltd and LCM Litigation Fund Pty Ltd are both fully equity funded ventures. If there were to be a panic for investors to withdraw their funds, they would be able to sell their shares to buyers on a secondary market without disrupting funding operations. The only impact of this would be to drive down the market value of the litigation funder.

Nevertheless, because there is no secondary market for litigation funding contracts, the funder’s only ready access to liquidity would be by directly raising funds with a rights issue (issuing more equity) or convertible notes (debt – with the option to be converted into equity at maturity). In both cases, investor panic would increase the risks of the funder not being able to roll over its convertible notes or implement a fully subscribed rights issue. The reliance on rights issues also risks diluting the voting power of management and their resolve to keep a high level of cash. Consequently, the lack of liquidity requirements for litigation funders exposes them to a destabilising force drawing them closer to the prospect of insolvency.

An attempt to regulate against liquidity risk is seen in the aftermath of the GFC in the United States. The newly established Financial Stability Oversight Council (‘FSOC’) is able to impose prudential requirements on non-bank financial institutions with assets at or greater than $50

\[\text{2013 Annual Report, above n 135, 73–5.}\]
\[\text{See generally Association of Litigation Funders, Code of Conduct for Litigation Funders, (at January 2014) }\]
\[\text{Ibid r 9.4.2.}\]
\[\text{2013 Annual Report, above n 135, 24.}\]
\[\text{Kalajdzic, Cashman and Longmoore, above n 4, 142; cf Annual Report 30 June 2013 (Hillcrest Litigation Services Limited, 29 August 2013) 26; 2013 Annual Report (IMF (Australia) Limited, 21 August 2013) 24.}\]
\[\text{2013 Annual Report, above n 135, 24, 54.}\]
billion.\textsuperscript{146} The language of the enabling legislation provides for a wide discretion for the FSOC to determine which institutions or classes of institutions are to be subject to extra regulations.\textsuperscript{147} However, such an approach suffers from the ‘boundary problem’.\textsuperscript{148} That is, with the high level of discretion afforded to the FSOC, there will be a high degree of uncertainty concerning the scope of institutions covered. There would also be ambiguity concerning the ad-hoc nature of the FSOC’s discretionary powers. Furthermore, the use of an explicit asset threshold would suggest the legislation is aimed at protecting the financial system and would therefore preclude much smaller litigation funders.

By contrast, the United Kingdom has adopted a less government-centric solution that seeks to ‘ring fence’ the operations of banking institutions.\textsuperscript{149} Under this model, the deposit taking arm of the bank is to be an entity independent of the investment banking arm of the bank. If the investment banking arm’s exposure to financial risks caused a collapse, the ring fence around the deposit taking arm will protect depositors.\textsuperscript{150} Given, the primary aim of this response is to protect depositors, there is little direct application to litigation funders that are funded by equity. Nevertheless, the principle behind this regulatory approach can be applied by ring fencing the litigation funding arm of the funder from the capital raising arm. Thus, if the capital raising operations of the litigation funder become subject to liquidity risk, the ring fence will be able to protect clients and ensure minimum disruption to their cases in progress.

\section*{VI Externalities}

Another financial issue impacting litigation funding is that of externalities. Externalities refer to an exchange that imposes a cost on non-consenting third parties.\textsuperscript{151} In this case, this would refer to an exchange of money from the funder in return for a cause of action from the client. The non-consenting third party would be the general public who have had an ‘important public institution’\textsuperscript{152} (the courts) put at risk of abuses of process and other detriments to the administration of justice.\textsuperscript{153}

In his analysis, Trebilcock advances two conceptions of externalities.\textsuperscript{154} First, a liberal approach is taken, where externalities are characterised as a harm on non-consenting third parties. As a result, the harm principle would justify the government stepping in to intervene on behalf of those third parties.\textsuperscript{155} This analysis is consistent with Schwarcz, who suggests the externalities

\textsuperscript{146} Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 USC §§ 115, 165(a)(1) (2012) (‘Dodd-Frank’).
\textsuperscript{147} Ibid.
\textsuperscript{148} Schwarcz, above n 98, 1820; Broome, above n 125, 76.
\textsuperscript{150} Ibid 3.
\textsuperscript{152} Ibid 61.
\textsuperscript{153} Fostif (2006) 229 CLR 386, 435 [93].
\textsuperscript{154} Trebilcock, above n 151, 59–64.
\textsuperscript{155} Ibid 61.
during the GFC were caused not by market failure, but by government inaction.\textsuperscript{156} That is, externalities are symptomatic of the government’s failure to take responsibility.\textsuperscript{157}

The second view of externalities takes a utilitarian approach whereby externalities are seen as another transaction cost.\textsuperscript{158} As opposed to stepping in on behalf of injured third parties, the government in this case would step back and make a utility maximising judgement that increases the overall benefit for all parties.\textsuperscript{159} That is, the government is justified in allowing some externalities to exist provided the benefits of their existence outweigh the costs. This was the view taken by the Commonwealth Government in their minimalist regulation of litigation funding,\textsuperscript{160} citing the increased access to justice as the overall benefit justifying the potential threats to justice.\textsuperscript{161} By contrast, the High Court’s view is that public policy concerns justify court intervention in litigation funding contracts on behalf of society.\textsuperscript{162} Since this power is exercised regardless of any benefit the contract would have produced, it is more aligned to the liberal view of externalities.

The value of taking a shadow banking perspective is also evident with its impact on the role of government. After the deregulation of the late 1980s,\textsuperscript{163} United States regulators took a relatively hands off approach in light of the perceived benefits free markets would bring.\textsuperscript{164} This parallels the current approach to litigation funding, where the Commonwealth Government has allowed externalities in return for greater access to justice. However, after the GFC, this laissez-faire approach has been subject to much criticism, with many commentators calling for a paradigm shift to a more proactive approach.\textsuperscript{165} This has been reflected in both United States and United Kingdom reactions to the GFC, with these governments taking a much more involved approach to financial regulation.\textsuperscript{166} The Commonwealth Government’s current approach to litigation funding is inconsistent with this post-GFC paradigm shift and leaves litigation funders exposed to pre-GFC era financial risks.

\section{Too Big to Fail}

The third shadow banking issue impacting litigation funding is the ‘Too Big to Fail’ mentality. During the GFC, the bailouts of the Bank of America and Citigroup created an implicit

\begin{itemize}
\item Scharcz, above n 98, 1820.
\item Ibid 1806–7, 1812.
\item Trebilcock, above n 151, 59.
\item Ibid.
\item Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth).
\item Fostif (2006) 229 CLR 386, 417 [39].
\item Ibid 333–4.
\item Ibid 334; Scharcz, above n 98, 1800–4; Broome, above n 125, 80–1.
\end{itemize}
expectation that such ‘systemically significant’ institutions were ‘Too Big to Fail’ and would attract government bailout money. Such an expectation amounts to a moral hazard, that is, where a party is protected from the full consequences of their risky actions. Since those banks did not fear a collapse, they were more willing to take make riskier investments and accelerated systemic problems.

However, Australia’s shadow banking industry is relatively small, accounting for only 15% of total financial assets. It is unlikely that any litigation funder would be able to be considered as ‘systemically significant’. Nevertheless, the litigation funder’s speciality in organising masses of plaintiffs for class actions and insolvency cases could position them to be seen as ‘Too Important to Fail’ and, as a result, be subject to the same moral hazard. That is, if such an expectation exists, litigation funders could get away with funding riskier cases and carry less liquidity in order to drive up performance. When they face the prospect of insolvency, the litigation funder would be able to draw on the sheer number of plaintiffs affected to obtain a bailout from the government.

‘Too Big to Fail’ was addressed in the United States with the Dodd-Frank Wall Street Reform and Consumer Protection Act. This legislation restricted emergency lending with tighter regulations and the requirement for enough security to protect taxpayers. Section 1101 also clarified that the purpose of emergency lending was to inject liquidity into the financial system, as opposed to saving any individual institution. If this approach is mirrored, litigation funders would have access to emergency funds only on the basis of protecting the integrity of the justice system. On the other hand, the United Kingdom’s approach is to require ‘designated investment firms’ to have Recovery and Resolution plans (‘living wills’), detailing how the institutions would recover from a stress scenario and what steps would need to be taken to wind up the institution. By contrast to the United States approach, which is still reliant on taxpayer money, the United Kingdom approach is a ‘bail-in’ model where the costs of institutional collapse are borne by the senior creditors. As a result, this would provide an incentive for senior creditors to become de facto regulators of the institution while protecting the taxpayer from the collapse.

The aforementioned solutions to the challenges of liquidity risk, externalities and ‘Too Big to Fail’, lend themselves to two broad regulatory approaches. The first model, Command and

168 Broome, above n 125, 69.
169 Schwarcz, above n 98, 1803.
172 Ibid.
175 Broome, above n 125, 77; Schwarcz, above n 98, 1818–20.
177 Ibid 3 [6].
Control, places the government in centre stage. The second model, Break and Dissolve is a compromise, using a ‘Litigation Continuation Fund’ to leverage self-regulation while also acknowledging the valuable role of regulators.

VIII MODEL 1: COMMAND AND CONTROL

Internationally, litigation funding has been largely regulated by the courts and self-regulation.\(^{178}\) As seen in the doctrinal analysis above, the experience of Australia’s early litigation funders has been similar. However, the recent increase in government involvement—in particular, their classification of litigation funding as a financial product—\(^{179}\) suggests the time is ripe for a departure from this laissez-faire approach. As a result, this model seeks to address liquidity risk, prevent ‘Too Big to Fail’ and reconcile the unique ethical issues posed by litigation. In addition, the model also demonstrates the government’s reluctance to address externalities.

Under the Command and Control model, liquidity risk will be managed by the ‘Litigation Funding Act’, which will insert a new chapter into the Corporations Act devoted to litigation funders.\(^{180}\) The new chapter will be overseen by ASIC, which already administers a liquidity requirement (albeit limited to the holding of client monies) for non-APRA regulated bodies.\(^{181}\) In particular, this new chapter will give ASIC a wider discretion to impose liquidity requirements, much like the Financial Stability Oversight Council in the United States.

Compared to the courts and legal industry bodies, ASIC is in a far better position to regulate liquidity. This is because it is common practice throughout the banking sector to manage liquidity through the calculation of a Liquidity Coverage Ratio.\(^{182}\) The calculation of this ratio involves financial modelling that ensures banks are able to survive up to 30 calendar days in stress scenarios similar to the GFC.\(^{183}\) Given the quantitative nature of this endeavour, regulators would need access to an immense amount of financial data. Since companies already lodge their financial reports with ASIC every financial year,\(^{184}\) ASIC is in the best position to determine a Liquidity Coverage Ratio for non-prudentially regulated entities.

To prevent ‘Too Big to Fail’ situations, ASIC will also be given powers to request systemically significant funders to create living wills. These documents allow funders to fail without having an adverse impact on the legal system. For instance, they could include clauses to ensure that creditors only retrieve their funds conditional to any ongoing proceedings getting to settlement. By introducing the prospect of failure to systemically important funders, there will be a disincentive for them to take on high risk litigation.

\(^{178}\) Kalajdzic, Cashman and Longmoore, above n 4, 122, 125; Association of Litigation Funders, Code of Conduct for Litigation Funders, (at January 2014).

\(^{179}\) Corporations Regulations 2001 (Cth), as inserted by Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth) sch 1 item 1A.

\(^{180}\) Corporations Act 2001 (Cth).


\(^{182}\) See generally Basel Committee on Banking Supervision, above n 140.

\(^{183}\) Ibid 20.

\(^{184}\) Corporations Act 2001 (Cth) s 319.
Nevertheless, ASIC’s data advantage may also become a disadvantage when it comes to preventing ‘Too Big to Fail’. This is seen with the boundary problem that is inherent with the Command and Control approach to regulation. That is, in determining which litigation funders are systemically significant enough to require a living will, it is likely that the line will be drawn with financial criteria. As a result, the legal system would still be exposed to moral hazard from financially small but legally ‘Too Important to Fail’ litigation funders.

Similarly, commentators have criticised this overly financial approach on the grounds that the regime does not incorporate professional legal and ethical standards. However there are some indications to the contrary. For instance, the recent reforms have imposed conflict of interest management obligations on litigation funders. One of the situations in which conflicts of interest may arise is where the litigation funder needs to improve their cash flow and thus force their client to accept a lower settlement. In this situation, the law requires that litigation funders have ‘adequate practices’ and follow ‘certain procedures’ to manage such conflicts of interest. To comply with these obligations, funders will need to have documentation of these policies. Thus, in the above scenario, it is IMF’s policy that their instructions can be overruled by the client issuing their own instructions. Disagreements concerning settlement are managed by seeking the advice of counsel on whether the settlement is ‘reasonable in all of the circumstances’.

Furthermore, after the collapse of Storm Financial and Opes Prime during the GFC, there was a loss of public trust and confidence in Australian financial institutions. As a result, there has been a trend towards higher professional standards being placed on the finance industry. For

185 Schwarcz, above n 98, 1820; Broome, above n 125, 76.
188 Office of the Legal Services Commissioner (NSW), above n 4, 3–4; see generally Legal Profession Act 2004 (NSW); Legal Profession Act 2004 (Vic); Legal Practitioners Act 1981 (SA); Legal Profession Act 2006 (ACT); Law Society of New South Wales, Professional Conduct and Practice Rules (at 1 January 2014).
189 Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth) sch 1 item 23 s 961B(1); Corporations Regulations 2001 (Cth), as inserted by Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth) sch 1 item 6, reg 7.6.01AB(2); see generally Australian Securities Investment Commissions, Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest, RG 248, April 2013.
190 Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth) sch 1 item 6, reg 7.6.01AB.
192 Corporations Amendment Regulation (No 6) Amendment Regulation 2012 (No 1) (Cth) sch 1 item 6, reg 7.6.01AB(1), 7.6.01AB(2)(a).
193 Ibid reg 7.6.01AB(4); Australian Securities Investment Commissions, Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest, RG 248, April 2013, 12.
194 Walker, above n 191, 100.
example, the ‘best interest obligation’ has been imposed on the provision of financial advice. Similar to a lawyer’s fiduciary duty, this obligation, if imposed on litigation funders advising potential claimants, would require them to act in the best interests of the claimant. However unlike a common law fiduciary duty, the legislature outlines in detail how best interest obligations would be fulfilled. Both the conflict of interest and best interest obligations demonstrate a post-GFC financial regulatory regime that is able and willing to impose professional duties on the industry. Thus, the lack of professional or ethical standards could potentially be unfounded in the long term as this regulatory trend continues.

Regardless of which regulator administers the Command and Control regime, this model is reliant on the government to remedy externalities. However Archarya suggests this reliance may be misplaced because governments are subject to moral hazard. This is seen with the United States Government’s acquiescence to the pre-GFC growth of shadow banks which allowed for cheaper mortgages and greater access to housing. As a result, governments had an immediate political incentive not to regulate the industry, while the consequences of that decision would be borne by future governments during the GFC. Similarly, the Commonwealth Government’s reliance on shadow banks to increase access to justice creates an immediate political benefit, leaving the adverse consequences to successive governments. As a result, externalities will remain unregulated where there is only government supervision.

IX MODEL 2: BREAK AND DISSOLVE AND THE LITIGATION CONTINUATION FUND

Alternatively, a less government-centric model would involve two components. Firstly, the litigation funding business model will be broken up into a fundraising entity and a ring fenced litigation entity. This ensures issues such as liquidity risk and ‘Too Big to Fail’ are addressed. Secondly, a ‘Litigation Continuation Fund’ will be established that harnesses competition to reduce externalities. Finally, the relative merits of both models, in particular concerning legal ethics will be considered.

Under the Break and Dissolve model, liquidity risk is managed by dissolving the regulation of the fundraising entity into existing financial and corporate law, and the regulation of the litigation entity into the existing legal professional regime. Since the fundraising entity is independent of the litigation entity, it is likely that existing financial institutions, such as banks, money market funds, or investment banks, will perform that function. As a result, this article is only concerned with what happens after wholesale funding is raised by the fundraising entity.

197 Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth) sch 1 item 23 s 961B(1).
198 Ibid.
199 The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008) 39 WAR 1, 568 [4552].
200 Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth) sch 1 item 23 s 961B(2).
202 See especially ibid 1769–70.
Since institutional investors are able to provide longer term loans to the litigation funder, the funder no longer profits from maturity transformation. The litigation entity’s decreased reliance on being able to ‘roll over’ funds significantly reduce their exposure to liquidity risk. Instead, litigation entities would profit from management fees charged for their fund management role. These characteristics would essentially place litigation entities within the definition of a hedge fund.\(^{205}\)

Nevertheless, the liquidity risk facing litigation entities can still be managed through security for costs orders.\(^{206}\) While the power is discretionary,\(^{207}\) *Green v CGU*\(^{208}\) suggests that, in practice, courts tend to order security for costs to match the financial rewards the funder gains funding the litigation with the attendant risks of the litigation. In essence, this imposes a specific liquidity ratio for each litigation venture and prima facie negates the need to ring fence the funding clients.

However, there are three drawbacks to this approach. First, security for costs is ordered ‘on the application of the defendant’\(^{209}\) and would directly impact the profitability of the litigation venture for the litigation funder. This would therefore likely lead to satellite litigation,\(^{210}\) which would prolong the proceedings for all parties. Second, the determination of the quantum of security is a hypothetical exercise, subject to a high degree of uncertainty.\(^{211}\) As a result, this translates into higher financial risks taken on by the funders. Accordingly, in order to compensate for the risks taken, funders charge higher fees, which ultimately reduce access to justice. Third, security for costs would only apply to matters before the courts. Thus, the liquidity risk facing litigation funders in matters conducted out of court remain an issue for defendants.\(^{212}\)

While the security for costs regime may still operate under the Break and Dissolve model, ring fencing the litigation arm of the funder allows funders to charge more competitive fees and offers a minimum level of liquidity protection for out of court matters.

The Break and Dissolve approach would also prevent ‘Too Big to Fail’ by placing litigation funders under the office of the various state based Legal Service Commissioners.\(^{213}\) Although Legal Service Commissioners would still be dealing with the boundary problem of identifying systemically important entities, they are much better equipped than ASIC. Unlike ASIC’s approach, systemically important litigation entities could be defined by reference to the number of plaintiffs the funder has funded. As opposed to a financial benchmark, this indicator is a

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\(^{206}\) *Federal Court of Australia Act 1976* (Cth) s 56; *Uniform Civil Procedure Rules 2005* (NSW) reg 42.21; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 62; *Supreme Court Civil Rules 2006* (SA) Pt 14; *Civil Procedures Rules 2006* (ACT) Ch 2 Pt 2.17 Div 2.17.8.

\(^{207}\) *Federal Court of Australia Act 1976* (Cth) s 56(1)*Uniform Civil Procedure Rules 2005* (NSW) reg 42.21(1); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) reg 62.02(1); *Supreme Court Civil Rules 2006* (SA) s 194(1); *Civil Procedures Rules 2006* (ACT) s 1901.

\(^{208}\) [2008] NSWCA 148 (20 June 2008) [51].

\(^{209}\) *Federal Court of Australia Act 1976* (Cth) s 56(1); *Uniform Civil Procedure Rules 2005* (NSW) reg 42.21(1); *Supreme Court (General Civil Procedure) Rules 2002* (Vic) reg 62.02(1).

\(^{210}\) Legg et al, above n 2, 234.

\(^{211}\) Ibid.

\(^{212}\) *Fostif* (2006) 229 CLR 386, 435 [93].

superior way to navigate the boundary problem as it captures all potentially at-risk funding entities, regardless of financial size. Furthermore, ring fencing the litigation entity ensures that client proceedings are protected from the financial risks faced by the funding entity. By ensuring that discontinuance is avoided, ring fencing minimises the disruption to the courts and the drain on legal resources in times of financial stress. Since this reduces the severity of the funder’s collapse on their clients and the legal system, funders will be allowed to fail and will therefore make more prudent investments.

The second component of this model is the ‘Litigation Continuation Fund’, which is a market-based solution to reduce externalities. The fund will provide emergency finance to any ongoing proceedings at the time a funder collapses. The fund is to be financed by an annual tax on litigation investment entities. While the idea is not new, the ‘Litigation Continuation Fund’ differs from the failed Justice Fund proposal in 2008 in two respects. Firstly, the Justice Fund was an attempt by the Victorian government to address externalities by stepping in and replacing the existing ‘no win no fee’ law firms and private litigation funders. Not surprisingly, this was met with resistance. For this reason, the ‘Litigation Continuation Fund’ does not seek to replace commercial litigation funders. Instead, the fund complements commercial activities by providing emergency cash in the event of a commercial funder collapse.

The second difference is that the Justice Fund’s only purpose was litigation funding, which placed a focus on it being the ‘likely province of endless bureaucracy’. By contrast, the ‘Litigation Continuation Fund’ has a much more powerful purpose than just the provision of funds. Since the fund is financed by the litigation funding industry, industry participants will become de-facto regulators of each other, ensuring that no funder will abuse the existence of the fund by funding risky cases or otherwise doing harm to the courts. Under this model, the interests of the non-consenting third parties become aligned with the commercial interests of the funders. Unlike the Command and Control model, this allows externalities to be reduced independently of morally hazardous government policy.

Furthermore, the Break and Dissolve model acknowledges the value of both ASIC and the legal professional regime by allowing the disparate entities to be dissolved into the existing regimes. A similar but more general approach has been outlined by the Productivity Commission. In particular, the legal professional rules regime includes the Legal Profession Act, the common

214 Uniform Civil Procedure Rules 2005 (NSW) reg 12.3; Supreme Court (General Civil Procedure) Rules 2002 (Vic) reg 25.06; Supreme Court Civil Rules 2006 (SA) reg 108; Court Procedures Rules 2006 (ACT) reg 1167.
215 Schwarcz, above n 98, 1814.
218 Ibid 621–2.
219 Ibid 622.
220 Schwarcz, above n 98, 1814.
221 Productivity Commission, above n 4, 546.
222 Legal Profession Act 2004 (NSW) see also Legal Profession Act 2004 (Vic); Legal Practitioners Act 1981 (SA); Legal Profession Act 2006 (ACT)
law duties imposed on the profession,223 the Solicitors Rules,224 and the Barristers Rules.225 Under this model, litigation entities will be held by Legal Services Commissioners and the courts to the same standards and duties as those imposed on lawyers. Importantly, litigation entities will owe a paramount duty to the court,226 a duty unique to lawyers, which is out of scope under the current ASIC regime.227

As held in Brookfield Multiplex, clients engage litigation funders for several reasons – from getting an ability to access justice to managing the financial risks of litigation. As a result, the regulation of the industry has required a balance between achieving those two ends. Nevertheless, just because both ends are achieved through the funding contract does not imply they are of equal importance or that both are deserving of equal levels of regulation. Not surprisingly, the primary concern of the literature is on granting access to justice and preserving the integrity of the legal system as opposed to allowing companies to hedge their litigation risk.228 As a result, the Break and Dissolve model with a ‘Litigation Continuation Fund’ would be the preferred model because of its use of the legal professional rules regime.

X Conclusion

The ‘greed is good’ mantra of the financial world in the 1980s has well and truly died down after the GFC. Valuable lessons can be learnt from the experiences of the shadow banks and the greater financial system after the GFC, which can be applied to the regulation of litigation funding.

By moving away from managed investment schemes and setting the legal definition of litigation funders as third party commercial litigation funders, this article has implicitly drawn out the distinctions between the financial system and the legal system. Furthermore, the current regulations suggest litigation funders are shadow banks, sitting at the crux between these diverse systems. As a result, a myriad of new issues have been uncovered by taking a shadow banking perspective to litigation funding regulation. Issues such as liquidity risk, the government’s role in relation to externalities, and the ‘Too Big to Fail’ mentality pose unique challenges for the regulators of litigation funding. Ironically, the exploration of regulatory approaches has led to a Break and Dissolve model that acknowledges the strengths inherent in the existing financial and

224 Law Society of New South Wales, Professional Conduct and Practice Rules (at 1 January 2014); New South Wales Bar; Law Institute of Victoria, Professional Conduct and Practice Rules 2005 (at 20 June 2005); Law Society of South Australia, Rules of Profession Conduct & Practice (at 1 March 2003); Law Society of the Australian Capital Territory, Legal Profession (Solicitors) Rules 2007 (at 1 October 2007).
225 New South Wales Barristers’ Rules (at 6 January 2014); Victorian Bar, The Victorian Bar Incorporated Practice Rules (at 22 September 2009); South Australian Bar Association, Barrister’s Conduct Rules (at 14 November 2013); Australian Capital Territory Bar Association, Legal Profession (Barristers) Rules 2014 (at 20 August 2014).
226 LexisNexis, Riley Solicitor’s Manual, (at March 2014) Relationship Between Lawyer and the Administration of Justice, ‘20 Duty to the Court – Introduction’ [20 005.5].
227 Australian Securities and Investments Commission Act 2001 (Cth) s 1.
228 See generally Legg et al, above n 2; Kalajdzic, Cashman and Longmoore, above n 4; Productivity Commission, above n 4; Morabito, above n 4; Office of the Legal Services Commissioner (NSW), above n 4.
legal regulatory regimes. As a result, there is no need for an independent regime, especially for litigation funders as with the Command and Control model. Regardless of which approach is taken, the analysis confirms that in both cases litigation funding requires greater financial regulation.

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VICTIM PARTICIPATION AND MINORITIES IN INTERNATIONALISED CRIMINAL TRIALS: ETHNIC VIETNAMESE CIVIL PARTIES AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

LYMA NGUYEN* AND CHRISTOPH SPERFELDT**

In 2010, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) charged four senior leaders of the former Khmer Rouge regime with genocide against two minority groups, the Cham and the ethnic Vietnamese. This article examines the role of minority victims in a genocide trial, using the specific case study of a group of ethnic Vietnamese survivors who joined as civil parties before the hybrid criminal proceedings at the ECCC. The article highlights the challenges that arise in the process of including minority narratives within the broader context of a mass atrocity trial, by describing the participation process civil parties have undertaken to date. Importantly, the case of the ethnic Vietnamese survivors shows how victim participation in a criminal trial can shed light on larger, contemporary human rights issues affecting a minority group. In the present case, a number of ethnic Vietnamese civil parties have sought access to, or recognition of, Cambodian nationality, through a request for ‘collective and moral reparations’ under the ECCC’s Internal Rules.

I BACKGROUND: THE KHMER ROUGE TRIALS AND VICTIM PARTICIPATION

The twentieth century has seen many violent conflicts and mass atrocities in Cambodia, with the worst occurring between 1975 and 1979 during the period of Democratic Kampuchea, often referred to as the era of the Khmer Rouge regime. After decades of stalemate and many years of protracted negotiations, in 2003 the United Nations and the Royal Government of Cambodia concluded an agreement to establish the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal.¹ The court’s mandate is to bring to justice ‘senior leaders’ and those most responsible for the crimes committed during the reign of the Khmer Rouge regime, 1975–79. The ECCC is a mixed hybrid court of national and international composition,² applying both international and Cambodian domestic law.³ Five individuals were

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* LLB (UQ), BA (UQ), LLB (UBC), GDLP, LLM (ANU) is a Barrister at William Forster Chambers in the Northern Territory.
** MA (FSU Jena) is a PhD scholar at the Centre for International Governance and Justice (CIGJ) at the Australian National University.
² This article uses the terms internationalised criminal courts and hybrid courts interchangeably, both referring to mixed courts of national and international composition.
initially charged in two proceedings before the ECCC, referred to as ‘Case 001’ and ‘Case 002’. Additional prosecutions, referred to as Cases 003 and 004, are considered but have not yet proceeded beyond the preliminary investigative stage. Despite numerous problems and criticism throughout the ECCC’s operation, the pronouncement in July 2010 of the first verdict against Kaing Guek Eav, the former head of the Khmer Rouge interrogation centre S-21, was for the Cambodian public a visible milestone for the delivery of some justice.

The ECCC is distinct from other international or internationalised criminal courts because of its extensive victim participation scheme. The ECCC Internal Rules in 2007 introduced victim participation provisions based on domestic procedural law enabling survivors to file a complaint or an application to become a witness with the Co-Prosecutors, or to apply to the Co-Investigating Judges to become a civil party, with the prospect of claiming ‘moral and collective’ reparations. The possibility for victims to participate in the criminal trials as parties civiles or civil parties, where they can play an active role with extensive procedural rights was, at the time, an unprecedented mechanism in international criminal justice. These participation rights confer upon the survivors — themselves key beneficiaries of the ECCC process — direct access to justice and the opportunity to present their personal experiences, views and concerns within a criminal litigation process. Civil parties arguably have enjoyed — at least initially and prior to multiple amendments of the Internal Rules — more participatory rights than available to victims at the International Criminal Court (ICC), including the right to request investigations. However, adapting the traditional civil party mechanism designed to deal with national crimes to align with the purposes of internationalised proceedings dealing with mass crimes has been a gradual learning curve for the ECCC.

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4 Case 002 currently proceeds only against two defendants, Nuon Chea and Khieu Samphan, after Ieng Thirith was found by the Trial Chamber not to be fit to stand trial, and Ieng Sary died on 14 March 2013.
5 Refer to the various reports published by the Open Society Justice Initiative (OSJI) from 2006 to 2013.
8 Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Ver 4) (adopted 11 September 2009). Internal Rule 23 states that ‘the purpose of Civil Party action before the ECCC is to (a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) seek collective and moral reparations, as provided in Rule 23quinquies’.
9 More recently, the Extraordinary African Chambers, established to try former Chadian ruler Hissène Habré, introduced civil party participation, as existent under the Senegalese criminal procedure code. See art 14 of the Statut des Chambres Africaines Extraordinaires, cited in Human Rights Watch, Statut des Chambres Africaines Extraordinaires (30 January 2013) <http://www.hrw.org/node/113271>.
In the ECCC’s second and largest trial (Case 002), the Courts’ Victims Support Section (VSS) received more than 8,200 victim application forms, out of which almost 4,000 victims sought civil party status. Following admissibility appeals before the Pre-Trial Chamber, the vast majority of applicants were admitted to join the proceedings in Case 002 — making this case one of the largest cases of victim participation before modern-day internationalised criminal courts.  

Despite the broad appeal of the ECCC’s civil party scheme locally, victim participation in internationalised criminal proceedings is generally still a novel experience. A historical perspective reveals what Susanne Karstedt calls ‘a road from absence to presence, and from invisibility to the visibility of victims’.  

Since the adoption of the ICC Rome Statute, a number of international criminal courts have bolstered the position of victims in their proceedings, giving more weight to restorative justice principles in their processes. These first experiences have not come without challenges, and a vigorous debate rages among academics and practitioners about the purpose and feasibility of victim participation in international criminal trials. While these debates are akin to longstanding debates about the role of victims in domestic criminal proceedings, they also have distinct features.

At one end of the spectrum are scholars and practitioners who — after the first decade of victim participation in action — are mainly concerned that the inclusion of victim redress into an international criminal trial threatens a careful balance of long-established legal principles, particularly those relating to the fair trial rights of accused persons. Further, there is concern that the still young international criminal justice institutions are overburdened with unreasonable expectations. The arguments in this group of literature are mostly pragmatic, and focus

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11 The number of civil parties as of November 2011 was 3,866. See also ECCC, ‘Pre-Trial Chamber Overturns Previous Rejection of 98 Percent of Appealing Civil Party Applicants in Case 002’ (Press Release, 24 June 2011).
17 See, eg, Christine Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clou  

primarily on procedure and cost-effectiveness, and thus remain within the self-contained institutional framework of the international criminal justice system.

At the other end of the spectrum, numerous scholars and activists advocate for a victim-oriented approach to international criminal justice.\(^{18}\) Ralph Henham and Mark Findlay are at the forefront of those arguing for positioning victims in a place of priority in international criminal justice.\(^{19}\) They oppose those advocating for a more minimalist approach, because ‘this argument fails to understand … that the eventual legitimacy of international criminal justice rests on much more than show trials’.\(^{20}\) Taking into consideration factors such as legitimacy, relevance and the overall accountability of the international criminal justice system, these authors argue for transformation of the criminal trial process to recognise victims of mass atrocities as the ‘rightful’ constituency for international criminal justice, regarding the criminal trial itself as the locus for giving effect to victims’ demands.

There are many more nuanced voices within the scholarly literature that cannot be readily consigned to any of these two groups. However, these arguments demonstrate the range of opinions that have shaped this debate thus far. Importantly, most of these contributions are normative in nature, and it is therefore important that they are accompanied by an analysis of the actual experiences of victim participation to date. The first judgments from the ICC and the ECCC provide an opportune time for reflection,\(^ {21}\) including inquiring into the distinct experiences of different victim and survivor groups during their participation process.

Interestingly, there has been very little research into the experience of (ethnic) minority groups.\(^ {22}\) Victim participation in internationalised criminal tribunals can provide a platform for minorities to give voice to, and present, the specificity of the harm they suffered as a result of mass atrocities. Nowhere is the specific nature of the crimes and the resulting harm more evident than in the case of deliberate persecution of minority groups, more so when it amounts to genocide. Victim participation schemes can provide an avenue for minorities to highlight the full extent of the crimes committed against their group and, at the same time, complement a society’s mainstream narrative of mass historic crimes.

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\(^{20}\) Henham and Findlay, above n 19, 7.


At the ECCC, victim participation has provided an avenue for minorities to present the distinct nature of the harm they suffered as a result of crimes committed by the Khmer Rouge regime. Three groups have received particular attention: the Cham, the Khmer Krom, and the ethnic Vietnamese. While the ECCC’s Closing Order has sought persecution and genocide charges in the case of the Cham and the Vietnamese, the Khmer Krom’s plight has only been addressed more recently in the Court’s investigations in Case 004. Much of this can also be attributed to active victim participation of Khmer Krom civil parties.23

This article examines the role of minority victims in a genocide trial, using the specific case study of a group of ethnic Vietnamese survivors who joined as civil parties before the proceedings at the ECCC. The article highlights the various challenges that arise in the process of including minority narratives within the broader context of a mass atrocity trial, by describing the participation process civil parties have undertaken to date. Finally, the case of the ethnic Vietnamese survivors highlights how victim participation in a criminal trial can shed light on larger human rights issues affecting a minority group. This is demonstrated through an analysis of these civil parties’ collective reparations requests.

II  THE CASE STUDY: RESEARCH AND METHODOLOGY

This article builds upon over five years of outreach and legal casework with ethnic Vietnamese civil parties, conducted between 2008 and 2013.24 Most of these survivors reside on floating villages along the Tonle Sap River and the Tonle Sap Lake in Kampong Chhnang province, Cambodia. Altogether there have been 43 ethnic Vietnamese civil parties admitted by the ECCC, jointly represented by national and international co-counsel.25

Ethnic Vietnamese groups have lived in Cambodia throughout contemporary history. Nowadays, they are one of, if not the largest, minority groups in Cambodia. Despite this, the group remains understudied and there has been little available public information about this minority.26 In 2012, following the publication of the report ‘A Boat Without Anchors’, to be further discussed later,

23 The Khmer Krom provide an interesting case study on how a group can articulate its collective suffering through victim participation, and to some degree, influence the investigations. For instance, crimes against the Khmer Krom now feature much more prominently in the investigations of Case 004. See Mahdev Mohan, ‘Re-Constituting the “Un-Person”: The Khmer Krom and the Khmer Rouge Tribunal’ (2008) 12 Singapore Yearbook of International Law 43.

24 For more information, refer to the website: www.civilparties.org.

25 This number of civil parties is now lower as some civil parties have passed away. National counsel for this victim group has included Mr Ny Chandy (2009-2010) and Mr Sam Sokong (2011-2014), from Legal Aid of Cambodia, and international counsel has been Australian lawyer, Ms Lyma Nguyen.

research interest in ethnic Vietnamese in Cambodia increased.27 This article aims to contribute to existing research by highlighting the specific challenges faced by this minority civil party group, against the backdrop of the impending trial concerning the genocide of the group in Case 002/02 at the ECCC.

Over the period 2008–12, a number of inquiries arose from participation at the ECCC of ethnic Vietnamese minority populations. (1) The first was a 2008 baseline survey involving 150 ethnic Vietnamese adults throughout three Cambodian provinces, conducted by the local NGO Khmer Kampuchea Krom Human Rights Association. This brought about an understanding of the composition and attitudes of the minority group, in order to prepare focused ECCC-related outreach activities.28 (2) In 2010, more in-depth follow-on interviews took place with approximately 25 ethnic Vietnamese individuals, providing further information about respondents’ personal history, violence suffered by the community under different Cambodian administrations and the myriad of socio-political problems they face.29 (3) The findings of this research resulted, in 2012, in the initiation of a research project, in collaboration with the Jesuit Refugee Service (JRS) Cambodia, to examine the legal status of eight individuals, the majority of whom belong to the civil party group. This project led to the publication of a report, ‘A Boat Without Anchors’, which provided an assessment of the claims of the persons interviewed, and analysis of the relevant laws.30

As these research components were limited in the scope, geographical coverage and the representation of only a small number of persons affected, their findings do not allow for making broader generalisations about the situation of all ethnic Vietnamese subgroups across Cambodia. However, the few secondary sources available on this topic suggest that the problems experienced by the respondents are a widespread phenomenon, not only limited to Kampong Chhnang province.31


29 Lyma Nguyen, Jessica Pham, and Christoph Sperfeldt, ‘Interviews with Ethnic Vietnamese Persons (names of interviewees suppressed; Kampong Chhnang and Pursat Provinces, Cambodia, 19-22 July 2010), Transcripts No. 1-25. All interviews were conducted in the Vietnamese language and were later translated into English.


III THE CONTEXT: BRIEF HISTORY OF THE VIETNAMESE IN CAMBODIA

The relationship between mainstream Khmer society and the Vietnamese minority has been largely influenced by different interpretations of the historical relationship between the two groups. During the 18th and 19th centuries, when boundaries were fluid and largely undefined, numerous Vietnamese tradesmen and fishermen moved up the Mekong River. 32 New patterns of Vietnamese migration emerged during the French colonisation of Indochina (1863-1953), when the French staffed much of their colonial administration over the protectorate with Vietnamese civil servants and actively encouraged a large Vietnamese labour force to work on their plantations. The colonial census of 1921 puts the number of ethnic Vietnamese in the protectorate at almost 6 percent of the population. 33 Many of the fishing villages around the Tonle Sap Lake date back to that time. 34

After Cambodia gained independence from France in 1953, the Vietnamese found themselves in a new state, under the regime of Prince Sihanouk (1953–70). 35 The regime introduced new policies and laws attempting to regulate minority and immigrant communities in Cambodia. Discriminatory measures seemed to have primarily targeted the ethnic Chinese and Vietnamese. Measures taken against the Vietnamese can also be seen as being connected to the foreign policy context of that time, which was characterised by rising tensions with the two Vietnamese states and the Vietnamese war increasingly spilling into Cambodia. The historical development of the size of the Vietnamese minority community at that time is difficult to determine. The official 1962 census identified 217,774 Vietnamese ‘nationals’ within a total population of more than 5.7 million (almost 4 percent), while Poole estimated that 394,000 ‘ethnic’ Vietnamese lived then in the country. 36

Following the 1970 coup against Sihanouk and the establishment of the Khmer Republic (1970–75), political propaganda by the Lon Nol regime turned many of the negative sentiments towards the ethnic Vietnamese minority into violent persecution, mainly in Phnom Penh and other urban areas. The subsequent attacks and massacres resulted in the killing of thousands of ethnic Vietnamese. 37 In addition, according to observers and official statistics from the Republic of Vietnam, and as cited by Pouvatchy, some 200,000 to 250,000 Vietnamese fled or were forcibly repatriated to South Vietnam in 1970. 38

After further escalation of Cambodia’s civil war, the Khmer Rouge captured Phnom Penh in April 1975. Under the Democratic Kampuchea (1975–79) the situation for the remaining

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34 Derks, above n 26, 536.
37 Chou Meng Tarr reports at least 4000 dead. Meng Tarr, above n 26, 33–47.
members of the Vietnamese minority drastically deteriorated. Shortly after taking power, the new regime implemented policy measures with an aim to expel and forcefully deport the Vietnamese minority from Cambodia. After the large-scale exodus during the Lon Nol regime, most estimates put the number of ethnic Vietnamese in Cambodia at around 200,000 in the mid-1970s.\(^{39}\) It is estimated that around 150,000 to 170,000 were forced out of the country between April and October 1975.\(^{40}\) A more recent demographic expert report commissioned by the ECCC concluded that 100 percent of the remaining ethnic Vietnamese were systematically killed during the Khmer Rouge regime.\(^{41}\) By the end of 1978, the Vietnamese minority had completely disappeared from Cambodia.

Soon after the fall of Phnom Penh in January 1979, the People’s Republic of Kampuchea (PRK, 1979–89) came into existence. The new regime relied on assistance from Vietnamese officials and military. In the early 1980s the flow of immigration reversed, and a new phase of immigration from Vietnam to Cambodia began. This soon became a major politicised subject in the discourse of Cambodian opposition groups and for those states concerned about growing Vietnamese influence in Cambodia in the context of the Cold War. Estimates of the number of immigrants therefore vary greatly.\(^{42}\) While the existing literature does not provide a reliable assessment of these claims, more credible estimates show that there were more ethnic Vietnamese in Cambodia than the authorities acknowledged, but fewer than the opposition groups claimed. Median estimates put the overall number at around a similar level as the Vietnamese population in Cambodia at the end of the 1960s.\(^{43}\) Among those ‘immigrants’, Heuveline argues, ‘a majority … were probably return migrants’.\(^{44}\) Gottesman summarised the situation during the PRK period as follows: ‘[a] s a recognised minority in Cambodia, the ethnic Vietnamese enjoyed a certain civic equality … The question of whether ethnic Vietnamese could become citizens was, however, never resolved’.\(^{45}\)

The presence of ethnic Vietnamese in Cambodia remained a contentious issue up to the Paris Peace Conference. The 1991 Paris Peace Agreement established the United Nations Transitional Authority in Cambodia (UNTAC) (1992–93), which carried out a large peacekeeping operation in order to organise free elections. The influx of donor funding and foreigners created new opportunities, and it is believed that this led to more recent immigration, predominantly to the

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44 Heuveline, above n 43, 64. Likewise, Chou Meng Tarr writes ‘the reality is that many of these Vietnamese “settlers” were either Vietnamese who had lived for several generations in Cambodia prior to the 1970s, or were their descendants’. Meng Tarr, above n 26, 40.
urban centres of Cambodia. Opposition groups stepped up their rhetoric against Vietnamese civilians, and the Khmer Rouge instigated a campaign of political violence against these civilians. In its final report, UNTAC’s Human Rights Component documented the killing of 116 ethnic Vietnamese persons between July 1992 and August 1993. Prior to its departure, UNTAC organised country-wide elections. The peace agreements had stipulated that ‘every person who has reached the age of eighteen …, and who was either born in Cambodia or is the child of a person born in Cambodia, will be eligible to vote in the election’. Little is known about how many ethnic Vietnamese were registered for these elections, but field research indicates that a considerable number, amongst the long-term residents, were never registered.

Following the 1998 elections, violent attacks in Vietnamese communities decreased. Nevertheless, the legal status and living conditions of many ethnic Vietnamese in Cambodia remained insecure. Sporadic anti-Vietnamese rhetoric continues to erupt during the times of elections, as was again observed during the 2013 national elections. There is little public information available as to the number and composition of today’s ethnic Vietnamese population in the Kingdom of Cambodia. Most contemporary estimates place the Vietnamese population at around five to six percent of the country’s population of around 15 million. This historical context is significant to the contemporary treatment of the Vietnamese minority in Cambodia, including the perception of Vietnamese civil parties before the ECCC.

### IV THE CIVIL PARTY GROUP: CHARACTERISTICS AND COLLECTIVE NARRATIVE

Based on the information compiled through the authors’ research, this section provides a brief and much generalised account of the background and history of the minority civil party group. Whilst individual stories necessarily varied in detail, the congruence in the collective narrative was significant. All survivors were above 40 years old, with an average age of 50 to 60 years. The vast majority of people living in the civil parties’ communities adhere to Buddhism. Most speak both Vietnamese and Khmer and few speak Vietnamese only. All civil parties resided on ‘floating villages’, and approximately one third of the respondents in the 2008 research claimed that their occupation was ‘fishing’.

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46 Minorities Rights Group International, above n 32, 23.
49 An interview with a former officer of the UNTAC Human Rights Component confirmed that the Mission made little effort to assess whether or not individuals among the ethnic Vietnamese minority were eligible to vote under the electoral law. Interview with former UNTAC official, 15 April 2014.
50 See Chhay Channyda, Kevin Ponniah and David Boyle, ‘Outcasts in Their Own Country’, Phnom Penh Post (Phnom Penh), 13 August 2013.
51 See also Kevin Ponniah, ‘Cambodia’s Vietnamese Community Finds Voting is not Necessarily a Right’, The Guardian, 4 September 2013.
Although all civil party respondents indicated that they were born in Cambodia, some were not able to recall their exact date of birth. The majority of interviewees in the 2008 and 2010 research projects claimed that their parents were also born in Cambodia. Taking account of the average age of the respondents, it is apparent that these ethnic Vietnamese communities — although not necessarily of the current composition — existed at the time of the French protectorate, with many of the civil parties born on Cambodian territory, either before or shortly after the country’s independence in 1953. This suggests that this group belongs to one of the longest existing ethnic Vietnamese communities in Cambodia, as distinct from more recent Vietnamese immigrants.

All survivors experienced similar stories of discrimination and violence before, during, and following the Khmer Rouge period. Respondents recounted that during the Sihanouk and Lon Nol regimes, it was difficult to engage in business or to earn a proper living, mainly because of the imposition of various government fees they faced. Whatever they wanted to accuse us of, they could do (even if it was not true),’ one respondent said. Few survivors reported any violent or armed attacks during the Lon Nol regime, confirming assumptions in the secondary literature that it was largely ethnic Vietnamese people residing in urban areas who were targeted by violence and the exodus during that time. None of the survivors reported to have left the country.

The consensus amongst all survivors was that the situation they experienced under the Khmer Rouge regime was considerably worse. At around the time of the fall of Phnom Penh in April 1975, most interviewees recounted that they were first separated from the Khmer population and then forcibly relocated to a temporary relocation site east of the Tonle Sap River. Many survivors reported acts of violence and killing, and witnessing family members being killed at this site. Following several months of being subjected to extreme deprivations, including starvation, forced labour, enslavement, ill-treatment and summary executions, all members of the minority group were deported en masse, down the Tonle Sap River, through several fleets, to Vietnam. These deportations occurred between July and September 1975. Survivors recounted that they had to leave all their belongings behind, resulting in most of them losing important identification documents during the forced deportations. None of the Vietnamese who stayed behind were known to have survived the regime.

After having resided as refugees in Vietnam for a number of years, most survivors returned to Cambodia between 1980 and 1983. Generally, the returnees re-established their ‘floating’ communities around the same location or in close proximity to their previous location, along the

53 For more information, see Chhim, above n 27.
56 Derks confirms these relocations through her own research. See Derks, above n 26.
57 Pham, above n 54, 8–9.
Tonle Sap River and Lake. In After the Khmer Rouge, Evan Gottesman wrote about the re-emergence of these communities:

Prior to 1975, tens of thousands of Vietnamese had lived on Cambodia’s riverbanks and lakeshores, their lives organised around traditional fishing practices. [...] According to Vietnamese advisors, all but 20 percent of the ethnic Vietnamese fishermen died during the 1970s; almost all the rest fled to Vietnam. The reemergence of Vietnamese fishing villages – now called Fishing Solidarity Groups – was therefore presented to the Cambodians as a partial correction of earlier brutality. 58

Survivors recounted a rapid deterioration of the security situation in their communities following the withdrawal of the Vietnamese military from Cambodia and the arrival of the UN mission, particularly around the time of the UNTAC-organised elections. Some described armed attacks on their villages, allegedly conducted by the Khmer Rouge guerillas. One survivor recounted, ‘[t]hey came to shoot. They randomly shot into the neighbourhood. [Many people] were injured. [They] died. Many people died in their homes.’ 59 Sporadic violent attacks on these communities continued until 1997, when one of the clients lost her daughter through an armed attack by Khmer Rouge guerrilla. Nowadays, members of the civil party group live a peaceful, albeit marginalised life on the floating villages, mostly centred around fishing. An array of economic, social and political disadvantages makes it difficult for these communities to access development opportunities, including basic education and health care. 60

V  ETHNIC VIETNAMESE CIVIL PARTIES AT THE ECCC

This part highlights some selected key issues and challenges that have arisen during the participation process of ethnic Vietnamese civil parties before the ECCC.

A  The Challenge of Prosecutorial Selectivity

Shortly after the ECCC’s establishment, the Office of the Co-Prosecutors (OCP) began their preliminary investigations. During this process, the OCP was able to rely on the substantial document archives kept since the mid-1990s by a Cambodian NGO, the Documentation Center of Cambodia (DC-Cam). 61 The Co-Prosecutors utilised the materials held by DC-Cam, which eventually formed a large part of the evidence for the allegations concerning crimes against the Vietnamese. The Co-Prosecutor’s Introductory Submission focused on the treatment of ethnic Vietnamese in the former Eastern Zone, predominantly in Prey Veng province, and on crimes committed against the Vietnamese during incursions into Vietnam by Khmer Rouge armed forces. DC-Cam researchers had previously conducted extensive research and interviews in

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58 Gottesman, above n 43, 155.
59 Pham, above n 54, 10–11.
60 See, eg, Ang Chanrith, above n 27; See also H Forbes, ‘We Are One. A Report on the Participation of Ethnic Vietnamese Families in the Area Development Programs of World Vision Cambodia’ (Report, Prepared for the Peacebuilding Project of World Vision Cambodia, August 2005).
61 DC-Cam has provided the ECCC with databases containing over 50,000 documents, 400,000 pages of document copies, 19,000 pages of interviews, and other materials in response to requests <http://www.d.dccam.org/Projects/Tribunal_Response_Team/Tribunal_response.htm>.
former Eastern Zone areas, focusing in particular on Pochen Dam village, Prey Veng province.\(^6^2\)

A number of these interviewees were, to some extent, of Vietnamese descent and were able to provide testimony about the crimes committed against the Vietnamese, or those perceived as Vietnamese in these areas, including against family members and relatives. However, most of these respondents identify themselves as being Khmer.\(^6^3\) This research confirms how effective the Khmer Rouge had been with their policies of eliminating the ethnic Vietnamese populations from these areas.

More than one year after the ECCC judges had adopted Internal Rules allowing for civil party participation, no ethnic Vietnamese survivor had applied to participate, and there was a real risk that this minority group — the crimes against whom the Co-Prosecutors had qualified as genocide — would not be represented among the victim composition before the ECCC. It was against this background that the Khmer Kampuchea Krom Human Rights Association (KKKHRA) began, from mid-2008, to carry out ECCC-related outreach in Khmer Krom and ethnic Vietnamese communities. With the support of KKKHRA outreach staff, ethnic Vietnamese survivors in these areas were able to submit complaints and civil party applications to the ECCC. By 2009, a sizeable group of ethnic Vietnamese survivors from Kampong Chhnang province had applied for civil party status. While these applicants considered themselves to be ethnically Vietnamese, they considered Cambodia to be their home, having lived for generations in Cambodia in areas around the Tonle Sap Lake.

It is important to note that during the investigative stage, survivors and the wider public did not know the scope of investigations undertaken by the OCP and subsequently by the Co-Investigating Judges (CIJs). However, lawyers representing these applicants were aware that the CIJs were predominantly investigating crimes against the Vietnamese in the former Khmer Rouge Eastern Zone, thereby excluding pertinent facts provided by the majority of ethnic Vietnamese applicants, having suffered harm in different geographical areas. As a result, in December 2009, civil party lawyers filed an extensive request to the CIJs for further investigations covering crimes against the Vietnamese in Kampong Chhnang province.\(^6^4\) The lawyers argued that the investigations set out in the Introductory Submission did not capture the extent of the crimes committed against this minority group in Cambodia. They found further that the policy of genocide and persecution of the ethnic Vietnamese was not limited to the Eastern Zone (Prey Veng Province), but extended to the Western Zone (Kampong Chhnang Province) where the ethnic Vietnamese were, \textit{inter alia}, forcibly relocated, prevented from reproducing, forced into mixed marriages, enslaved and bartered for rice and salt, and executed as part of a similar pattern of conduct

\(^{62}\) See also Elizabeth Do, \textit{Treatment of the Vietnamese Minority in Democratic Kampuchea from a Comparative Perspective} (Senior Honors Thesis, Political Science Department, Stanford University, 2010) <http://www.d.dccam.org/Tribunal/Analysis/pdf/Treatment_of_the_Vietnamese_Minority_In_Democratic_Kampuchea_From_a_Comparative_Perspective.pdf>.

\(^{63}\) See Documentation Center of Cambodia, \textit{DC-Cam Holdings of Minority Groups: Interviews about Vietnamese} (18 August 2006) <http://www.d.dccam.org/Publication/Research/Interviews/Interviews%20about%20Vietnamese.pdf>. The list mentions 55 interviews being conducted by DC-Cam staff, with 39 individuals listed in the corresponding table, mostly from Pochen Dam or neighboring villages.

and in a concerted effort to physically eliminate all the Vietnamese. It is critically important to our clients, the historical/legal record, and the ECCC’s legacy that the Co-Investigating Judges acknowledge that these crimes occurred, investigate the animus, nature and scope of these crimes, and include them in the charges to be preferred against the Charged Persons.65

The civil parties’ submission provided a detailed account of the crimes suffered by the applicants and the modalities of their forced transfer from Cambodia to Vietnam in 1975. The submission provided complementary evidence about the build-up of the genocidal dynamics against ethnic Vietnamese people in Cambodia – beginning with the deportation of the majority of the Vietnamese minority from Cambodian territory in 1975, and escalating in 1977–78 into the killing and elimination of almost all of the remaining Vietnamese in Cambodia. The submission argued that the deliberate infliction of certain conditions of life calculated to bring about the destruction of the group, and imposing measures to prevent birth within the group, were acts amounting to genocide, and that the forced deportation, persecution and enslavement of members of the group amounted to crimes against humanity.66 The Co-Prosecutors recognised the value of this evidence by ultimately including it, in 2010, into their Final Submission for Case 002.67

In January 2010, however, the CIJs rejected the civil party lawyers’ request for further investigations on the basis that they had not been seized of the requested facts through the Co-Prosecutors’ Introductory Submission. Still, the CIJs issued a Closing Order for Case 002 in September 2010 that charged Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea, the four Senior Leaders in the ECCC’s largest case file at that time, with genocide against the Vietnamese, deportation of the Vietnamese as a crime against humanity and other crimes specific to the treatment of the Vietnamese.68

The Co-Investigating Judges, in combination with rejecting the civil party lawyers’ request for further investigations, also issued the first decision on civil party admissibility in Case 002. By declaring the facts of the request to be outside the scope of judicial investigations, and declining to expand the investigations, the CIJs consequently found that there was no basis for the applicants’ civil claim, because the harm suffered by these applicants was not linked with the geographical scope of judicial investigations. Hence, the Judges declared the civil party applications of the first ethnic Vietnamese applicants to be inadmissible.69 This first admissibility decision in Case 002 was made by the CIJs even before dealing with the admissibility of the broader set of civil party applications and establishing corresponding criteria and guidelines for

65  Ibid [8].
66  Ibid.
69  16 Vietnamese civil party applicants were affected by this decision. See Prosecutor v Nuon (Order on the Admissibility of Civil Party Applications Related to Request) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigation Judges, Case No 002/19-09-2007-ECCC-OCIJ, 13 January 2010).
civil party admissibility. The decision was appealed by civil party lawyers to the Pre-Trial Chamber, which initially upheld the decision of the CIJs.\textsuperscript{70}

Following this logic, the CIJs also declared all remaining Vietnamese civil party applicants from Kampong Chhnang inadmissible when, in September 2010, they published their Closing Order in Case 002. However, in June 2011, following mass appeals against these civil party admissibility decisions by the CIJ,\textsuperscript{71} the ECCC Pre-Trial Chamber not only overruled the CIJ’s decision, but also reconsidered its own previous decision and eventually admitted all ethnic Vietnamese civil party applicants from Kampong Chhnang province into the proceedings in Case 002, granting all survivors civil party status.\textsuperscript{72} A total of 43 ethnic Vietnamese survivors from Kampong Chhnang province were thus able to join the proceedings as civil parties.

The case of this minority survivor group not only highlights the considerable uncertainties with which survivors were confronted during their participation process, but also demonstrates how the reality of prosecutorial selectivity — a necessary feature of mass crimes investigations — could be at odds with the objective of safeguarding representativeness within and among the victim compositions participating in the judicial proceedings of an internationalised criminal court. While victims of mass crimes and victims’ advocates usually strive for the most comprehensive list of charges and inclusion of victim groups, usually for the purposes of establishing historical records for future generations, prosecutors at these tribunals need to be mindful of the available resources, the age of the accused and many other factors when making prosecutorial decisions. However, given the direct link between the charges, harm and victims’ admissibility, a narrow scope of investigations and prosecutions actually limits the access of survivors to justice and eventually — in the case of the ECCC — to reparations. This situation is often further aggravated by a lack of alternative or complementary transitional justice mechanisms, including truth-seeking or reparative justice schemes.

\textsuperscript{70} See Prosecutor v Nuon (Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case No 002/19-09-2007-ECCC-OCIJ, 12 February 2010); and Prosecutor v Nuon (Appeal Against Combined Order on Co-Prosecutors’ Two Requests for Investigative Action regarding Khmer Krom and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and Vietnamese) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case No 002/19-09-2007-ECCC-OCIJ, 12 February 2010). See also Prosecutor v Nuon (Decision on Appeals against Co-Investigating Judges) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19/2007/ECCC/OCIJ, 13 January 2010) and Prosecutor v Nuon (Order on the Admissibility of Civil Party Applications Related to Request D250/3) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19-09-2007-ECCC-OCIJ, 13 January 2010).


Although ECCC prosecutors considered the fate of the ethnic Vietnamese minority in their charges, the geographical limitations to their investigations threatened to adversely affect the group’s representation at trial. In the case of this particular minority, the genocide against the group meant that, to start with, there were very few direct survivors remaining in Cambodia. Without admitting individuals from the minority group into the proceedings as civil parties, there was a real risk that — in spite of the accused persons being charged with genocide against the Vietnamese — the few surviving members of this genocide group were effectively excluded from having a voice among the many other groups represented in the pool of civil parties before the ECCC. It was only due to the Pre-Trial Chamber’s appeals decisions that ethnic Vietnamese civil parties were able to have their specific interests represented in the criminal proceedings.

It appears that research has so far devoted little attention to the dilemma of the impact of prosecutorial decisions on victims’ rights and remedies. Commenting about situations before the ICC, Cécile Aptel argued ‘the direct consequences of the choice made by international prosecutors according to their discretionary powers is to simultaneously ascribe blame to the few instances, suspects and crimes they pursue, and take the attention away from others’.\textsuperscript{73} Aptel also drew attention to the fact that international criminal justice has strong symbolic powers, in that ‘its scope is ascribed a significant meaning: it recognises and acknowledges certain victims, and symbolically rejects others’.\textsuperscript{74} While criminal justice frameworks cannot provide justice to every victim of mass atrocities, the question remains whether it is at all possible to reconcile the logic of prosecutorial selectivity with the aspiration of achieving representativeness among participating survivors, including minority groups, in the judicial process.

B Issues surrounding Genocide against the Vietnamese Minority

Both inside and outside Cambodia — the use of the term ‘genocide’ and its scope in the context of Cambodia have been contentious. In the case of the Vietnamese minority, opposition against the use of the legal definition of genocide has arisen on both factual and politically oriented grounds, the latter stemming mostly from the difficult relationship between the Khmer majority and the Vietnamese minority in Cambodia.

Among historians, Ben Kiernan and the Yale Genocide Program have gathered vast amounts of information about the crimes committed during the Khmer Rouge regime,\textsuperscript{75} much of which provided the initial basis for the documentary collections at DC-Cam.\textsuperscript{76} Ben Kiernan and colleagues have repeatedly stressed the genocidal nature of the crimes against the Vietnamese, highlighting ethnic policies and racial discourse during that time.\textsuperscript{77} Kiernan portrays a vicious

\textsuperscript{74} Ibid 1372.
\textsuperscript{75} Kiernan, above n 40.
\textsuperscript{76} See also Craig Etcheson, \textit{After the Killing Fields: Lessons from the Cambodian Genocide} (Praeger Publishers, 2005).
\textsuperscript{77} Liai Duong, ‘Racial Discrimination in the Cambodian Genocide’, (GSP Working Paper No 34, Yale University: Genocide Studies Program, 2006). See also the work of Gregory Stanton on this subject and refer to Tom Fawthrop and Helen Jarvis, \textit{Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal} (UNSW Press, 2005).
dynamic, which began in 1975 with the forcible removal of the majority of ethnic Vietnamese from Cambodian territory; followed in mid-1976 by a prohibition for the remaining Vietnamese from leaving the country; and culminating in ‘Directive from 870’, issued in April 1977, which called for local officials to arrest all ethnic Vietnamese and all Khmer who spoke Vietnamese or had Vietnamese relatives. The scholar concluded, ‘there is no question that Democratic Kampuchea waged a campaign of genocide against the ethnic Vietnamese’. Similarly, the UN Group of Experts sent to Cambodia in 1998 to assess the modalities for the prosecution of those who committed crimes during the Khmer Rouge period recommended that genocide be included in the jurisdiction of the proposed tribunal:

In the view of the Group of Experts, the existing historical research justifies including genocide within the jurisdiction of a tribunal to prosecute Khmer Rouge leaders. In particular, evidence suggests the need for prosecutors to investigate the commission of genocide against the Cham, Vietnamese and other minority groups ... The Khmer Rouge subjected these groups to an especially harsh and extensive measure of the acts enumerated in the Convention. The requisite intent has support in direct and indirect evidence, including Khmer Rouge statements, eyewitness accounts and the nature and number of victims in each group, both in absolute terms and in proportion to each group’s total population.

However, reactions were mixed when it became clear that the ECCC’s Co-Prosecutors and Co-Investigating Judges would proceed with charging the accused in Case 002 with the crime of genocide. A number of scholars and observers disagreed with such a construction of the historical facts. Philip Short, although agreeing that the Vietnamese were indeed targeted and killed, called the genocide charges ‘misconceived’, arguing that these attacks were primarily motivated by political reasons rather than genocidal intent. The historian Henri Locard agreed with Short, arguing that these crimes would better be characterised as ‘politicide’. Prior to the commencement of investigations at the ECCC, William Schabas had argued that crimes committed under the Khmer Rouge regime would not be covered by the the legal definition of genocide, but should rather be characterised as crimes against humanity. Whilst focusing much on crimes committed against the Khmer population and religious groups, Schabas makes little or no reference to the ethnic Vietnamese minority in Cambodia. Most critics also highlighted the legal and procedural challenges associated with trying genocide, in light of the need for an expeditious trial.

Ultimately, the ECCC Co-Prosecutors – after reviewing all the available evidence – ‘have alleged genocide against the Cham, as well as against Vietnamese, and … believe that the facts

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78 Kiernan, above n 40, 296–7.
79 Ibid 460, see also pages 296-298 and 423-427.
81 See, eg, Brendan Brady, ‘Cambodia Confronts the “G” Word’ (2010) Foreign Policy <http://www.foreignpolicy.com/articles/2010/01/08/cambodia_confronts_the_g_word?page=full>.
83 Henri Locard, ‘Not Only Questionable, Genocide Charge adds to Tribunal Imbroglio’, Letter to the Editor, Cambodia Daily, 22 December 2009, 34.
Cayley consequently argues that ‘there is little occasion in the case of Cambodia's ethnic Vietnamese population to engage in the usual academic debates about the ‘in whole or in part’ requirement, or how many victims it takes to trigger the Genocide Convention’. Professional demographers employed by the ECCC concluded in relation to the ethnic Vietnamese who remained in Cambodia after the forced expulsion that ‘all 20,000 of them died from the hands of the Khmer Rouge during the years from April 1975 – January 1979”. As for genocidal intent, Cayley asserts, ‘in the case of the Khmer Rouge genocide against the Vietnamese, we have a rare instance in which the special intent requirement need not be inferred. As early as January 1978, the leadership began exhorting cadres and troops to prepare to exterminate the entire Vietnamese race.’ These conclusions are also supported by the facts recounted in the statements of the ethnic Vietnamese civil parties, which provide important evidence about the build-up and escalation of the genocidal dynamic against the ethnic Vietnamese minority in Cambodia. None of the Vietnamese civil parties were able to give an account of anyone who remained in Cambodia in 1975, having survived the Khmer Rouge regime. Civil parties — both ethnic Vietnamese and Khmer nationals — also describe instances of mixed marriage policies being implemented, mainly through the killing of Vietnamese spouses. National Co-Prosecutor Chea Leang described the regime’s mixed marriage policies as follows:

[T]he ethnic Vietnamese spouses of mixed marriages were slain, while their Khmer spouses were left unharmed. This policy demonstrates the racial targeting of the Vietnamese – a Vietnamese man married to a Cambodian woman would be killed, but his wife and children spared in most cases. But a Vietnamese woman married to a Cambodian man would be killed along with all of her children. Several witnesses addressed the Co-Investigating Judges on the reason behind this policy: to kill ‘the Vietnamese genes or the Vietnamese blood line’ because ‘the Vietnamese race should neither exist anymore, nor should it be allowed to reproduce’.

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86 Ibid 456.
88 Cayley, above n 85, 457.
89 Tableau, above n 41, 47–8.
91 Leang, above n 87.
The genocide charges in Case 002 have not only been controversial among legal scholars and professionals — there has also been much debate among the wider Cambodian population. Much of the past and contemporary situation of the ethnic Vietnamese in Cambodia relates to the aforementioned problematic historical relationship between the two states, as well as the prevailing attitudes and prejudices among the Khmer mainstream society towards its Vietnamese minority. According to a 2007 survey on inter-ethnic relations in Cambodia, conducted by the Alliance for Conflict Transformation (ACT), out of more than 1,100 respondents in Cambodia, 58 percent thought that the Vietnamese had ‘bad intentions towards Khmer people’. Data from the survey also indicated that a culture-based or ethnicity-based conception of citizenship continues to dominate the attitudes of the majority population. As a result, ethnic Vietnamese — even those who lived for generations in the country — are frequently not viewed as part of Cambodia’s citizenry.

In the Cambodian context, where atrocity crimes affected both Khmer nationals and minorities, the genocide charges alleged by the ECCC’s Co-Prosecutors and Co-Investigating Judges pose a social dilemma, insofar as the Khmer word for ‘genocide’ — literally meaning to ‘destroy from the root’ — has become the most commonly used term to refer generally to the atrocities committed by the Khmer Rouge. Whilst its mainstream meaning has become more widely used since the 1980s, the legal definition of ‘genocide’ is more technical and often conflicts with the prevailing understanding of the term. By charging the remaining senior leaders of the Khmer Rouge regime with ‘genocide’ only against two minority groups, the judicial process at the ECCC has also exposed the sensitive relationship between the Khmer majority and the Vietnamese minority in Cambodia.

Given these controversies surrounding genocide charges at the ECCC, does anything turn on the inclusion of the genocide charge? The lawyers for the Vietnamese civil parties stated that the inclusion of the genocide charge was important in that it would allow these survivors to formally pursue the truth about why they were targeted and, in the process, ‘reconstitute their identity’ as a distinct group in Cambodia whose rights need to be respected. Many members of the civil party group identify themselves strongly with a sense of their survivorship, both individually and collectively, specifically because they belong to a group that was positively targeted for extermination. In light of the sensitivities surrounding how the ethnic Vietnamese are currently perceived in Cambodian society, the genocide charges hold even more importance to the civil parties, because some mainstream Cambodians still consider it implausible that these Vietnamese hold a status as ‘victims’, mainly because of the mistrust levied at the Vietnamese in Cambodia, stemming from the complex history and politics between the two countries. Lawyers also argue that having the full extent of crimes placed on the historical record is a significant step towards

96 Integrated Regional Information Networks, Cambodia: Khmer Rouge Genocide Charge Marks Milestone for Minorities (24 May 2010) Refworld <http://www.refworld.org/docid/4c0367cb1e.html>. See also Brady, above n 79.
bridging the gap between the atrocities suffered in the past by the client group and their ability to move forward into the future with a sense of closure. According to this argument, because genocide charges reflect the full criminality of the defendants, a genocide trial would not only be a manifestation of justice for these survivors, but an international judicial measure against impunity for perpetrators of genocide.

These controversies, both inside and outside Cambodia, have at times appeared superfluous, particularly following a decision taken by the ECCC Trial Chamber to sever Case 002 into a number of sub-trials. The first sub-trial, Case 002/01, dealt mainly with the crimes of forced transfers of Cambodian population groups, and the Trial Chamber ruled that crimes against the Vietnamese would not be covered in that sub-trial. On account of the age and health of the two remaining accused and the difficult financial situation of the ECCC, the Co-Prosecutors and many observers had initially lowered expectations about the prospects of genocide charges proceeding to final determination and publicly stated that future sub-trials are unlikely to proceed. In January 2013, international Civil Party Lead Co-Lawyer, Elisabeth Simmoneu-Fort stated, ‘it is likely there will not be more than Case 002/01 … I assume that for a part of civil parties, it is difficult to admit that genocide will not be examined at all.’ The verdict in Case 002/01 against the two remaining Senior Leaders, Khieu Samphan and Nuon Chea, was handed down on 7 August 2014.

Meanwhile, the Trial Chamber’s severance decision was further litigated through appeals to the Supreme Court Chamber, which ordered, in July 2013, that ‘evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01, and that Case 002/02 shall comprise at a minimum the charges related to… genocide.’ The ECCC Trial Chamber complied with the decision and, through a second severance decision issued in April 2014, confirmed that genocide charges against the ethnic Vietnamese minority would form part of Case 002/02. With the trial hearings in Case 002/02 having commenced in October 2014, victims still hold hopes that Cambodia will eventually see this long-awaited genocide trial.

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97 Wallace, above n 82, 32.
99 Prosecutor v Nuon (Severance Order Pursuant to Internal Rule 89ter) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 22 September 2011).
100 Prosecutor v Nuon (Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007/ECCC/TC, 26 April 2013) [159]. This decision was appealed to the Supreme Court Chamber, both by the Prosecution and the Nuon Chea defence team.
101 Quoted in Bridget Di Certo, ‘Rest for the wicked’, Southeast Asia Globe (Phnom Penh) 7 January 2013.
103 Prosecutor v Nuon (Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002 - Summary of Reasons) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case No 002/19-09-2007-ECCC, 23 July 2013) [13].
104 Prosecutor v Nuon (Decision on Additional Serverance of Case 002 and Scope of Case 002/2) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007-ECCC/TC,4 April 2014).
C Legal Representation and the Importance of Local NGO Support

Most survivors in Cambodia have required assistance to participate in the ECCC’s legal proceedings. Some difficulties faced by survivors wishing to apply to participate at the Court — particularly for those residing in rural Cambodia — have included inadequate outreach, the complexity of the required Victim Information Form, and illiteracy. In this context, Cambodian NGOs have played a critical role in providing outreach to victims and acting as intermediaries between victims and the Court.105 The principal intermediary for interested survivors among the ethnic Vietnamese minority was the KKKHRA, which worked with a number of Vietnamese communities alongside their main work with Khmer Krom communities in a few selected provinces in Cambodia. Given that the ethnic Vietnamese had thus far not been included in the many ECCC-related outreach programs conducted by both the Court and local NGOs, KKKHRA decided to conduct a baseline survey among Vietnamese communities with whom it worked. The purpose of the survey was to develop an understanding of the minority group in order to effectively prepare targeted ECCC-related outreach activities.106 As a result of this initial survey, KKKHRA decided to focus its outreach efforts on Kampong Chhnang province, where interest among survivors in the ECCC’s victim participation scheme was highest.

Following a few ECCC-related outreach missions, a number of survivors asked KKKHRA to assist them to apply as complainants or civil parties to the ECCC. KKKHRA was able to rely on the services of a permanent field staff in Kampong Chhnang to assist in the application process, whereby each applicant was required to complete the ECCC Victim Information Form, which was only available in Khmer, English and French. Although most of the survivors in the client communities were able to speak Khmer, many were illiterate or unable to understand the complex language used in the form. Without assistance from an intermediary NGO or lawyer, most would not have been able to submit an application to the ECCC in Phnom Penh. Likewise, the ECCC and its underfunded Victims Unit relied heavily on intermediary NGOs to effectively undertake the Court’s notification obligations vis-à-vis complainants and civil party applicants.

In a country where most survivors lack the means and a level of education necessary to enable them to engage the proceedings on their own, the lack of legal representation soon became a major obstacle to active participation. Since the Court did not initially offer a legal aid scheme for civil parties, the procurement of legal representation became an additional area of NGO support.107 Intermediary organisations, fearing that civil parties were not able to exercise their rights to participate, reached out to external partners. Some NGOs actively sought national and international pro bono lawyers or mobilised their traditional relationship with Cambodian legal

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106 Sperfeldt (ed) with Chanrith and Balthazard, above n 28.

aid NGOs, such as Legal Aid of Cambodia (LAC). Cambodian lawyers from LAC were amongst the first to represent civil parties before the ECCC, implementing a unique framework for professional development for Cambodian lawyers, typically in cooperation with international pro bono civil party lawyers. This combination enabled both the sharing of local knowledge with international lawyers and formal and on-the-job training and capacity-building for national lawyers and support staff.

In the case of the ethnic Vietnamese minority, collaboration emerged between national counsel from LAC and an international lawyer from Australia, acting on a pro bono basis. One initial challenge was building trust with these survivors – victims of mass atrocity crimes do not always find it easy to trust people in positions in government or law, and the ethnic Vietnamese survivors were no exception. The history of discrimination and persecution against the Vietnamese minority in Cambodia resulted in many survivors holding a real fear of repercussions for speaking out about their experience of crimes. Some individuals from the minority group had continued to face armed attacks and killings by Khmer Rouge guerillas into the mid-1990s, long after the Khmer Rouge regime had collapsed. In combination with the relationship built with the minority communities by KKKHRA, trust was built with the international civil party lawyer, who was able to communicate directly with the clients in the Vietnamese language, without interpreters or intermediaries. Because of the actual and structural violence against the group, civil party lawyers took also great caution to explore suitable protective measures with the ECCC Witness and Expert Support Unit, to ensure, as far as possible, the anonymity of clients.

As a result of these efforts, ethnic Vietnamese participants have benefited from active legal representation of their specific interests during the pre-trial phase, most visibly manifested in their ultimate admission as civil parties in Case 002, following several admissibility appeals launched by their lawyers. However, in 2010 the ECCC Judges Plenary amended the Internal Rules to impose common legal representation of civil parties at the trial phase of proceedings by two court-employed Civil Party Lead Co-Lawyers. These Lead Co-Lawyers draw their powers from the Internal Rules and represent a ‘consolidated group’ of civil parties, with a mandate to file one single claim for collective reparations at the end of trial proceedings. Although primarily aimed at enhancing the efficiency of trial management, these amendments raise challenges to the representation of special interest groups, including but not limited to civil parties from minority groups. For common legal representation of such a large and diverse

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108 See also Christoph Sperfeldt, Oeung Jeudy and Daniel Hong, ‘Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers’, (Report, Cambodian Human Rights Action Committee, November 2010).

109 Initially, the engagement was facilitated through the NGO Access to Justice Asia, and later through Ms Nguyen’s independent work as a pro bono civil party lawyer. Support was provided at times through the Australian Volunteers International’s (AVI) Lawyers Beyond Borders program, and the Australian Prime Minister’s Executive Endeavour Award. See more at www.civilparties.org.

110 Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Ver 8) (adopted 3 August 2011) r 12ter.

111 Some of the Internal Rule amendments provoked strong opposition from lawyers, civil parties and certain NGOs, as civil parties were not consulted in the choice of a common legal representative. Further, the civil party lawyers, who hold the direct power of attorney with their clients, ultimately have a limited say in their representation. See also Andrew F Diamond, ‘Victims Once Again? Civil Party Participation before the Extraordinary Chambers in the Courts of Cambodia’ (2011) 38 Rutgers Law Record 34 http://lawrecord.com/files/38_Rutgers_L_Rec_34.pdf.
group of survivors to be representative and at the same time non-discriminatory, regular communication and appropriate consultations between the Lead Co-Lawyers, civil party lawyers and their clients are required.

The outreach and legal representation of the Vietnamese civil parties highlights the indispensable role local partners play in supporting an internationalised criminal justice process. The proximity of local NGOs to the survivor communities further provided some comparative advantages in NGO-organised outreach over court-organised activities. These NGOs, through their provincial networks and longstanding local presence, had developed trust with rural communities and were able to reach out to survivors residing in those areas. The representation of Vietnamese civil parties before the ECCC benefited from the combination of KKKHRA’s networks and associated local knowledge with proactive legal representation. These advantages enabled a more active and inclusive participation process for this group of minority civil parties. Ultimately, the strategic mobilisation of local partners also means that this endeavour can become part of a longer-term sustainable effort, as some NGOs plan the continuation of their work beyond the life of the ECCC.

D Meaningful Participation in a Context of Legal and Procedural Uncertainty

The ECCC became the first internationalised criminal court to incorporate victim participation on the basis of a civil party system. This ‘experiment’ in international justice was characterised both by a large number of civil parties seeking to participate in the ECCC’s proceedings, and by numerous legal and procedural uncertainties associated with the implementation of such an ambitious scheme. These problems were further complicated by the fact that the ECCC did not budget for victim participation during its early years, leading to many shortcomings in the outreach programs, delays in the processing of applications, untimely notifications to applicants and the need to procure external legal representation for civil parties. Despite the assistance of local intermediary NGOs, designing a meaningful participation process for survivors under such circumstances was challenging. A few examples of the participation of ethnic Vietnamese civil parties — both at the pre-trial and trial phases — may highlight some of these challenges.

Maintaining direct access between lawyer and client within the frameworks of very limited resources is the first challenge. It was only through funding and services provided by intermediary NGOs, as well as the engagement of pro bono lawyers that regular outreach and client meetings could be arranged. Since the ECCC did not offer any outreach materials in the languages of minority groups, outreach was conducted predominantly in the Khmer language, with the use of Khmer language materials. However, dialogues at the meetings were conducted in both Khmer and Vietnamese and, where necessary, interpretation was made available for clients. From 2008 to 2012, there were, on average, two to three outreach meetings per year in the civil parties’ communities. In addition, lawyers and intermediary NGOs organised at least one trip per year to Phnom Penh, with a view to providing each client the opportunity to visit the ECCC at least once. From 2010 onwards, the Victims Support Section (VSS) was also able to

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assist by having civil parties visit the Court during trial proceedings and/or for court update meetings.

Logistically, this work relied on the indispensable support of provincial NGO staff, lawyers and their legal assistants. In the case of the Vietnamese client group, financial support from the Civil Peace Service program of the German Development Service, provided since 2007, was key to funding local NGO-organised services to survivor participants and to cover the cost of travels and client conferences.\[^{114}\] Focal persons were appointed in each of the client communities, and a simple prepaid telephone card was sufficient to enable regular communication and the possibility for consultation with clients, as required. This communication and outreach network was also used by the ECCC, which did not initially have the logistical capacity to deliver court notifications to applicants and civil parties, and therefore relied primarily on intermediary NGOs and civil party lawyers to assist.

Second, it is noteworthy that during the investigative phase in Case 002, survivors and the wider public were not made aware of the scope of investigations undertaken by the OCP and subsequently, by the CIJs. Although it was recognised that investigations in civil law systems are generally confidential, a lack of any public information for interested survivors – for more than three years and over almost the entire investigations in Case 002 – was criticised.\[^{115}\] As a result, little information was available to inform consideration of the criteria for civil party admissibility, being the need for civil party applicants to ‘demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based’.\[^{116}\] Thus, applicants in Case 002 could not deliberately set out crimes they experienced and place them within the scope of crimes judicially investigated by the Court, in order to meaningfully link the harm they suffered to the criminal acts with which the accused were charged. An NGO worker at the time likened this situation to driving a car in the dark without any lights or directions. Since the ECCC did not initially provide any legal aid scheme for civil parties, the few available pro bono lawyers were unable to represent the interests of the many unrepresented applicants.

In November 2009 — less than three months before the announced closure of investigations and a corresponding deadline for the filing of applications from survivors — the CIJs, for the first time, made information about the scope of judicial investigations publicly available.\[^{117}\] Although the CIJs granted existing applicants an additional three months to provide supplementary information in support of their claims, it was for many applicants and intermediary organisations

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\[^{116}\] Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Ver 8)* (adopted 3 August 2011) sub-r 23bis(1).

\[^{117}\] ECCC Public Affairs, ‘Co-Investigating Judges Release Information about Scope of Investigation in Case 002’ (Press Release, 5 November 2009). In January 2010, the CIJs officially notified of the closing of their investigations, bringing into effect a deadline for civil party applications no later than 15 days after the notification, according to the previously revised Internal Rules.
too late, and — given the need for coordinated outreach to victims in rural Cambodia — logistically impossible, to provide additional information within that timeframe. Recognising these difficulties, the CIJs eventually extended the deadline for the submission of supplementary information to the end of June 2010.\textsuperscript{118}

For Vietnamese civil party applicants, there was a widespread perception among NGO workers and some lawyers, that individuals belonging to the two minority groups affected by genocidal policies — the Cham and the ethnic Vietnamese — would ultimately be eligible for civil party status, simply because the Khmer Rouge’s genocidal policies per se sought to eliminate these groups, in whole or in part, throughout the territory of Cambodia. The CIJ, however, reiterated that the geographical focus of investigations regarding the treatment of Vietnamese was limited to the former Eastern Zone. As described earlier, this led to the initial rejection of Vietnamese civil party applicants who suffered harm outside this narrow geographical scope.\textsuperscript{119}

Following the CIJs’ initial rejection of these applicants, intermediary NGOs and lawyers decided to take further measures to manage the expectations of the remaining Vietnamese applicants and to avoid further traumatisation among those Vietnamese survivors. Eric Stover stated, ‘war crimes trials, like most criminal trials, have the potential for producing the unexpected at any stage of the proceedings. … This constant state of uncertainty places witnesses in an intimidating position and throws into doubt the very idea that bearing witness can be therapeutic.’\textsuperscript{120} Similar observations can be made about civil party participation at the ECCC, which developed in a context of continual legal and procedural uncertainty. To counter any potential negative side effects from participating in the ECCC process, intermediaries and lawyers began to collaborate with the Transcultural Psychosocial Organization (TPO), an NGO specialising in psychosocial support with an emphasis on survivors of the Khmer Rouge regime. TPO also provided training to NGO workers on the symptoms of trauma and strategies to deal with survivors of mass atrocities.

One culturally adapted trauma treatment approach developed by TPO was ‘testimonial therapy’, in which survivors are invited to talk about their traumatic experiences and, together with a counsellor, transform the testimony into a written document. The testimony is read aloud and delivered during a Buddhist ceremony in the presence of other survivors. This practice allows victims to express and process traumatic experiences, to honour the spirits of the dead and to

\textsuperscript{118} This deadline only concerned applications that had already been submitted before the initial application deadline at the end of January 2010. Many other survivors interested in applying for civil party status benefitted little from the belated release of public information about the scope of investigations in Case 002. Importantly, for the 16 Vietnamese applicants whose civil party status had earlier been rejected by the CIJs, the additional time granted to provide supplementary documentation in support of their claims was meaningless. The CIJs did not address how this new deadline would apply to applicants whose claims had already been deemed inadmissible. Arguably, this amounted to an instance of a lack of due process for these minority victims at the early pre-trial stages.

\textsuperscript{119} The practice of informing interested survivors about the scope of investigations improved with the application processes in the politically-contested Cases 003 and 004, where general information about crime sites under judicial investigation was provided at an earlier stage. See unilateral press releases in relation to Case 003 by the International Co-Prosecutor in May 2011, and more recently by International Co-Investigating Judge Mark Harmon in February 2013.

document human rights violations. Following the CIJs’ 2010 decision deeming the first lot of Vietnamese minority civil party applicants to be inadmissible, lawyers approached TPO to conduct testimonial therapy sessions with some of these survivors, in an attempt to compensate the Court’s rejections through a non-judicial measure that could potentially provide some closure for the survivors. The participating clients reacted extremely positively to the session, highlighting the importance of involving psychosocial support measures suitable to the cultural context, in victim participation processes.

In mid-2011, the judicial roller coaster gained new momentum when most ethnic Vietnamese applicants were re-admitted as civil parties, after the Pre-Trial Chamber reconsidered and reversed its previous ruling, which had initially upheld the CIJs’ decision to deem a small group of Vietnamese applicants inadmissible. The multiple appeals, and various judicial decisions during the admissibility process — both adverse and favourable — has at times been conceptually difficult to communicate with clients. However, regular communication through outreach activities, combined with accompanying psychosocial support measures, seem to have made this participation process more acceptable for these individuals. This experience suggests that attention to the process taken with victim participation — including regular communication and consultation with survivor participants — may be as important to the victim participants as the ultimate judicial outcomes. The management of client expectations during these communications is key to dealing with the intrinsic complexities and uncertainties involved in the criminal litigation of mass crimes, as the survivors’ experiences and memories of the judicial process have great impact on victims of crime.

VI COLLECTIVE REPARATIONS AND THE BROADER HUMAN RIGHTS CONTEXT

Alongside the International Criminal Court, the ECCC is one of the few international or hybrid criminal courts with an explicit reparations mandate. However, the Court’s Internal Rule 23 limits the scope of reparations to ‘collective and moral reparations’ only — presumably as opposed to individual or material reparations. In addition, the first Internal Rules provided that these reparations were to be borne exclusively by the convicted person. The limitations in the first Internal Rules led, in effect, to there being no substantial reparations for civil parties in the first trial, against Kaing Guek Eav, alias Duch. It was only in 2010 that the ECCC Judges amended the Internal Rules with a view to providing more flexibility in designing and implementing moral and collective reparations applicable to Case 002 and beyond. The

121 Judith Strasser et al, ‘Engaging Communities – Easing the Pain: Outreach and Psychosocial Interventions in the Context of the Khmer Rouge Tribunal’ in Katharina Lauritsch and Frank Kernjak (eds), We Need the Truth. Enforced Disappearances in Asia (ECAP, 2011) 146.
122 Information gathered through feedback questionnaires in 2010.
124 The Trial Chamber granted only two reparations requests in Case 001: to include in its judgment the names of civil parties and their relatives who died at S-21, and to compile statements of apologies by the convicted person.
amendments involved two significant changes: (i) the Internal Rules now provide that the ECCC judges may recognise that a project — identified and designed in collaboration with the VSS — gives effect to a reparations award sought by civil parties, and (ii) the VSS is entrusted with the development and implementation of non-judicial measures, which benefit not only civil parties but also the broader interests of victims generally. In both cases, the VSS is required to seek external funding.

In granting the ethnic Vietnamese minority group civil party status, the ECCC, in 2011, recognised them as victims who have a standing to seek ‘moral and collective’ reparations, having suffered personal and direct harm as a result of crimes committed by senior leaders of the Khmer Rouge regime. During the application process, a significant number of Vietnamese civil parties indicated in their Victim Information Forms, that they sought ‘Cambodian nationality’ as a moral and collective reparation. These requests were further discussed and clarified during consultations with the group, as civil party lawyers focused on assessing the civil claims within the framework of the ECCC’s ‘moral and collective reparations’ mandate. Overall, clients were able to establish that the crimes they were subjected to caused, in part, their present-day harm in that, during the various occasions in which they were forcibly relocated by the Khmer Rouge, victims were forced to leave behind, destroy or otherwise lost, important documentation demonstrating their ties to Cambodia. As a result of this loss, clients suffered harm in that, upon their voluntary return to Cambodia in the 1980s, these individuals could not establish their identities and were, instead, treated as ‘immigrants’ or ‘foreign residents’ by Cambodian officials. The lack of Cambodian nationality results in lack of access to basic social, economic, political and human rights, and forms the basis of the group’s civil claims, having established that the direct and personal harm is linked with crimes with which the accused persons in Case 002 are charged — namely, forced deportation, persecution and genocide.

The Civil Party Lead Co-Lawyers first put forward this reparations request in June 2011 — during the Initial Hearings in Case 002 and prior to the severance of that case — and later provided specifications about the reparation request on 19 October 2011. In their submission on the initial specification of the reparation awards sought by civil parties, the Civil Party Lead Co-Lawyers proposed a ‘project to facilitate acquisition of Cambodian citizenship’. The lawyers emphasised that the civil parties’ claim is ‘moral and collective’ in nature, and that it is linked to the harm suffered by survivors as a result of their forcible expulsion from Cambodia. Importantly, the reparations request is framed around loss of identity resulting from crimes committed pursuant to genocidal policies aimed at eliminating an ethnic group based on its ethnic identity, leading to the loss of identification documents and consequential adverse

125 See Extraordinary Chamber in the Courts of Cambodia, Internal Rules (Ver 6) (adopted 17 September 2010) rr 12bis (2) and (3), 23quinquies.
126 Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Ver 8) (adopted 3 August 2011) r 23 provides that: (1) The purpose of Civil Party action before the ECCC is to: (a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) Seek collective and moral reparations, as provided in Rule 23quinquies.
127 See Kevin Ponniah, ‘Cambodia’s Vietnamese Community Finds Voting is not Necessarily a Right’, The Guardian, 4 September 2013.
128 Prosecutor v Nuon (Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek - Hearing of 19 October 2011) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007-ECCC, 12 March 2012) [88]–[93]
treatment as ‘immigrants’ in a country they consider to be their home. The reparation award proposed by lawyers representing these civil parties was outlined as follows:

[N]ationality applications could be facilitated through an outreach project on Cambodia's citizenship law and on the legal requirements that the applicants must satisfy when applying for citizenship in accordance with Cambodian procedures. A pertinent project might be to create a legal assistance service in the civil parties' home area, assist in collecting the application materials, filling in the applications and submitting them to the competent Cambodian authorities … In any event, applications for nationality under this reparation award must be processed by the competent Cambodian authority. The project is only aimed at facilitating the application process, and it is for the government to decide the status of these individuals through the normal process.¹²⁹

Aware of the fact that it is beyond the mandate of an internationalised criminal court to order a government to grant or provide access to nationality, the request makes clear that the ethnic Vietnamese civil parties do not intend to circumvent the discretion or authority of the Cambodian government to grant or recognise citizenship. Instead, the civil parties request a project — designed in collaboration with the VSS and with possible external funding — which would facilitate an assessment and application process, leaving any decision on the merits with the Cambodian authorities to determine in accordance with the relevant Cambodian laws.

When presenting these requests at the ECCC, the civil parties and their lawyers were well aware of the controversies around the topic. The topic of access to Cambodian nationality and ID cards for Vietnamese ‘immigrants’ has been fiercely debated in the Cambodian public, regardless of how many generations of individuals of ethnic Vietnamese origin have lived in the country. These sensitivities also became apparent during the presentation of the initial specifications, when three of the national defence lawyers reacted only to this request over the many others presented by the Lead Civil Party Co-Lawyers. National defence lawyer Son Arun stated:

[A]s for the Cham people, I can say that when they are as they are living here in Cambodia they are considered as Khmer people. And as for Vietnamese, they have two groups of Vietnamese; one is legal Vietnamese immigrants and another one is illegal Vietnamese immigrants. So in this regard I would like to submit that the Chamber consider whether reparations can be awarded to those illegally migrated into the country.¹³⁰

Apart from misinterpreting the request as being for a wider group of Vietnamese than the minority civil party group, the defence lawyer’s comments highlight the problematic relationship between the Khmer majority and the Vietnamese minority, depicting that it is difficult for many commentators to conceive of these long term residents as being a part of the Cambodian citizenry, much as the Cham are, in spite of also being a minority in Cambodia.

Following the subsequent severance of Case 002, crimes against the Vietnamese minority were not addressed in the first sub-trial, neither were the reparation claims of the affected civil parties. This enabled time for civil party lawyers representing ethnic Vietnamese clients to initiate a research project to further assess these nationality claims. The JRS Cambodia, an organisation

¹³⁰ Transcript of Proceedings, Prosecutor v Nuon (Hearing on Specification of Civil Party Reparations Awards and Accused Ieng Thirith’s Fitness to Stand Trial) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007-ECCC, 20 October 2011).
that possesses extensive experience with refugees and other displaced populations, became involved in supporting a pilot project, jointly implemented throughout 2012 by JRS and the legal team representing the Vietnamese civil parties. Following in-depth interviews with members of the civil party group, a comprehensive legal assessment report, ‘A Boat Without Anchors’ was published.\(^{131}\) In assessing the nationality status of the focal group, this report (i) considered the status of the members of the civil party group under the applicable Cambodian and Vietnamese nationality laws; (ii) examined documentation available among the focal group to establish or prove their civil status; and (iii) considered how the national authorities of Cambodia and Vietnam view and treat members of the group under the operation of their respective laws. This legal assessment was intended to be of use beyond the specific purpose of the ECCC’s legal proceedings.

The report made a number of important findings. Firstly, even though Cambodia’s current Nationality Law governs access to Cambodian nationality today, it is the nationality laws applicable under earlier administrations that remain relevant to the determination of citizenship for members of this group, all of whom were born and resided in Cambodia many years before the current law came into force. Most members of the survivor group have a strong claim for recognition of a previous acquisition of Cambodian nationality, which they automatically acquired on the basis of the \textit{jus soli} provisions of the earlier 1954 nationality laws. Secondly, and importantly, Cambodian authorities do not regard members of the client group as Cambodian nationals under the operation of Cambodia’s laws, but rather have treated them as ‘immigrants’ or ‘foreign residents’.\(^{132}\) In addition, the group has no effective access to civil registration in Cambodia, including birth registration for children born in Cambodia. From the Vietnamese authorities’ treatment of the focal group during their exile in Vietnam, and of others who emigrated permanently to Vietnam in more recent times, it appears that Vietnamese authorities do not currently view the focal group as Vietnamese citizens — however, the state leaves open an avenue for naturalisation. Based on these findings, the report concludes that the ethnic Vietnamese group the subject of the research, including civil parties, appears to be stateless.\(^{133}\) It is hoped that other researchers and local NGOs will further investigate these preliminary findings. They have already encouraged more public debate in Cambodia and beyond.\(^{134}\)

The reparations request of these minority survivors highlights how victim participation in a criminal trial can shed light on larger human rights issues affecting a minority group. Reparations generally combine both backward-looking and forward-looking elements in their

\(^{131}\) \textit{A Boat Without Anchors}, above n 30.


\(^{133}\) \textit{A Boat Without Anchors}, above n 30, Executive Summary. Looking into the future, the report discusses ways for reducing and preventing statelessness among this group, including recognition of nationality acquired under previous laws, and made recommendations to relevant stakeholders.

aim to remedy harm resulting from violent conflict and severe abuse on a mass scale.\textsuperscript{135} Often conflicts build upon or reinforce existing dynamics of inclusion and exclusion — minority groups are particularly affected by such dynamics. Criminal trials and associated reparations programs may therefore provide a forum to expose larger human rights issues affecting marginalised minority communities in a post-conflict society. Collective reparations specifically have the potential to draw attention to collective harm, or harm shared by an entire group of individuals, as demonstrated by the case of the Vietnamese minority civil parties. However, it is often difficult for judicial mechanisms to conceive of, and bring about, reparative measures that, while addressing a specific harm, also address the larger structural causes of the violations. In a recent guidance note, the UN Secretary General stressed, ‘reparations have the potential to be transformative and to assist in overcoming structures of inequality and discrimination’.\textsuperscript{136} Such ‘transformative’ reparations have also become part of the scholarly debate.\textsuperscript{137}

In July 2014, the Civil Party Lead Co-Lawyers renewed the ethnic Vietnamese civil parties’ reparations request during the Initial Hearing for Case 002/02.\textsuperscript{138} While it is not expected that the ECCC’s collective reparations mandate could provide a complete remedy to address the exclusion of the civil parties from Cambodia’s citizenry, the Case 002/02 trial may yet be an additional avenue to raise awareness of the historical disenfranchisement of these communities and promote further social and political discourse about the past and future of Cambodia’s long-standing Vietnamese minority.

VII CONCLUSION

In this article, the authors examined the role of minority victims in a genocide trial, using the specific case study of a group of ethnic Vietnamese survivors who joined as civil parties before the internationalised criminal proceedings at the ECCC. In particular, the article highlighted the challenges involved in the inclusion of minority narratives into a larger context of a mass atrocity trial, depicted in part through the challenges relating to prosecutorial selectivity, the debates surrounding genocide charges at the ECCC and the civil parties’ collective reparation request for recognition of and/or access to Cambodian nationality. In her examination of law, state crime and genocide, Jennifer Balint provides an account of similar cases that unveils the ambiguous nature of a genocide trial, such as the Cambodian proceedings, taking place in a complex historical and cultural context. She writes:

\textsuperscript{135} See Pablo de Greiff, The Handbook of Reparations (Oxford University Press, 2008).
\textsuperscript{137} This is particularly true in relation to gender-based and sexual violence. See also Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Peace’ (2014) 8 International Journal of Transitional Justice 339.
It is at these times that we see the schism within law most vividly. Law can include and exclude. It can be a site for justice and for injustice. It is what we appeal to, yet what may not hear us. It can be a basis for change, yet entrench existing prejudices.¹³⁹

With Case 002/02 having progressed to trial phase in October 2014 at the time of writing, a final assessment of the participation of Vietnamese civil parties in the ECCC process would be premature. Despite the continuation of trial proceedings, uncertainties with the ECCC justice process remain. National Co-Prosecutor, Chea Leang, concluded earlier, ‘it is not clear whether the charges of genocide will proceed to trial at all. At the same time, it is an opportunity to establish an accurate historical record of the genesis, escalation and culmination of genocide.’¹⁴⁰ The Vietnamese civil parties and survivors before the Court await answers as to why the regime created and implemented genocidal policies and practices, which to this day have impacted upon the societal status and human rights of the members of the group. While they are aware that the ECCC alone cannot accomplish the long term task of social reconstruction in the wake of conflict and mass atrocities, the Court can create space for new possibilities. For this reason, the ECCC participation process for the ethnic Vietnamese survivors holds significance not only for the past and present generation, but also future generations, who were able to exist only because of the survival of these victims who were deported from Cambodia in 1975, prior to the mass killings of Vietnamese within Cambodia. Hence, many Vietnamese civil parties view their involvement as being part of an effort to spare their children from a repetition of these atrocities and to provide future generations of their minority group equal rights and development opportunities in Cambodian society.

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¹⁴⁰ Leang, above n 87. Italic in the original.
INTERNATIONALISATION AND INTERCULTURAL SKILLS:
USING ROLE-PLAY SIMULATIONS TO BUILD BRIDGES OF TOLERANCE AND UNDERSTANDING

SOPHIE RILEY AND GRACE LI*

Although the notion of internationalisation does not have a settled meaning, its main theme focuses on enriching ‘the international dimension’ of the higher education experience. Internationalisation traditionally includes promoting student mobility and embedding international elements in existing curriculum. Yet, in order to achieve true internationalisation, teachers also need to consider how students develop intercultural skills. The literature indicates that it may be difficult to implement learning strategies that achieve these outcomes. In an attempt to fill this gap, this paper evaluates a project that the authors undertook, which utilised role-play simulations in order to build bridges of tolerance and understanding amongst a diverse student cohort. The project reflected an integrative approach that incorporated international elements into the existing curriculum. It was conducted in two stages, commencing with a pilot exercise in an undergraduate law subject taught to business students and concluding with a workshop designed to shed light on some of the challenges underscored by the pilot exercise. In particular, the workshop explored findings that role-play simulations were an effective tool in encouraging students to engage with each other at a disciplinary and personal level, but somewhat less effective in facilitating meaningful intercultural exchange. Both the pilot project and the workshop highlight the need for teachers to build on their role as intercultural facilitators and to innovate and explore all students’ experiences of ‘internationalisation’. Moreover, while educational institutions consider internationalisation to be one of their strengths, more work needs to be done to assist teachers in developing and implementing internationalisation of the curriculum at the subject, course and program levels.

I INTRODUCTION

In 2013, there were 526 932 enrolments by full-fee paying international students in Australia on a student visa. This represents a 2.6% increase on 2012 and compares with the average annual growth rate for international enrolments of 5.9% per year over the preceding ten years.¹ These

* Sophie Riley, Senior Lecturer, University of Technology Sydney and Grace Li, Senior Lecturer, University of Technology Sydney. The assistance of Associate Professor Betty Leask in permitting the use of survey instruments is gratefully acknowledged as are helpful comments on the role-play simulation project made by Kay Weijuan Zhu, Vice Dean of International Exchange Faculty in Shanghai Business School. The title is adapted from an article written by Betty Leask, ‘Using Formal and Informal Curricula to Improve Interactions Between Home and International Students’ (2009) 13(2) Journal of Studies in International Education 205, 205 where she refers to tolerance and understanding as the foundation of cultural competence.

figures reflect a policy drive towards internationalising higher education, which has become an accepted feature of the Australian higher education landscape.  

The notion of internationalisation does not have a settled meaning. De Wit defines it in terms of ‘processes [that]…enhance the international dimension’ of learning in higher education. Montgomery views the process as one that encourages students to develop intercultural skills that enable them to ‘work in an intercultural context’. Internationalisation is sometimes confused with globalisation and vice versa.  

Strictly speaking, globalisation occurs ‘without regard to national borders’. In the context of higher education, globalisation could refer to the free and unregulated movement of students across the globe. By way of contrast, internationalisation, at least in a practical sense, predominately involves students moving from developing to developed countries in a process regulated by the developed countries. In this paper the term ‘internationalisation’ is used as it more correctly reflects the backdrop to the project that is later discussed.

It is worth keeping in mind that there are arguments against, as well as in favour of, Internationalisation of the Curriculum (IoC). Arguments against internationalisation emphasise the danger of subjects adopting a superficial approach to the study of foreign or comparative legal systems, and distracting students from studying domestic regimes. At the same time, arguments in favour of internationalisation note that comparative studies can actually assist students towards a better understanding of domestic regimes. Moreover, if students can relate to legal problems in different jurisdictional settings this can sharpen their problem-solving skills.

This paper argues that there are benefits to internationalisation and provides a case study as one means of promoting it.

It follows that, in a pragmatic sense internationalisation is reflected in the cross-border movement of students. However, this is not the only dimension to internationalisation. An equally important component involves fostering interaction between local and international students so that each cohort has the opportunity to develop intercultural skills. Commentators

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9 Ibid.

10 Altbach and Knight, above n 7, 290, 292.

largely agree that the key to attaining intercultural skills lies in students developing respect and tolerance for each other.\(^{12}\) This includes having the capacity to question one’s own philosophies, ideals and assumptions as well as acknowledging that others may regard exchanges ‘through different cultural lenses’.\(^{13}\) Moreover, merely bringing two diverse cohorts of students together does not automatically lead to the acquisition of intercultural skills.\(^{14}\) Indeed, early studies on the dynamics between local and international students concluded that students were reluctant to engage with those from other cultures. This illustrates the challenging nature of fostering intercultural skills.\(^{15}\)

However, more recent literature notes that students are starting to see benefits in learning in a culturally-diverse environment.\(^{16}\) In particular, graduates hope to attain transferable skills that prove advantageous in international employment markets.\(^{17}\) This sentiment is shared by Australian universities whose graduate attribute and vision statements for teaching and learning reflect the strategic importance of ‘international’ competencies.\(^{18}\) In order to foster the attainment of intercultural knowledge and skills, teachers need to take on the role of intercultural facilitators and incorporate intercultural activities into the learning process.\(^{19}\) Internationalisation can then become focused on students’ relationships with each other in an intercultural context.

This paper discusses two projects that the authors conducted in 2010-2012, focusing on the use of role-play simulation (RPS) as an enriching group work activity to help students develop intercultural skills. The projects reflect an integrative approach that incorporated international elements into the existing curriculum. It was an attempt to fill a gap, identified in the literature, between the objective of internationalisation and its achievement. The first project, which comprised the running of the RPS, was carried out pursuant to a Vice-Chancellor’s learning and teaching grant from the University of Technology, Sydney.\(^{20}\) The second project, involving a

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\(^{13}\) McAllister, et al, above n 11, 368.

\(^{14}\) Leask, ‘Using Formal and Informal Curricula to Improve Interactions Between Home and International Students’, above n 12, 205; see also Montgomery, above n 4, 256.


\(^{16}\) Ibid; Leask, ‘Using Formal and Informal Curricula to Improve Interactions Between Home and International Students’, above n 12, 219.


\(^{19}\) Sophie Riley and Grace Li. Vice-Chancellor’s Learning and Teaching Grant, *Role Play Simulations: Active Learning for Educational Integration and Professional Practice*, University of Technology Sydney (2011).
workshop, was made possible by a grant from the Office of Learning and Teaching. Together, the two projects focused on the single topic of promoting internationalisation and intercultural skills in teaching and learning. The RPS project was carried out as a trial, to introduce a new classroom teaching/learning activity. The students regarded this as a successful tool for delivery of subject content. By contrast, it was not as effective as expected in promoting internationalisation and the development of intercultural skills. The primary purpose of the follow-up workshop was to share the experience of the authors, including challenges, and to obtain specialist help in making internationalisation operational. In the process, the authors gained insight, which can be incorporated into future classes, in order to help students attain intercultural competencies.

The paper starts by examining the literature regarding personal skills that encourage students to develop tolerance and respect in an intercultural context. This provides the theoretical background for the RPS and the workshop. Part three of this paper provides a description and evaluation of the 2011 RPS project, which proved to be an effective tool for encouraging students to engage with each other both at a disciplinary and personal level, but seemingly less effective for facilitating extensive and meaningful intercultural exchange. Following the RPS, the authors arranged the role-play workshop that explored more effective means of engaging students by using RPSs. As set out in part four, the workshop revealed that teachers are keen to implement principles of IoC, yet are unsure how and where to start. Perhaps for this reason, educators are enthusiastic with regard to obtaining specialist help to implement IoC. The paper concludes by noting that while educational institutions consider internationalisation to be one of their strengths, more work needs to be done to assist teachers in developing and implementing IoC at the subject, course and program levels.

II Background: Developing Intercultural Skills

As discussed in the introduction, in a pragmatic sense, internationalisation is reflected in the cross-border movement of students. However, this should not be the only dimension to internationalisation. In particular, Sawir considers that such an approach exhibits a narrow understanding of internationalisation. This approach is reflected in curriculum design and learning approaches that focus on language difficulties and limit consideration of international students to helping them “survive” in the new academic setting. Extending beyond this restricted view of internationalisation is the notion that internationalisation should also assist with the development of intercultural skills. As Vai Io Lo indicates:

… internationalisation does not equate with the recruitment of international students and the consequential enlargement of an international student body... In essence, internationalisation is a two-way enterprise because international students learn Australian law by pursuing law degrees here,
while domestic students learn from their international peers through class discussions and team projects.\(^{25}\)

Intercultural skills have been described as capabilities that allow people to ‘behave effectively and appropriately in intercultural’ contexts.\(^{26}\) The skills commence with the development of intercultural awareness and progress to an intercultural sensitivity that allows students to understand and appreciate other cultures.\(^{27}\) Commentators such as Leask have noted that in order to develop intercultural skills an approach is needed that:

>[enables] our students and staff [to] develop their intercultural competence to the point where they move beyond the limitations of their own world view and develop new frames of reference.\(^{28}\)

However, achieving these types of objectives can be challenging. As has been noted, students may not wish to mix with those from other cultures. For example, in 1998, Volet and Ang conducted a key study of the dynamics of student interaction and concluded that students favour working in groups of individuals from similar cultural backgrounds.\(^{29}\) These findings were replicated some six years later by Sanchéz who found that 99.1% of students surveyed felt that cultural differences presented a barrier against intercultural exchange.\(^{30}\) This was particularly the case where interaction is mandatory for group activities and assessments.

However, by 2008, commentators such as Montgomery had discerned a shift in attitudes amongst students. Those who had worked in culturally diverse groups were at least interested in other cultures, and could also see positive aspects to interacting in a culturally diverse environment.\(^{31}\) This shift in attitude is significant because the acquisition of intercultural skills normally progresses by means of a complex series of interactions and modification of attitudes that are based on growing cultural sensitivity and awareness.\(^{32}\) Thus, it is axiomatic that intercultural skills cannot exist unless students are willing to engage with cultural diversity.

In encouraging positive changes, there are many practical issues teachers need to keep in mind. To start with, international students are often ‘cultural outsiders’ who must deal with inequalities not faced by local students.\(^{33}\) However, the very fact that international students are living and studying overseas means they often have no choice but to confront cultural issues. Hence, international students experience at least a fundamental level of intercultural engagement.\(^{34}\) The same is not necessarily true for local students. Courses invariably contain a ‘hidden’ curriculum

\(^{25}\) Lo, above n 8, 3, 18.


\(^{28}\) Leask, ‘Using Formal and Informal Curricula to Improve Interactions Between Home and International Students’, above n 12, 219.

\(^{29}\) Volet and Ang, above n 15, 18–9.


\(^{31}\) Montgomery, above n 4, 262, 263–4.

\(^{32}\) Chen, above n 26.

\(^{33}\) Turner, above n 19, 244.

that favours specific social and ethnic viewpoints. Moreover, even where local students recognise the value of intercultural skills, the classroom dynamics of mixed cultural groups are often delineated by the potential for cynicism and wariness. If managed inappropriately, this type of situation will not only impact on the learning experience of international students, but can also fail local students by not developing suitable cultural skills. Thus, the pedagogical issues turn on how best to foster intercultural skills through a process of ‘internationalisation’ that takes place in local settings. Within this context, intervention by the teacher is critical.

In effect, teachers become intercultural facilitators who create learning environments where students can develop respect and understanding for the ideals, principles and hopes of others. This requires commitment and planning by the teacher and includes implementing strategies that make the classroom atmosphere conducive to intercultural learning, and targeting learning and assessment activities that incorporate an intercultural element. It is important to maintain a sense of ‘social inclusion’ for all students, and to channel this to create authentic learning experiences within the framework of the subject content. Collectively, thoughtfully planned interventions enable teachers to take advantage of cultural diversity in a way that emphasises the significance of effective intercultural skills, while also acknowledging the subject discipline from a global viewpoint.

From the teacher’s perspective, designing authentic learning experiences entails changes which can be substantial. Lombardi and Oblinger point out that teachers may be concerned that designing, implementing and assessing authentic learning tasks will increase their workload. This is especially relevant where the assessment task is new and requires extra time and resources to prepare and familiarise the students. Further, authentic learning experiences may require great effort to administer in subjects with large student numbers.

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36 Gabb, above n 19, 363.
37 Haigh, above n 34, 282.
38 Turner, above n 19, 240–1.
42 Haigh, above n 34, 282.
43 Montgomery, above n 4, 256.
44 Irene CL Ng ‘Teaching Business Studies to Far East Students in the UK’ in David Palfreyman and Dawn Lorraine McBride (eds), Learning and Teaching Across Cultures in Higher Education (Palgrave Macmillan, 2010), 36, 41.
45 Kimmel and Volet, above n 15, 2.
47 Ibid.
With these points in mind, the authors devised an RPS with two aims: first, to enhance the overall learning experience of the students; and second, to harness the cultural diversity of the student cohort in order to promote the development of intercultural skills. This activity has provided a useful example of the rewards of planning for intercultural learning.

III A PROJECT TO ENHANCE STUDENTS’ INTERCULTURAL LEARNING

A Role-Play Simulations and Intercultural Skills

The use of RPSs is of course, well established for some aspects of legal education, such as interviewing clients and negotiating. By contrast, it appears that RPSs have not been developed with the specific aim of enhancing student learning in environments of high cultural diversity.

The use of role-plays as a learning tool usually involves ‘setting up of more or less unstructured situations’ where students are assigned roles which they act out in an improvised way.\textsuperscript{48} Simulations are similar, with the main difference that simulations are less tightly scripted than role-plays.\textsuperscript{49} Therefore, RPSs can be thought of as framed scenarios in which students assume various roles that they adopt and develop in an extemporised way. In each case, the aim is to offer the student a ‘highly simplified reproduction’ of the real world.\textsuperscript{50} The objective is not to reproduce the complexities of the real world in their entirety, but instead, to include sufficient real-world elements to provide students the opportunity of learning from their enactment of the scenarios, rather than merely by reading and discussion.\textsuperscript{51}

In the pilot project, the authors hoped that the learning task would provide students with opportunities to develop intercultural awareness and sensitivity. These are essential precursors to the development of intercultural skills. In particular, the authors hoped that encouraging students to work in groups with members of diverse cultural backgrounds would break down the cultural barriers and stereotyping that they had recognised during their iterative development of the subject, Applied Company Law.\textsuperscript{52} RPSs are particularly well suited to achieve these objectives. This is because in order to carry out the activity, students must interact with others in a way that encourages them to tap into their social skills and closely consider the outlooks and values of others.\textsuperscript{53} This is not to say that RPSs are without problems. One disadvantage is that by their very nature they are simplified. Despite this, many of the issues that flow from oversimplification can be rectified by strategies such as on-the-spot correction of students’ factual errors and by thorough debriefing.\textsuperscript{54}


\textsuperscript{49} Ibid.

\textsuperscript{50} Morry Van Ments, The Effective Use of Role Play (Kogan Page Ltd, London 1999) 3.

\textsuperscript{51} Ibid.

\textsuperscript{52} Sophie Riley and Grace Li, ‘Student Diversity: Widening Participation by Engaging Culturally Diverse Non-Law Students in Law’, in Sally Kift, Jill Cowley, Michelle Sanson and Penelope Watson (eds), Excellence and Innovation in Legal Education (LexisNexis, 2011) 337.

\textsuperscript{53} DeNeve and Heppner, above n 48, 233–4.

\textsuperscript{54} Ments, above n 50, 16–7.
Further, it is worthwhile remembering, that as simulations become more complex, they are also subject to additional constraints. These constraints can limit the ‘power of the imagination’ that enables students to improvise, and develop their own understanding of the material as well as exploring the viewpoints and beliefs of other group members.\textsuperscript{55} Another disadvantage flows from the resourcing considerations identified by Lombardi and Oblinger\textsuperscript{56} and discussed in the earlier part of this article. In particular, this is an issue in subjects with a large student cohort.

In addition, when the subject involves a team of teachers, some may be wary of engaging with unfamiliar learning and teaching activities. As a corollary, some teachers may also be concerned that RPSs do not represent ‘learning’ in a traditional sense. As a consequence, these teachers’ views may subtly alter the pedagogical value of the activity for their students.\textsuperscript{57}

B The Project

As already noted, in 2011 the authors designed and conducted a teaching and learning project entitled ‘Role-Play Simulations: Active Learning for Educational Integration and Professional Practice’. The project was supported by a Vice Chancellor’s Teaching and Learning Grant from the University of Technology, Sydney (UTS). The project aimed to provide students with a practice-oriented learning experience and to afford an opportunity for local and international students to interact in a semi-structured environment.\textsuperscript{58} The project was implemented in a subject called Applied Company Law. This is a cross-disciplinary subject taught by the Faculty of Law to students enrolled in the School of Business. The subject has a high proportion of international student enrolments. The RPS grew out of an earlier project that had concluded that students were aware of the benefits of cultural interaction, but that they look to their teachers to facilitate the achievement of this outcome.\textsuperscript{59} The RPS project was carried out in three distinct phases: development and design in autumn 2011; the implementation of the RPS activity in classes; and the student evaluation in spring 2011. The overall findings were that the RPS proved to be an effective tool for encouraging students to engage with each other at a disciplinary and interpersonal level. By contrast, it was less clear how effective it had been in facilitating meaningful intercultural exchange.

The RPS activity setting was the Annual General Meeting (AGM) of a fictitious Australian company called Telco Ltd. Telco supplies mobile and Internet services and its board of directors is investigating the possibility of expanding Telco’s operations to China. To do this, Telco needs additional funds and has approached an overseas investor from China (Investor) who will become a shareholder and who will also sit on the board. The investor agrees to contribute $AU50million and the board appoints Investor as a director, with the appointment to be confirmed at the next AGM. The company’s shareholders are made up of three major factions: directors 40%; other shareholders 54%; and a group of environmentalists 6%. There are tensions...

\textsuperscript{55} Ibid.
\textsuperscript{56} Lombardi, above n 46, 5.
\textsuperscript{57} Van Ments, above n 50, 15.
\textsuperscript{58} The role-play project was titled ‘Educational Integration: Enhancing Intergroup Dynamics Between Local and International Students in Cross-Disciplinary Law Subjects at UTS’ and was approved in 2010 under UTS HREC 2010-310.
\textsuperscript{59} Riley and Li, ‘Student Diversity’, above n 52.
amongst the groups, including the fact that the ‘other shareholders’ are concerned about the appointment of the Investor to the board, largely because they are not familiar with business practices in China. The confirmation of the Investor’s appointment at the next AGM is therefore not guaranteed.

In writing the scenario, the authors specifically considered how they could incorporate intercultural elements. The authors were also mindful of the fact that many cultural challenges stem from the context of the subject discipline. For example, in the business world there are great variations in business practices across different countries and cultures. Therefore, to tap into this diversity, students were provided with an opportunity to explore cultural norms within the limits of the scenario. Furthermore, the authors also tried to avoid what Zhang and Mi have identified as the ‘deficiency’ perspective. Rather than concentrating on what is commonly perceived that international students cannot do, the authors instead focused particularly on what international students could bring to role-play simulations.

Before the start of the activity, the authors briefed the teaching team on the objectives of the RPS and how it would be conducted. In the first tutorial, the tutors explained the RPS to their class and gathered information on whether the students were enrolled as local or international students and what languages the students spoke. In the second tutorial, the tutors divided the students into groups of approximately five to six students, consisting of a mixture of local and international students. In order to obtain as standardised a mix of cultures as possible, the students were not permitted to self-select into these groups. Each group was assigned to take the role of one of five ‘players’: the board of directors, the company secretary, an investor, the main group of shareholders and a group of environmental shareholders. As an introduction to the role-play simulation, the authors prepared a flyer titled ‘Making Connections’ in accordance with the guidelines developed by Arkoudis, Yu, Baik et al. This flyer, which the tutors distributed in the first class, explained the aims and importance of the RPS. In addition, the tutors also gave the students a copy of the scenario, a brief for their role, an assessment guide and a timetable for completion of written work and the carrying out of the RPS. Four of the individual groups were also provided with special or secret information sheets containing material only known to the individual group. These ‘secrets’ were designed to bring an element of fun to the role-play and anecdotally were quite successful, as the groups tried to discover each other’s ‘secret’.

The groups were typically given 15 minutes in each of the next five tutorials to work on the role-plays, although they were also expected to organise meetings outside of class as necessary. During the tutorials, the teachers were on hand to answer questions and make sure the students

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60 Ng, above n 44, 41.
61 ‘Cultural norms’ here refers to the different ways to conduct business in different cultures. In this RPS, the scenario included a Chinese investor wanting to invest a large amount of money into an Australian company. The design of this particular factual element encourages students to find out and to learn how to do business in Chinese culture. We also intentionally put students from different cultural backgrounds into study groups hoping cultural exchange could occur in carrying out their communications.
were on the right track. The course coordinator also set up a dedicated online discussion board for the RPS that was monitored regularly. Student groups were required to document their activities in a position statement. This was submitted as a group assessment during the tutorial held in week seven. In this statement, students were expected to identify relevant issues (legal, cultural and/or social) and strategies for dealing with those issues. The same tutorial was also the forum for the RPS activity and students were assessed individually for their participation in this exercise, both on this day and during the in-class preparation sessions.

The RPS was not designed to be tightly scripted or replicate the real world in every way. They did, however, allow the students to use their knowledge and understanding to develop their roles in individual ways. Thus the role-play would not necessarily pan out in an identical way for each class. There were also practical matters the authors needed to take into account. For example, the RPS would take the place of the mid-semester exam, and therefore needed to be based on material that the students learned in the first five weeks of the subject. The actual AGM also needed to be carried out within the time-frame of one tutorial, although, as already noted, the students were given time for preparation during the tutorials leading up to the RPS. In addition, the design of the RPS needed to be sufficiently flexible to take into account the fact that students enrol late, change tutorials or withdraw from a subject.

To evaluate the impact of the RPS, the authors surveyed the students two weeks after the simulated AGM. The survey results, together with the tutors’ own observations are discussed below.

C Results: Evaluating Students’ Learning and Intercultural Engagement

A total of 273 of 326 students in 13 classes participated in the survey. In broad terms, international students accounted for 40% of the participants, while the remaining 60% were local. The questionnaire consisted of 11 questions. Five open-ended questions elicited important information, such as what the students felt they had learned, whether they had difficulties with the learning exercise and whether they felt comfortable working in their group. Six closed questions were used to obtain data about students’ enrolment and how many times their group met.

Students’ answers to the question: ‘What did you learn from participating in this role-play exercise?’ were clustered around three areas and demonstrated that the students found the role-play most useful in learning about the structure of an AGM, followed by fostering teamwork and finally learning about other cultures. The RPS would thus appear to be most successful for attaining disciplinary knowledge and fostering team-work skills. Given that this was an open-ended question that allowed students to nominate as many or as few learning outcomes as they wished, the fact that 10.5% of the local student cohort found the exercise useful for learning to work with those from different cultures is more significant than may first appear. Eleven of the 273 students surveyed made negative comments about the exercise, including two who indicated they found it difficult to work with international students and seven who felt they had not learned a great deal. By the same token, there were also 21 positive comments about the usefulness of the learning task. This was the first time that a project in this subject targeted student diversity
and it provides a solid foundation from which to continue embedding the attainment of intercultural skills.

### Table 1
**What did the students learn?**

<table>
<thead>
<tr>
<th></th>
<th>International</th>
<th>Local</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structure of AGM</td>
<td>31.80%</td>
<td>41.40%</td>
<td>73.20%</td>
</tr>
<tr>
<td>Teamwork</td>
<td>30.90%</td>
<td>17.30%</td>
<td>48.20%</td>
</tr>
<tr>
<td>Different cultures</td>
<td>2.70%</td>
<td>10.50%</td>
<td>13.20%</td>
</tr>
</tbody>
</table>

Another open-ended question asked students to comment on any difficulties they faced in carrying out the role-play simulation. Because it is an open-ended question, students can comment on as many difficulties as they would like to. Their responses were varied and a summary is set out in Table 2 below.

### Table 2
**Difficulties**

<table>
<thead>
<tr>
<th>Reason</th>
<th>Not indicated Int. or Local</th>
<th>Not Answered</th>
<th>Language Barriers</th>
<th>More Detail</th>
<th>Commitment</th>
<th>Not enough information</th>
<th>None</th>
<th>Not enough time</th>
<th>Group too big</th>
<th>Marking Criteria</th>
<th>Textbook</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>International</td>
<td>Local</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Answered</td>
<td>34</td>
<td>33</td>
<td>67</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Language Barriers</td>
<td>1</td>
<td>29</td>
<td>24</td>
<td>54</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>More Detail</td>
<td>19</td>
<td>28</td>
<td>47</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commitment</td>
<td>6</td>
<td>31</td>
<td>37</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not enough information</td>
<td>13</td>
<td>9</td>
<td>22</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>3</td>
<td>18</td>
<td>21</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not enough time</td>
<td>1</td>
<td>9</td>
<td>10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group too big</td>
<td>1</td>
<td>6</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marking Criteria</td>
<td>2</td>
<td>4</td>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Textbook</td>
<td>2</td>
<td></td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>110</td>
<td>162</td>
<td>273</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The students’ most commonly cited difficulty was language barriers and this made up just over 20% of the student cohort. However, if the figures are evaluated according to the students’ enrolment as a local or international student, 26.4% of international students considered language difficulties a problem compared to 14.8% of local students. In addition, local students were likely to think of language barriers in terms of the English proficiency of international students. Eight local students for example commented that the biggest difficulty was working with international students, some of whom had ‘sub-standard’ English language skills. By the same token, when answering this question, six international students said ‘thank you’ for the chance to interact with local students.
The second most common difficulty mentioned by the students was the need for ‘more detail’. ‘More detail’ indicates that the students required greater detail about the task in terms of what was expected of them and the assessment criteria. On the other hand, ‘not enough information’ refers to students wanting more information about the company in the scenario and the resources available. If the responses are calculated as a percentage of the category of student who answered this question, more international students (27.63%) felt this hindered their learning experience compared to local students (21.71%).

When students were asked whether they were able to contribute to the group meetings 95% of the students believed they contributed to group discussions in a meaningful way. The very small percentage of students who indicated otherwise cited reasons such as: other members would not listen to his/her views, they had nothing to contribute and concern about expressing his/her views in front of the group. A reasonably high proportion of students (65%) also felt comfortable working in their group most of the time; with only 4% of students responding that they did not feel at all comfortable working in the group. Reasons for this discomfort included a ‘bad group’ and communication problems. The three main reasons students felt comfortable in their group were: friendly members, a ‘good group’ and equal contribution by team members. These results are significant in the context of the large body of literature documenting the difficulties often experienced by students in group assessment work. With respect to how the student groups allocated their tasks, more than half (54%) of the students prepared for the RPS as a group. Furthermore, 61% students believed the exercise encouraged them to interact with other members of their group outside the scheduled group meetings. Once again, this is significant given the reluctance to mix in cross cultural groups outside of class usually found in the literature.

Importantly, several tutors noticed that the students had achieved a far deeper understanding of the subject matter than would normally be expected at this early stage of the semester. In particular, the authors and two other tutors observed that the students were becoming curious, actively asking questions and exploring the material in a way that involved linking different parts of their degree programs. This was telling, because their exploration stemmed from aspects of the scenario and the role-plays that were not spelled out in detail. Although some students indicated in their responses that they wanted ‘more information’, it appeared that this very ‘lack’ of information had in fact acted as a catalyst for them to consider the implications of the scenario from a variety of perspectives. Indeed, the authors noted that in classes students started to ask extremely targeted questions, underpinned by a richer understanding of corporate law issues than they had encountered in many years of teaching the subject.

D The Project: Analysis

In analysing the data, it is clear that a majority of the students felt that they had learned something useful about AGMs and teamwork. In particular, the exercise provided students with an opportunity to engage in practice-oriented learning. Not only did the students gain

64 Kimmel and Volet, above n 15, 18–9; Sanchéz, above n 30, 4.
65 Leask, ‘Using Formal and Informal Curricula to Improve Interactions Between Home and International Students’, above n 12, 205.
disciplinary knowledge, but the exercise also provided opportunities to create a real-life scenario for students to practise their problem-solving skills. Some of the positive comments included: ‘Good to see how an AGM works, rather than just reading about it. Makes you actually think about the issues’; ‘It is also useful to have an idea of what an AGM is like before we see the real thing’; ‘It was a very informative experience which I think will benefit me one day in the workplace’. These comments were all made by local students, which may indicate that international students struggled to recognise the value of the role-play activity or, perhaps, that the way an AGM is conducted in Australia seemed of little or no relevance to them and their own cultural legal contexts.

Another positive outcome was that the project afforded students a chance to hone their social skills in a culturally-diverse setting. Not only did the authors specifically include intercultural elements in the RPS, but the assessment task required students to comment on any legal/social and cultural issues they identified and/or encountered. The authors had hoped that these interventions would create opportunities for the students to engage with each other at an interpersonal level, which would lead to the development of empathy and tolerance and a greater awareness of cultural matters. The extent to which the project achieved these aims is not clear, although the reported student meetings outside of scheduled class times seem to be a positive step.

At first glance, the fact that only 13.2% of the student cohort indicated that they learnt something useful about working with those from different cultures is disappointing. However, if the data is analysed further, a slightly different picture emerges. Indeed, the data indicates that the students did interact in a meaningful way, even if the students themselves did not recognise that fact. It will be recalled that 95% of the students felt they made a meaningful contribution to their group and only 4% did not feel comfortable working in their group. This indicates that students’ attitudes towards each other were tolerant and cooperative. Moreover, the fact that an overwhelming majority of students felt they made meaningful contributions signifies that no single student dominated the groups. Given that the groups were deliberately comprised of local and international students, it is also clear that tolerance and cooperativeness flowed between local and international students and vice versa. This conclusion is further reinforced by the fact that 61% of the students believed that the learning exercise encouraged them to interact outside the scheduled group meetings. These interactions were voluntary and are a further indication that students worked collaboratively. This collaboration was crucial to the completion of the assessment, for students needed to be sufficiently open and frank with each other in order to express different points of view, including those relating to cultural issues. Overall, the project encouraged students to work collaboratively in culturally diverse groups and this proved to be an important outcome.

There were a few cultural elements that the authors had incorporated into the design of the RPS, which included: 1) in the first class, collected data from students in relation to their cultural background (by using a short questionnaire); 2) in the second class, students were put into groups with others from a different cultural background (based on the data collected at the first class); 3) there were specific requirements in the RPS information sheet requiring students to consider cultural elements in carrying out their tasks; 4) a Chinese investor was inserted into the RPS scenario and played an important role in the project; 5) cultural exchange was clearly specified as a criteria for the evaluation of the RPS; and 6) cultural exchange was also made clear as an important goal for students to achieve in the final project survey.
As already mentioned, another unexpected and welcome outcome was the deeper and richer understanding that students attained with respect to corporate law. Although the scenario involved an AGM, students asked questions extending beyond the conduct of company meetings. This included issues relating to directors’ duties, the power structures that operate within a company and corporate governance. The incisive quality of the questions demonstrated that students were linking the different parts of the subject – something that was not targeted in the original project design, but which was a potentially important outcome of the RPS activity.

Despite all of these positive outcomes, the authors reflected on the students’ comments and the survey results, to evaluate which parts of the project could be improved. One aspect that the survey pinpointed was the fact that the students expressed a strong desire for clearer instructions and more detailed information on their roles. While this is something that can be easily addressed in the writing of an RPS, the authors feel that a balance needs to be struck between how much information and/or constraints are given to students and how much ‘learning space’ teachers reserve for students to question, research and make their own contributions. The authors acknowledge that the students’ stance towards a learning activity may be coloured by the perceived complexity of the task and that it is vital to brief students to an appropriate extent. The requests for clearer information also varied across the tutorials, therefore these may be related, at least in part, to the dynamics of the different tutorial classes as well as to individual teachers’ approaches to the RPS. The authors also acknowledge that it is vital to brief the teaching team adequately. This helps to ensure that each teacher is able to support students when they undertake novel learning tasks. This will clearly need to be a strong focus in any future iterations of the RPS activity.

IV THE ROLE-PLAY WORKSHOP

A Pre-Workshop Survey

As discussed in the introduction to this paper, following the role-play activity the authors obtained a grant from the Office of Learning and Teaching (OLT) to bring together experts in internationalisation and the use of role-plays as a learning tool. The purpose was to workshop some of the challenges that flowed from the RPS activity. In particular, the workshop targeted the use of RPS as a type of group work that could be used to enhance local-international student engagement. A key theme that underpinned the sessions was the understanding that ‘internationalisation’ depends on the development of intercultural skills based on fundamentals of respect and tolerance for other people.67

Prior to the workshop, participants were asked to complete an anonymous online survey to gauge how they perceived and implemented IoC. The survey was based on a questionnaire developed by Associate Professor Betty Leask, ‘Questionnaire on the Internationalisation of the

67 The workshop project was titled: ‘Internationalisation of the curriculum: Using Role-Play Simulations to Enhance Intercultural Engagement in a Practice-Oriented Context’ and was approved in 2012 under UTS HREC 2012-193A.
Curriculum’, and was designed to elicit information on the participants’ understanding of IoC, the relative importance of internationalisation to the participants’ educational institution, and how educators implemented the concept of internationalisation.

The survey comprised eight questions where answers were provided on a Likert scale, with room for participants to provide additional comments. Nineteen people participated in the survey and five participants also made comments. Question one asked the participants to identify how clearly the rationale for IoC was understood by the teaching team. The responses, set out in Table 3, indicate that 62.11% of the participants were either not clear on this point, or only somewhat clear.

### Table 3
**Understanding Internationalisation**

<table>
<thead>
<tr>
<th>Question 1: How clearly is the rationale for internationalisation of the curriculum in your course understood by yourself and other members of the teaching team (if any)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not clearly</td>
</tr>
<tr>
<td>7</td>
</tr>
<tr>
<td>36.8</td>
</tr>
</tbody>
</table>

Question 7 asked to what extent students are required to apply knowledge and skills in different national and cultural contexts. The responses, set out in Table 4, reveal that 31.6% answered never or almost never while 68.4% noted that such application was expected sometimes (42.1%), almost always (15.8%) or always (10.5%).

### Table 4
**Understanding Internationalisation**

<table>
<thead>
<tr>
<th>Question 7: To what extent are students required to apply knowledge and skills in different national and cultural contexts?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>5.3</td>
</tr>
</tbody>
</table>

The survey results indicate that most participants have some awareness of the rationale and importance of IoC and also that most participants have endeavoured to include international elements in their course. The latter, for example, is demonstrated by the fact that the majority of

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<uq.edu.au/tediteach/ioc/docs/QIC14.doc>; Support for Betty’s original work was provided by the Australian Learning and Teaching Council Ltd, the forerunner of the Office of Learning and Teaching.
teachers have required students to apply knowledge and skills in different national and cultural contexts. Despite this, there appears to be a gulf between these endeavours and teachers being able to demonstrate that their students have, in reality, achieved a measure of intercultural competence. This conclusion stems primarily from the responses to two questions: Question 5, set out in Table 5 below, which indicates that few participants had correlated assessment tasks with IoC; and Question 6, set out in Table 6 below, which reveals that international learning goals and outcomes are overwhelmingly not clearly defined.

**Table 5**
**Assessment and IoC**

<table>
<thead>
<tr>
<th>Question 5: To what extent do assessment tasks in your course require students to consider issues from a variety of cultural perspectives?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>5.3</td>
</tr>
</tbody>
</table>

**Table 6**
**Articulating Internationalisation in Learning Goals and Outcomes**

<table>
<thead>
<tr>
<th>Question 6: How clearly defined and articulated are the international/intercultural learning goals, aims and outcomes in your course?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not clearly</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>13</td>
</tr>
<tr>
<td>68.4</td>
</tr>
</tbody>
</table>

These gaps lead to an obvious dilemma when students are expected to achieve aims and objectives (68.4% of the responses to question 7) that are not assessable. From a pedagogical perspective it raises important issues of fairness, as well as competency with respect to realisation of course aims. Moreover, if it is kept in mind that the responses to question 6 disclose that 68.4% of participants have not clearly defined international and/or intercultural learning goals, aims and outcomes, it means that the message of internationalisation will not reach students in an articulate and openly defined way. In the absence of a strong link between aims, objectives and assessment tasks it is at least arguable that, even with the best intentions, attempts at IoC will be ineffective or, at the very least, not as effective as they could be. Moreover, these dilemmas extend to IoC at an institutional level, where assertions that graduates have achieved intercultural competence lack clear data to substantiate those claims.

The reasons for the gap between expectation and reality include two possibilities. First, although the majority of participants believe that IoC is an important consideration, there appears to be a
misunderstanding, or a narrow understanding, of the notion of IoC. One participant noted that because the subject they teach relates to Australian law, internationalisation occurs incidentally through limited comparative work. The same participant also indicated that internationalisation is not regarded as important for their subject. Another participant wrote that although the student cohort comprises a diverse range of students, IoC is not integrated into the core subjects. These comments evince a lack of understanding that an important component of IoC is the development of intercultural skills, something that is not necessarily fostered by the addition of ‘token’ international/intercultural activities. Indeed, Betty Leask also pointed out that IoC should occur even if there are no international students in the class.

Second, due to the fact that some subjects, such as those targeting international studies, are considered easier to internationalise than others, IoC, if it happens, frequently occurs at the individual subject level, rather than the program level. One participant commented that as a curriculum developer it would assist if ‘widely applicable curriculum internationalisation strategies’ could be developed. These would be made available to program and course coordinators who could adapt them for ‘discipline specific learning and teaching’, including assessment.

In this context, the discussion noted that when referring to international students, teachers and educational institutions need to question assumptions that international students are a homogenous group. Moreover, the workshop group examined whether there is a hidden curriculum that makes IoC challenging. In many cases, for example, teachers tend to focus on international material drawn from the United States and the United Kingdom. Yet, is this appropriate? Perhaps the answer is ‘yes’ if the subject relates to Australian law. However, coordinators need to consider the content of courses from a program view. Issues of cross-cultural orientation can provide an unnecessary hurdle for international students. Consider, for example, what messages teachers and institutions send when tacit, if not express, expectations centre on international students making the bulk of the connections and concessions, rather than local students also accepting that they have a part to play. This problem calls into question how lines of responsibility and obligation are determined and also how institutions can circulate that message. As a corollary, teachers and educational institutions also need to consider how international students interact in the wider community.

B Role-Play Simulation as a Learning Tool

Against this backdrop, the workshop explored the use of RPS as a learning tool to enhance internationalisation and promote practice-oriented learning. RPSs usually involve the ‘setting up of more or less unstructured situations’ where students are assigned roles which they act out in an improvised way. They are related to simulations, although the latter are less tightly scripted than role-plays.

Hence, RPSs are framed scenarios where students assume various roles, which they adopt and develop in an extemporised way. In each case, the aim is not to reproduce the complexities of the

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69 DeNeve and Heppner, above n 48, 231, 233–4.
70 Ibid.
real world in their entirety but instead to include sufficient real-world elements so that the
students have an opportunity of learning from their joint enactment of the scenarios, rather than
merely by reading and discussion.\footnote{Van Ments, above n 50, 15.}

Speakers at the workshop noted that using RPSs involve a big fear factor, largely because
students are worried that they will embarrass themselves. While such fear exists for all students,
it is intensified for international students. Specifically, the sense of isolation that international
students experience, combined with fear of embarrassment, can be a significant stumbling block
to their participation in RPSs. Yet, as was pointed out, if fear is properly handled it can lead to
positive feelings and emotions, such as curiosity and deeper interest. Moreover, ‘group work is
good for helping you to let go of your first idea’. From the teacher’s perspective, using RPSs
involves a vast shift in perspective. As pointed out in the workshop, teachers need to advance
from ‘pride in owning (my) knowledge’ to ‘pleasure in the fact of knowledge’. In particular,
teachers need to be prepared to ‘lose control’ of the action, to ‘teach through no talking’ and to
‘have the willingness to make mistakes’.

Other practical challenges stem from workloads that may increase if RPS is used. Writing
scenarios can be time-consuming and implementing and assessing an RPS can be labour-
intensive. In particular, this may be the case where the assessment is new and extra care must be
taken to familiarise students with it. In addition, because the assessment may be the first time
students are undertaking an RPS, it is important to be crystal clear on matters such as the
marking criteria.

Teachers also need to keep in mind that from the point of view of the students there are roughly
three stages to an RPS: briefing the students; actioning the RPS; and, debriefing. The students
will not be privy to much of the work that goes on behind the scenes, and yet the single most
important element for success of an RPS lies in its detailed design. This includes the
development of clear rules, roles and scenarios, as well as careful assessment. With respect to the
latter, this means ensuring that the teaching team assesses the RPS effectively. Although
assessment will depend on individual learning outcomes and attributes as well as the design of
the RPS, it is important for teachers to be aware that assessment can be undertaken throughout
the three RPS phases (briefing, action and de-briefing). In the briefing phase, assessment can
include knowledge tests, profile statements, position papers. In the action phase, assessment can
include participation, analysis, statement of standpoint, negotiation; and the debriefing phase
may include a report, a considered standpoint essay and evaluation of postings.

Given the large investment in time and effort that academics will invariably put into developing
RPS it is beneficial for the team to treat the RPS process as akin to a research project. This
involves some further work in summarising the project and writing it up for publication.
However, this extra work is worthwhile as it not only helps academics with their own research
output, but it also allows the project to be disseminated to a wider academic audience, helping
others who might be considering a similar learning task.
In addition, academics need to be appreciative of the time-and-effort cost and set up a team with widely drawn experience and expertise so that the load can be shared effectively. For example, one member of the team could be a content expert, another, an education-focused academic, and a third, a person experienced with the use of technology as a learning aid.

The use of RPSs, is of course well established for some aspects of legal education, such as interviewing clients and negotiating. Despite this, RPSs do not appear to have been developed with the specific aim of enhancing student learning in environments of high cultural diversity. Yet, as pointed out at the workshop, diversity should be a resource that at the very least enables students to examine and explore different points of view, including in the context of RPSs.

At the same time, the use of RPSs in situations of high diversity has many challenges. First, interaction does not happen automatically or indeed happen well. Successful interaction depends on the interventions made by teachers. Second, when planning interventions it is important for teachers to keep in mind that participants have distinct identities and paradigms. Thus, the type of role-play design a teacher will structure will be different in business from law, for example. Third, most studies thus far have focused on perceptions, and few have examined outcomes.

C Evaluation of the Workshop

Only 19 people attended the workshop, therefore evaluation done by collecting data from questionnaires and presenting data by way of percentages might not be the most effective way to analyse the workshop. Unfortunately, given that all of the workshop attendees were either academics or professional staff from educational institutions their time with us was rather limited. In this context, using a questionnaire was the most convenient way of collecting feedback on the day. Accordingly, the workshop evaluation is carried out primarily based on the data collected by the questionnaire at the end of the workshop.

The feedback was mainly positive, with 80% of the participants indicating that they found the workshops helpful to them. The participants particularly enjoyed the following: the fact that the sessions were interactive; learning how other universities manage group work; developing a better understanding of internationalisation; the good mix of discussion and questions, and; understanding that issues and strategies in internationalisation are common across universities.

Many participants also noted that they would have liked more time for real-life exercises and more activities on cultural diversity. In particular, one participant noted that, it is necessary to ‘separate the discussion of how to internationalise course content from parallel conversations around learning and teaching processes. We need strategies on both fronts’.

A number of participants also indicated that they would like individual follow-up, more workshops, examples, and more practical ‘how to do’ advice. These observations clearly indicate that teachers are keen to engage with IoC but are not sure where to start. At the same time, teachers are enthusiastic with regard to obtaining specialist help to implement IoC.
These statements also need to be read in conjunction with the pre-workshop survey responses to question 4, set out in Table 7 below. These indicate that 94.7% of participants believe that their teaching and learning arrangements support their students (to varying levels) to work effectively in cross-cultural groups and teams.

| Question 4: To what extent do the teaching and learning arrangements in your course assist all students to develop international and intercultural skills and knowledge? |
|-----------------|----------------|----------------|----------|----------------|----------------|
| Never           | Almost never   | Sometimes      | Almost always | Always      | Total responses to this question |
| 0               | 1              | 13             | 5         | 0            | 19               |
| 0               | 5.3            | 68.4           | 26.3      | 0            | 100%             |

However, it will also be recalled that 68.4% of participants acknowledged that they did not clearly define international/intercultural learning goals, aims and outcomes in their courses. It thus appears that while educational institutions consider internationalisation to be one of their strengths, more work needs to be done to assist teachers in developing and implementing IoC at the subject, course and program levels.

V CONCLUSION

The concept of internationalisation encompasses more than simply providing enhanced opportunities for cross-border movement of students. At an interpersonal level, it centres on the development of intercultural skills. These are skills built upon a foundation of tolerance and understanding of cultural diversity. In the words of Haigh, ‘internationalisation, [should effectively set] local learners those same challenges currently facing international learners.’

Accordingly, teachers have the opportunity to become intercultural facilitators by taking advantage of cultural diversity in their classrooms and highlighting the importance and relevance to students of developing intercultural skills.

The RPS project reported in this paper underscores that becoming an intercultural facilitator can be challenging. The findings demonstrate that although RPS is an effective tool for encouraging students to engage with each other at a disciplinary and personal level, this is not necessarily the case with respect to enabling meaningful intercultural engagement. Accordingly, for teachers to develop their role as intercultural facilitators, they need to innovate and explore all aspects of students’ experiences of internationalisation.

The workshop revealed that IoC can occur at different levels and at different stages of teaching and learning. In particular, IoC can occur in both the process and the products of education. It is

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72 Haigh, above n 34, 282.
telling that discussions at the workshop noted that while educational institutions consider internationalisation to be one of their strengths, more work needs to be done to assist teachers in developing and implementing IoC at the subject, course and program levels. Until institutions acknowledge and deal with this discontinuity, it is likely that IoC will remain an aspiration with piecemeal application and implementation.

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‘DOMESTIC PROMISES’ AND THE DIVISION OF FARMING PROPERTY IN AUSTRALIA

MALCOLM VOYCE

In Australia, property law represents a particular historical narrative of social ideas. To illustrate this proposition, two judgments are examined concerning the division of family property following divorce, and one judgment concerning Family Provision legislation. The objective is to build on the idea that in legal disputes property has been divided in a way that privileges ‘productive’ male labour and minimises the contributions of women. A second objective is to show how the division of property reflects a particular notion of Australian history and associated ideas about economics, sexuality and domesticity. Finally, it will be demonstrated that a phenomenon, which will, for the present, be called ‘domestic promises’, has been interpreted to exclude certain familial expectations regarding rural property.

I INTRODUCTION

‘No set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning.’

Alexander has argued that ‘exclusion theorists’ have considered that property properly concerns only the relationships between the owners and non-owners. However, some property theorists argue that we should also examine the relationship between the stakeholders of property owners through how the law governs their relationship with each other.

To carry out an examination of this kind, I concentrate on an era of Australian history up to the time that Paul Kelly called the End of Certainty. Kelly characterised this period, prior to the 1970s, as being a form of capitalism based on ‘White Australia, Trade Protection, Wage Arbitration, State Paternalism and Imperial Benevolence’. This was the period of history when Australia was called the ‘settler state’ and it was said of Australia that it ‘rode on the sheep’s back’ and that the pastoral industry carried the economy of the country. During this period, a

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* LLB (Auck), MA, PhD (Lond), PhD (Macq) is an Associate Professor at the Macquarie Law School.
2 See, eg, Penner who argues that property rights cannot be ‘fully explained by using the concepts of exclusion and use’ and that such concepts are ‘intertwined’; see James Penner, The Idea of Property in Law (Clarendon Press, 2000) 68.
5 Lloyd adds to this list by adding agricultural marketing, the Federal/State financial arrangements and State owned banks; see Christopher Lloyd, ‘Regime Changes in Australian Capitalism: Towards a Historical Political Economy of Regulation’ (2002) 42 Australian Economic History Review 238.
particular ‘rural ideology’ prevailed over farming and rural life. According to this ideology, the farm was a man’s realm and women were background figures in the landscape. Farming life, on this account, was based on the acceptance of male hegemony, domestic ideals for women, and a commitment to self-sufficiency and individualism without government interference. What has been called the ‘pioneer legend’ celebrated many of the values associated with rural life, such as courage, enterprise, hard work and perseverance. In a different way, the emergence of the ‘bush legend’ also encapsulated some of these values with its masculine ideal of fiercely independent, practical, rough-and-ready, self-made men. Another version of this theme emerges in the language of ‘agrarianism’ and the idea of ‘countrymindedness’. These sentiments have continued into later times, but I wish to concentrate on how they were imbricated with law in an earlier period.

While farmers in many instances settled family disputes within their own family circles, they sometimes could only resolve their disputes in the courts. My approach to texts that judicially allocate family property is not only to examine cases as ‘family legal texts’ but, more importantly, to view them as particular representations of rural ideology. I examine them as specific compilations of forms of knowledge such as that contained within the field of economics, and look for ways in which they are inscribed with notions of ‘sexuality’.

By the term ‘family law texts’ I mean those texts which provide rules for the distribution of property following a dispute over a will, a divorce settlement or a family trust property. My purpose is not to discover the political reasons why family law texts have been enacted as law, hence I am not interested in the usual form of legal history that seeks to discover why or by what process a certain rule came to be authoritative, or how a rule may have reflected patriarchal or vested economic interests. With my emphasis on the word ‘text’ I seek to differentiate my analysis from traditional legal analysis. My approach is to concentrate on the disciplines the texts adopt rather than trying to locate the proposition a case stands for. As a form of specialised literature, these texts consist of ‘social textual practices’ that seek to impose particular meanings on the world. Textual practices have been used systematically to appropriate, privilege and secure a specific and limited set of meanings, accents and connotations. In the production of meaning, the literary practices of law displace and reject alternative meanings.

To complete an examination of these legal texts, I examine how economics as a discourse on efficiency has been imbricated or combined with ideas of sexuality. I indicate the changes in register of essential ideas in family law texts—ideas of work and productivity—and how these words have come to carry ideas of sexuality as dangerous or productive. I am aware that this connection

8 Margaret Alston, Women on the Land: The Hidden Heart of Rural Australia (New South Wales University Press, 1995).
11 This view of family law texts does not represent a typical approach to family law. The conventional taxonomy of legal subjects has its own genealogy. As Sugerman has pointed out, it arose partially out of the classification system commenced by legal textbook writers, see David Sugerman, ‘Legal Theory, The Common Law Mind and the Making of the Textbook Tradition’ in William Twining (ed), Legal Theory and the Common Law (Blackwell, 1986) 26.
between economics and sexuality may surprise the reader, as we normally think of economics as the science of scarcity or of the choices made regarding the allocation of goods, and the mechanics that govern that process. In my use of the term ‘sexuality’, it does not refer to an innate or historically given set of biological predispositions, but rather to a set of practices, techniques, or behaviours that have emerged in the context of capitalism. This conjunction of terms calls attention to the way they are reciprocally constituted. Opposed terms are correlative, like ‘work and play’; each takes on a signification through that relationship.

II SAMPLE CASES ON FAMILY PROPERTY

The selection of cases to be examined was made on the basis that each case was representative of the emphasis given to the long-term survival of the farm in the interests of male farming involvement on the farm. Furthermore, these cases contain unfulfilled ‘domestic promises’ which were constructed in a way designed to avoid their detection. The period of these texts (1912–89) straddles the development of four important features of life in Australia. I take these to be the development of the economy based on agricultural products, the redeployment of forms of sexuality associated with capitalism, the development of notions of domesticity for women and the linking of economic texts with notions of ‘sexuality’.

A Robinson v Robinson\textsuperscript{13}

In 1954 Mr Robinson bought a block of farming land and transferred it into his own name as sole proprietor. He then started to build a house on the land financed by his bank. Later that year he met a recent immigrant (later, Mrs Robinson) and they moved into the uncompleted house. After they married in 1955, Mr Robinson asked his wife to continue to work in order that her wages could go towards the cost of the home. She also subsequently did manual work about the house and supposedly ‘kept house’. Mr Robinson promised that this arrangement would be of advantage to them because the house would belong to both of them. In the lounge room one night, Mr Robinson said ‘everything here belongs to both of us’ and ‘it’s all yours, and it’s all ours’.

The judge decided, as a matter of fact, that the husband did say something to this effect, but he construed these words as an advanced version of the marriage vow that ‘all my worldly goods with thee I share’. As regards the wife’s claim on the house, a half share of the land and a share of the contribution made to the couple’s expenses, the judge found as follows. Firstly, he found, as regards the land, that he was only empowered to declare who the legal owner was and not whether it should be shared according to notions of fairness and equity.\textsuperscript{14} This was indeed the case, because at the time the case was heard, the relevant law under the Married Women’s Property Acts only permitted the courts to decide issues as to title.\textsuperscript{15} Secondly, as regards the wife’s contribution to general household expenses, the judge applied the presumption that they

\textsuperscript{13} [1961] WAR 56.
\textsuperscript{14} Each state had their own act, see for example Married Women's Property Act 1892 (WA).
\textsuperscript{15} Ian Hardingham and Marcia Neave, Australian Family Property Law (Law Book Company, 1984) 32, 45; W Davies, ‘Section 17 of the Married Women's Property Act: Law or Palm Tree Justice’ (1967) 8 University of Western Australia Law Review 48.
were a gift to him and that there was no resulting trust back to the wife. I describe the significance of these two factors later.

B Parker’s Case

This case involved a dispute between husband and wife as to their respective contributions under the Family Law Act 1975 (Cth). Under this legislation, property could be divided according to the contributions of the parties. The husband was from a third generation farming family in northern Queensland. In 1971 he commenced farming with his father on a property which had been acquired by his grandfather in 1896, and which was currently owned by his father. Prior to this he had already built a family home on the property with the help of his parents and some borrowed money. In 1970 he married, and his wife left her clerical job one month prior to the birth of their first child (who by time of the hearing was 18 years old). In late 1972 she returned to work part-time and continued with part-time work until 1977. During this time their second son was born, in 1975 (he was 15 years old by the time of the hearing). In 1977 the husband, with his father, transferred all the plant, machinery and growing sugar to a family trust. The trust also took a lease on the farm from the father. During this period, in the late 1970s, the wife did the farm bookwork. In 1978 she had their third son.

In 1981 the husband invented a packaging machine, and the wife assisted in the clerical work for that operation. In 1984 she took outside work for three years. In 1985 the husband's father died and the husband received part of his wealth, including a part interest in another farm, which he subsequently operated. The wife also kept the books for the second farm property. The partners were found to have separated in 1989. The judge assessed their assets as being $2 011 655. As regards the wife’s contribution, it was accepted that she had worked as a homemaker and parent as well as on the farm, and that in the packing shed she had worked to her full capacity. The trial court judge accepted that she had far heavier duties than might normally be the case.

It appears that the court had some hesitation in accepting this evidence, and the trial court judge was reluctant to consider a maintenance element for the wife, as she would have received a large award and was capable of work. The wife also had responsibility for the three children, who at the time were between 12 and 18 years of age, but the conflict with work which parenting involved was not thought to be noteworthy. The judge accepted that the husband was a ‘highly driven, highly motivated man who had been industrious throughout the 20 years of marriage’. The crucial factor in the husband's favour was the assets he had brought into the marriage, and the work he had done on the farm after the separation of the parties (an eight month period). The judge awarded the wife 30% of the assets, amounting to $507 639, and payable within 90 days, in settlement of her property claims, and further ordered that she be paid $100 a week for each child to cover parenting costs. On appeal, The Full Family Court awarded the wife an additional sum of only $30 000, based on a mistaken assessment made by the lower court judge.

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17 The Act sets out general principles that a court must consider when deciding financial disputes after the breakdown of a marriage. Sections 79(4) and 75(2) make explicit the principles a court must consider, which includes the financial contributions of the parties and their future needs.
What is striking here is the brevity of the period the husband had worked on the property before the marriage, and how late in the marriage the husband had received the property inherited from his family, as weighed against the uninterrupted 20 years during which the wife had contributed to both the family and the business.

C The Parr Case

This case was an instance of a contested will under the Testator’s Family Maintenance legislation. This legislation allowed a family member who was not adequately provided for in a will or an intestacy to bring proceedings for further provision. In such actions, wives’ claims are given ‘paramountcy’ should they be perceived to have been dutiful wives and their claims not be disallowed by disentitling conduct. In Re Parr this older, stricter attitude is maintained.

In this case, the female applicant was 23 when she married her husband, who was a drover. The judge thought he was probably then a ‘hard working young country fellow’:

It is evident that he was one of those types, of whom the country may fairly be proud, who go out into the backblocks, take up virgin soil, clear it themselves, and live a hard life, working all hours and gradually improving their property.

The judge found that the wife was ‘probably more delicately nurtured’, as she had lived all her life in the more comfortable circumstances of a girl living in Melbourne. After marriage, they went to the country to live. For some years, while the husband was droving, the wife was left to her own devices. Eventually he ‘took up’ a farmstead and ‘made there his home’. The wife swore that her husband required her to live on the property in a one-roomed hut with an earthen floor and which had no windows or proper conveniences. The judge believed the wife to be a ‘delicate woman who required special food and who really required constant attention’, and that her husband never gave her proper food. On the other hand, the husband’s family saw her as a typical girl from the town who, finding herself in the backblocks, craved to return to the city: ‘Not cut out for country life she let him see it, and looking after herself, left him to shift for himself’. They alleged she refused to cook his meals and was always looking for an opportunity to get back to Melbourne. After 10 years of marriage she deserted him and refused to return when he wrote to her. Shortly afterwards he contracted pneumonia and died.

The judge saw the question to be decided as follows:

Now, the real question is, which is the correct view to take? Is it a case in which the widow did in her husband’s lifetime separate herself from him? Did she make her own bed, and must she lie on it? Or, were the hardships and the trials to which she was subjected, in her particular circumstances, such that the Court would say that he must have been an unnatural or a heartless man and that he could only expect if he treated her in that way that she would leave him, and that he had no right to complain of her conduct towards him.

18 Re H F Parr (deceased) [1929] 30 NSWR 10.
19 In New South Wales the governing act was the Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW).
21 Ibid 11.
The applicant wife alleged that two years prior to their separation, the husband had made her a co-partner in his business and had made her a half-share gift of his stock, implements and chattels but not of the farming land. As evidence of this agreement, the wife produced letters which her husband had given her as ‘a sort of guarantee of good faith’. But the judge accepted evidence from the husband’s mother who argued that this was not true. The wife argued she had suffered from gastric trouble, leaving her without energy. However, the judge supposed it was not her lack of energy which led her to separate herself from her husband, but rather ‘a disinclination to share the life deliberately chosen by her when she married him’.

The real difficulty, the judge decided, was that she did not lead the life of a settler's wife, or share the hardships which a settler's wife was called upon to share. His view was that she did not carry her share of the burden, and that she was not unable to do so but rather had a ‘frank disinclination to do so’. Such was the judge's view of the evidence that, had the husband applied for restitution of conjugal rights, or had his wife applied for maintenance, the husband would have won, because she had deliberately separated herself from her husband. Despite the ten years of marriage prior to her leaving her husband, the judge decided that he should apply the same principles to determine whether she should obtain maintenance. As she had ‘deliberately cut herself off from her husband and left him to his own devices’, she should receive no maintenance but only her half share of the business.

III THE CONTEXT OF THESE CASES IN AUSTRALIAN HISTORY AND THE REPRESENTATION OF WOMEN IN THESE TEXTS

The cases discussed above reflect connections with the pioneer settlement of Australia and versions of the Australian myth of ‘farming as a way of life’. The law in these cases reflects some ideas on property imported through the sensibilities of immigrants and their notions of work and domesticity, which emphasised productive labour for men and domestic roles for women. Collectively the cases enshrine the idea of the necessity for a stable rural sector and the idea that women were needed as ‘civilising agents’ and in need of patriarchal protection. In this scheme of thought women were required to maintain an orderly position and help create a prosperous nation. This group of cases also imbricate the idea of family history, based on the value attached to keeping and perpetuating the name of the family in its district. The patrimony a

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22 This is a supposition as regards the Robinson and Parr cases.

23 Here I meant the shadow of ideas left behind from English culture associated with the expropriation of common lands and the enclosures. These ideas existed alongside ideas that land belonged to those who could develop it. For a description of various attitudes to land, see Nicola Graham, *Landscape: Property, Environment and Law* (Routledge, 2011).

24 The downgrading of women’s contribution has been well commented on by family law scholars. On the special recognition in law given to productive efforts to increase or preserve the ‘viable’ aspect to property, see the law of waste. Under the law of waste, a life tenant is liable for voluntary waste, which diminishes the property, see Chris Bessant, ‘From Forest to Field: A Brief History of Environmental Law’ (1991) 16(4) *Legal Service Bulletin* 160. Secondly, see the rule that requires the trustee to sell declining or depreciating assets under the rule in *Howe v Dartmouth* 7 Ves 137. Thirdly, early forms of leases in colonial Australia required that improvements were to be carried out as a condition of the grant, as explained by Stefan Petrow, ‘Discontent and Habits of Evasion: the Collection of Quit Rents in Van Diemen’s Land 1825-1863’ (2001) 117 Australian Historical Studies 240.

son received in this notion of family life took the form of a partnership or custodianship rather than that of a piece of land as such, as the lengthy process of transfer meant that the farm was in a continuous process of transfer between generations.  

While professional economics as a form of calculation existed in its own discursive realm, my approach to these family law texts is to examine how ideas of rationality and productive behaviour were imported from the discipline of economics into family texts and were imbricated with notions of sexuality. This form of argument makes two moves. Firstly, I argue that economic values emanating from economics as a calculative science have been applied to the household realm. Secondly, I argue that economics as an idea of efficiency became connected to sexual norms concerning appropriate domesticity for women and a productive ideal for men. Prior to the notion of the economy as ‘a totality of monetarised exchanges in a defined space’, the family was regarded as a ‘household economy’. With the emergence of the notion of government in relation to the family there developed the idea that family property should be used efficiently and that a good family should have no wastage of income due to inappropriate transfers out of the family.

These texts thus reveal the incorporation of economic values into the idea of a family economy. Hence ideas of what was perceived as productive labour—necessary for the long-term custodianship of the family—became part of the prescriptive norms imposed on women as dependents, as mothers and housewives, and conceived of them as less productive than men and as unfit economic agents.

Furthermore, these professional expectations embedded in the texts regarding productive labour and support for family members were inscribed with ideas of ‘sexuality’. Thus in terms of these norms,  

26 Berenice Carrington, Pekina: An Ethnography of Memory (Unpublished Doctorate, Australian National University, 1997) 14, 121–3.
27 For a further development of this argument, see Malcolm Voyce, ‘Governing from a Distance: The Significance of the Capital Income Distinction in Trusts’ in Susan Scott Hunt and Hilary Lim (eds), Feminist Perspectives on Equity and Trusts (Cavendish, 2001) 197.
29 The oeconomy was the governance of the household (of servants, women, children, animals) and the political oeconomy was the governance of the state as household through its constituent households. See Mitchell Dean, Critical and Effective Histories: Foucault’s Methods and Historical Sociology (Routledge, 1994) 189.
31 On the position of women and Victorian economists, see Peter Groenewegen, Feminism and Political Economy in Victorian England (Edward Elgar, 1994); Michele Pujol, Feminism and Anti-Feminism in Early Economic Thought (Elgar, 1992). These authors discuss major figures of this period and their views on the market economy as a male preserve. On the view of classical economists and primogeniture, see D L C Miller, ‘Rights of the Surviving Spouse: A Distinct System in Scotland and Developments in England’ (1980) Acta Juridica 49.
those who were sexually dangerous or irresponsible with property were to be marginalised or punished, as they were deemed unproductive with property and at fault. Likewise, those who exhibited the positive attributes of masculinity were seen in a favourable light and as suitable recipients of property.

This form of argument deploys Foucault’s notion of how sexuality was connected to economic ideas such as that of productive behaviour.32 In this context ‘sexuality’ should not be regarded as a bodily phenomenon but as a discursive formation that readily connects with other ideas. Thus the idea of an efficient household economy emerged and became the norm, with the result that those who were subject to this discourse were required to act efficiently and with self-restraint. Along with this there evolved domestic ideals for women and productive ideals for men.

Official reports and cases from the period show a strong expectation that women should possess attributes that accorded with prescriptive notions of work, domesticity, and concern for the preservation and retention of family property. In other words, ‘property’ should be preserved by marriage partners through the application of effort and self-restraint.33 I have indicated how these texts reflect a particular view of Australian history and the subservient position of women as regards the construction of their labour and how it is rewarded. How have these texts been compiled? Or, to put the question in a way that accords with my earlier suggestion, ‘what does an examination of these texts reveal?’ Before I answer this question, two caveats are in order. Firstly, I acknowledge that ‘law’ does not necessarily reflect ordinary activities of everyday life. I make this rather obvious comment because lawyers often mistakenly believe that the law describes the world as it actually exists.34 Secondly, while the above analysis of cases shows the priority given to masculine labour and the invisibility of female labour, this analysis hides the role of agency, or what some scholars call ‘resistance’. I make this comment, as it may be tempting to read the position of women as prescriptively defined by men or by an exploitive patriarchal ideology. That makes it necessary to balance such accounts with readings that open up strategic avenues of self-transformation for women.35


34 Many scholars have noted the limits of state law given the continuation of customary forms of law in most states, as well as the existence of different groups at the margins of capitalist modernity, see Boaventura de Sousa Santos, ‘The Law of the Oppressed: The Construction and Reproduction of Inequality in Pasagada’ (1977) 12 *Law and Society Review* 5; Stuart Macaulay, ‘Non-contractual Relations in Business: A Preliminary Study’ (1963) 28 *American Sociological Review* 55. Rather than seeing law as a stable domain which relates in some complicated way to society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society, see David Kennedy, ‘A New Stream of International Law Scholarship’ (1988) 7 *Wisconsin International Law Journal* 1, 8.

How have the texts I have analysed been compiled? I argue they incorporate the ‘social facts’ of the family. I follow Durkheim’s approach in showing how these ‘social facts’ came to be composed.36 Durkheim argued that belief systems, customs and institutions are observable. ‘Society’, he argued, has a reality of its own, over and above the individuals who comprise it. Members of society, he contended, were constrained by common beliefs and moral codes passed from one generation to another and shared by the individuals who make up society. These common beliefs, Durkheim argued, constitute social facts.37 I utilise this approach to argue that family law texts incorporate the social facts of rural settlement. This process is wider than the process of judicial notice. I perceive these social facts to be the opening up of rural Australia for farming settlement through the allocation of family blocks of land, as based on the patriarchal family and the needs of the settler state to have a viable economy within the imperial trade environment. I take these ‘facts’ also to include the perception that farming was a ‘way of life’ and that there was a rural norm to be enforced in some cases as regards the desire of the family to pass on a sound business to the next generation.38

This approach to the texts shows that with the development of the economy there occurred a key change in particular concepts or register of words.39 I refer to the meaning of words used in conjunction with the idea of productivity—words such as ‘work’ and ‘labour’. In the past these terms and associated ways of thinking belonged to a ‘different form of knowledge and vocabulary of government’, related to older forms of ‘economic life’.40 These cases indicate that law installs limits to the discursive domain with respect to the positions of individual subjects. Foucault has outlined how ‘dividing practices’ separate the good from the bad, the sick from the insane.41 In terms of family law texts, these dividing practices separate the appraisal of work as productive and as non-productive. In detailing these practices, I put the positive term in the opposing pair first. The relevant binary notions in my account are ‘non-fault’ and ‘fault’,42 ‘contribution’ and ‘non-contribution’ and ‘business asset’ and ‘domestic (family) asset’.

40 Mitchell Dean, Governmentality (Sage, 1999) 45.
41 Michael Foucault, ‘Afterword: The Subject and Power’ in Hubert Dreyfus and Paul Rabinow (eds), Michael Foucault: Beyond Structuralism and Hermeneutics (Harvester, 1st ed, 1982) 208.
42 Under the Family Law Act ‘fault’ as a grounds for divorce and as a basis of property division has been abolished, see Leonie Star, Counsel of Perfection: The Family Court of Australia (Oxford University Press, 1996); H A Finlay, ‘The Grounds for Divorce: The Australian Experience’ (1986) 6 Oxford Journal of Legal Studies 368. My approach is not so much to develop the idea of fault in the second sense, but to note that while fault as a ground for the assessment of property settlements has been abolished or legislated out the front door it still lurks in the shadows.
The commonality of these binary oppositions involves productivity. The oppositions separate those deemed productive from those who are deemed blameworthy, morally deficient or involved in non-economic behaviour such as child-care or housework. I collate these ideas of non-productivity together on the basis that their commonality is that of fault. Considered within a wider focus ‘fault’ has the inherent quality of an ‘offence’ or a ‘deficiency’ which hinders conduct. These ideas are contrasted in economics with notions such as the rational productive man and accumulative behaviour. This ‘offence’ is thus quantifiable through economic calibrations incorporated into the dividing practices in the texts. While legal language and legal categories (for example, ‘dividing practices’) are open to interpretation, judges use interpretative or background assumptions to adhere to traditional interpretations above all other methods. Although the specific oppositional form of a dividing practice may change through law reform, the historical tradition of awarding property to the male, and the values within the settler state, remain relatively constant.

Fault in the divorce cases of Robinson and Parker amounts to not being productive in farm work. In Robinson the woman was involved in some manual work, but as she was tied to the house, she was deemed not to be working on the property. In Parker, while the woman worked in the packing shed and on the books, this work was not seen as of the same order as the man’s work. Finally, in Parr’s case fault was judged in terms of the male standard of a committed pioneer settler who was prepared to take on the hardship of family life.

The cases I have discussed were selected on the basis that they reflect older judicial values regarding marriage and the family. Under the Family Law Act 1975 (Cth) the courts may now assess the contributions made by the parties to the marriage. Fault is not supposed to be an issue under the Family Law Act. However, some conduct does take on the quality of fault. With my wider approach to fault, I argue that the labour of the women claimants was regarded as deficient, as in Parkers’ case, where the wife was not of an entrepreneurial mould. Her labour was regarded as of a

44 For instance the fault/no fault division changed as a result of the Family Law Act 1975 (Cth). Prior to 1975 fault under the State matrimonial acts, fault consisted of a matrimonial fault such as desertion or adultery. Post 1975 ‘fault’ in the context of divorce law consists of unproductive conduct in its various forms.
46 It is accepted that differential evaluations of property are made on the basis of inheritances and property which are brought into the marriage. I also mention the assessment of violence. However differences in awards are made on the basis of economic conduct against the party deemed to be deficient or what must be called fault. For support for my approach, see Juliet Behrens, ‘Domestic Violence and Property Adjustment: A Critique of ‘No-Fault' Divorce’ (1993) 7 Australian Journal of Family Law 9; Jocelynne Scutt, ‘Principle v Practice: Defining 'Equality' in Family Property Division on Divorce’ (1983) 57 Australian Law Journal 143, 152, 155.
different order to the ‘highly motivated industrious man’. While the principal axis of these oppositions revolves around the idea of productive conduct, the oppositions we see here were shaped primarily by the law/fact dichotomy. The law/fact dichotomy is the foundational dividing practice operating in these texts. This dividing practice incorporates the dividing practices mentioned above. In these texts it is clear that the descriptions of facts were created by the rules themselves. In other words, the events were transformed into ‘fact’ on the basis of the existing legal categories and the traditions of thought which underpin them. While the law/fact distinction is supposed to be a political strategy to check the abuse of power, the dichotomy is in reality a textual device, as there is no neat distinction between law and fact. The consequence is that male productivity was seen as productive and rewarded above the level accorded to female productivity.

One of the law/fact applications here is the presumption of advancement applied in the Robinson case. This presumption is often paired with the idea of a resulting trust. Under the presumption of advancement, there is an assumption that the recipient may keep the gift. This presumption applies where the contributor was the husband but not where the contributor was the wife. Under this line of reasoning in the Robinson case, the husband kept his wife’s contributions towards family expenses. However, this case illustrates how the presumption did not apply in the case of a wife’s gift to her husband. In this case, this presumption overrode the alternative method of looking at the facts—through the notion of a resulting trust. Under this doctrine, the proportionate contribution would have reverted to the donor.

Another application of the law/fact distinction was the provision under the law that judges could only allocate property according to who had rightful title under the family law as it then stood. The role of the court was to declare who had the propriety interest; it was not to allocate the property based on fairness. The law at this earlier stage of development revealed a concern for a ‘rights based’ approach and was not dealing with what has been the called a ‘utility approach.’ A rights based approach was concerned with distinctive legalistic forms of claims, such as torts or contract. At this stage of its evolution, the state was not concerned with corrective justice or with distributive justice.

The Robinson and Parker cases deal with property following a divorce. I now want to analyse the testamentary promise issue in the Parr case. This case reflects a liberal ideology as regards property, in that promises in the private realm (what I have called ‘domestic promises’) were deemed private affairs and were not considered enforceable.

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47 Two lines of cases show that farming property has been divided on a different basis from non-farming property. One line of cases, from 1977–85 held that land used for farming purposes which was essential for the production of income was consequently different from the category of land simply used for a place from the home. A second line of cases held that ‘business assets’ are in a different category than other assets and the special skill as regards their accumulation ought to be rewarded, see Malcolm Voyce, ‘The Farmer and His Wife: Divorce and the Family Farm’ (1993) 3 Alternative Law Journal 76.


contract law was seen as enabling people to realise their wills and to leave them to their own business affairs unrestricted by the government.\(^{52}\) In this context, the home was perceived as a haven from the market place and not a place for the application of legal rules. On this view, it was assumed that women’s work was carried out for love and affection.\(^{53}\) One could object to this approach on the grounds that familial relationships are supposed to be based on loyalty and trust and are therefore the very type of relationship which ought to be governed by the principles of the market place.\(^{54}\)

The Robinson and Parker cases deal with two kinds of ‘domestic promise’ in the rural context. Firstly, there is the kind of case where the deceased makes ‘gifts’ or ‘promises’ to heirs during their lifetime, where the recipient may have worked on the property and had a relationship with the deceased. These ‘promises’ or ‘undertakings’ are usually referred to as ‘testamentary promises’.\(^{55}\) It has been noted by judges that the community expected testators to recognise those to whom they had made promises of support. Some judges in this context labelled the requirements of ‘unconscionable behaviour’ as analogous to the moral duty concept in Family Provision applications.\(^{56}\) Secondly, there is the kind of promise where the parties in a marriage agree to share their property. The question arises after the separation of such parties, or the death of one party, whether such ‘undertakings’ should be recognised.\(^{57}\) These kinds of ‘undertakings’, as illustrated by the above cases, might be classified as either gifts\(^{58}\) or exchanges. The importance of this distinction


\(^{53}\) Balfour v Balfour [1919] 2KB 571, 574 (Lord Atkin) ‘The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts’. See Michael Freeman, ‘Contracting in the Haven: Balfour v Balfour Revisited’ in Roger Halsan (ed), Exploring the Boundaries of Contract (Aldershot, 1996) 68.


\(^{58}\) Gifts are usually seen as unenforceable as in many cases they are usually incomplete, under the Milroy v Lord principle. The situation is different if such gifts were made by deed or consideration supplied. See
is that in the case of a gift the undertaking may not be enforceable, whereas exchanges, on the other hand, are often enforceable, as there may be a degree of reciprocity.

In light of an anthropological understanding of the nature of gifts and exchanges, we may see this rigid classification as misguided because, as the above cases illustrate, this way of interpreting gifts and exchanges is at odds with how most cultures, past and present, conceptualise them. ‘Gifts’ and ‘exchanges’ exist on a continuum, and each usually contains an element of the other. Even when promises are made, and when these are not part of an express bargain, they are seldom gratuitous, as the promisor reaps value as the promisor, and may benefit from the reaction to such a promise—for example, because it may strengthen the long term relationship. In the farming context, we should recognise that such promises imply respect, through what has been called the ‘successor effect’, in that when there is a successor as a result of such a promise, this encourages the development of the farm. Any intimation that the father was not prepared to give the farm to a working son would imply that, under the son’s management, the farm would be run down.

At the time when the above cases were heard, the law as regards equitable remedies involved a search for a common intention among the parties, rather than a search for principles of distributive justice. Such a search has come to be seen as ‘unreliable and artificial’. Similarly, Professor Marcia Neave has shown that this approach involved an ex post facto rationalisation of conduct, where the issue of ownership was never seriously considered. It deliberately allowed the courts not to interfere, so as to allow domestic services to be ignored as having no value. To conclude the point I am making here, let me note the argument of Nick Piska, who reasons that the search for what was later seen in constructive trust cases as an ‘inferred’ or ‘imputed intention’ was a fiction. I return to the notion of a fiction later. Today, of course, a wider view of equity as unconscionable conduct might have allowed a remedy.

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Should the offer be followed by work on the property offered there may be an action for propriety estoppel.

This may be the case in the instance where the ingredients of proprietary estoppel have been successfully made out.

The dominant form of exchange in primitive societies has been seen as forms of reciprocal transactions that have been conceptualised as ‘gifts’. However, a fundamental ingredient of these gifts was their obligatory nature, as they were rarely gratuitous. For instance Marcel Mauss defines the essential features of a gift transaction as firstly, an obligation to give and secondly, the obligation to receive. The gift exchange was what Mauss calls a ‘total social fact’, that is an event that is at once social and religious, magical and economic and utilitarian and sentimental, jural and moral. See Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (Cohen and West, 1969) 52; Jane Barron, ‘Gifts, Bargains, and Form’ (1989) 64 *Indiana Law Journal* 155; Carol Rose, ‘Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa’ (1992) 44 *Florida Law Review* 295.


IV CONCLUSION: THESE TEXTS AND AUSTRALIAN HISTORY

The construction of the facts in these cases may be seen as a fiction. Piska argues, through Fuller’s work on fictions, that a fiction may be seen as a ‘consciously false assumption’ which pervades the fact-finding process. Fuller argues that a fiction reconciles a legal result with an unexpressed premise. Following this line of thought, he says fictions are like scaffolding, as they can eventually be dismantled. Alternatively, fictions may be seen to reflect the operation of dividing practices which separate productive from unproductive labour—a form of discourse which embodies certain sexual connotations as regards economics. Finally, these practices, as regards the legal requirements of contractual law, exclude familial understandings with respect to gifts.

Fictions in the property context, as discussed here, are rather like steel reinforcing, which is not taken away upon completion of a building but remains in an invisible form, while retaining its structural importance. Fictions in the property context (temporary or otherwise) enshrine the values or social facts that pervade the fact-finding. As Gadamer reminded us, facts are made as much as found in the legal process.

Property law in the farming context, in the period examined, incorporates a narrative enshrining the needs of the settler state, which envisaged a stable rural sector depending on masculine labour and domestic ideals for men. This form of property law reflected our inherited tradition of land law, the commodification of land, and the needs of those who sought land for exclusive possession. Property law in this context may be seen not only as concerned with ‘external owners’ but as a governance system that sought to adjust the internal relationship of owners in accordance with the needs of a rural ideology. However, this rural ideology was endowed with aspects of rationality, as domestic promises were deemed to be business transactions rather than familial understandings.

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69 Lon Fuller, Legal Fictions (Stanford University Press, 1967) 76, 230.
AN OPT-IN APPROACH TO REGULATING THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS

GREG WALSH

This article evaluates the merits of an opt-in approach to regulating the employment decisions of religious schools in Australia under anti-discrimination legislation. The essence of the model involves religious schools registering with the government for the specific protection they need to make employment decisions that they consider necessary due to the school’s religious identity. The legislature, executive and judiciary are provided with significant supervisory roles under the proposed model to address the potential for religious schools to abuse the protections provided. The article argues that the opt-in model has the potential to more appropriately regulate the employment decisions of religious schools compared to the other approaches currently relied upon in Australia.

I INTRODUCTION

It is important for the State to adopt the model that most appropriately regulates the employment decisions of religious schools under anti-discrimination legislation considering the substantial number of religious schools that exist in Australia. In 2011, for example, there were 9435 schools in Australia, comprising 6705 government schools, 1710 Catholic schools and 1020 Independent schools — the majority being religious schools — with the Catholic and Independent schools together employing 104,779 teachers. The actual number of employees who could be adversely affected by the employment decisions of religious schools would be much higher than this as this figure does not include management, support or maintenance staff of these schools or the employees of educational institutions other than schools. The importance of appropriately regulating religious schools is likely to be an issue of increasing importance considering that in Australia non-government schools — the majority being religious schools — are becoming more popular with the percentage of students attending non-government schools rising from 31% in 2001 to 34.6% in 2011.

It is also necessary to appropriately regulate the area considering the importance of the different rights that are involved in any consideration of how religious schools should be regulated under anti-discrimination legislation. Of particular importance in regulating the employment decisions

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of religious schools are the rights to equality and religious liberty. A failure to adopt an approach that fairly addresses the legitimate concerns of a range of individuals including employees, students, parents and adherents of the religious community on which the school is based can constitute a major violation of these two important rights. There are a range of other important considerations that would need to be considered in order to comprehensively evaluate the merits of any approach to regulating religious schools including the welfare of children, the rights of parents and minorities, human rights education, the right to privacy and freedom of association. However, a consideration of these additional factors is outside the scope of the article.

The article is structured in three main sections. Part II outlines the current approaches to regulating religious schools in jurisdictions throughout Australia. Part III provides an account of the opt-in model and an overview of its merits. Part IV addresses in detail some of the major advantages of the opt-in model.

II CURRENT APPROACHES TO REGULATING THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS

One of the most common legislative approaches in Australia allows religious schools to make adverse employment decisions in order to avoid injury to the religious susceptibilities of religious adherents. This approach has been adopted in the anti-discrimination legislation of the Commonwealth, the Australian Capital Territory and Western Australia in almost identical language. Additional protection is provided to religious schools by the Australian Capital Territory to allow adverse employment decisions to be made for employment positions that involve ‘the teaching, observance or practice of the relevant religion’, while Western Australia provides this protection to private educational authorities for employment positions that involve ‘the participation of the employee in any religious observance or practice’.

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4 The author has submitted another article for publication addressing the compatibility of provisions regulating the employment decisions of religious schools with the right to equality, which has a particular focus on whether the interests of religious schools can justify these kinds of provisions considering the substantial adverse impact they can have on employees and applicants. Although the two articles are substantially different there are some issues that have been addressed in a similar manner in both articles.


6 Although terms such as ‘exceptions’ and ‘exemptions’ are commonly used to refer to limitations provided to the operation of anti-discrimination legislation the terms are not used extensively in the thesis as they can suggest that the limitations are merely permissions to engage in discrimination that the government was forced to provide due to political pressure. The term ‘protections’ is preferred as it more accurately recognises that the limitations to the operation of anti-discrimination legislation are typically aimed at ensuring that a range of important rights are appropriately respected. For similar reasons the article avoids referring to employment decisions made by religious schools under the protections granted as acts of ‘discrimination’. Such terminology is more appropriate after the relevant factors have been considered and it has been concluded that the employment decisions cannot be justified.

7 Discrimination Act 1991 (ACT) s 44.

8 Equal Opportunity Act 1984 (WA) s 66(1).
A similar approach has been adopted in Victoria which provides protection to religious educational institutions for employment decisions on the basis of a person’s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity that conform to ‘the doctrines, beliefs or principles of the religion’ or are ‘reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion’. Further protection is provided in Victoria under a general section that provides that a person does not engage in discrimination if their conduct is ‘reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion’. The Northern Territory also protects the employment decisions of religious educational institutions if they are ‘in good faith to avoid offending the religious sensitivities of people of the particular religion’, but only on the grounds of sexuality and religious belief or activity.

Queensland permits employers to declare that a genuine occupational requirement applies to employment positions, which the Anti-Discrimination Act 1991 (Qld) specifically indicates includes ‘employing persons of a particular religion to teach in a school established for students of the particular religion’. The provisions allow a religious school to make an adverse

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9 Equal Opportunity Act 2010 (Vic) ss 83(1)–(2).
10 Ibid s 84.
11 Anti-Discrimination Act 1996 (NT) s 37A. A similar approach to a religious sensitivities test has been adopted in the United Kingdom under the Equality Act 2010 (UK) where employment decisions for the purposes of organised religion can be made on a range of grounds if the decision is to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers (sch 9 pt 1 ss 2(1)–(6)). For a detailed discussion of the approach adopted by the UK Parliament see Russell Sandberg, ‘The Right to Discriminate’ (2011) 13(2) Ecclesiastical Law Journal 157, 173–180; James Dingemans et al, The Protections for Religious Rights (Oxford University Press, 2013) 408–418.

12 Anti-Discrimination Act 1991 (Qld) s 25(1). A genuine occupational requirement has also been adopted by the European Union in relation to the ground of religion where a difference of treatment is held not to constitute discrimination if ‘a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos’: Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16, art 4(2) (‘Council Directive’). Guided by the Council Directive the British Parliament enacted legal provisions to allow a person with a religious ethos to make employment decisions on the basis of religion if they can show that religious identity is an occupational requirement, the requirement is a proportionate means of achieving a legitimate goal, and that the person who suffered from the adverse employment decision was unable to meet the requirement: Equality Act 2010 (UK) sch 9 pt 1 s 3. A similar approach has also been adopted in the United States where it is lawful for an employer to hire employees on ‘the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise’: Civil Rights Act of 1964, 42 USC § 2000e–2(e)(1). Further protection is provided through a general exception for a ‘religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on … of its activities’ (ibid 1(a)), a specific exception to religious educational institutions to employ persons of a particular religion: (ibid 2(e)(2)) and a Constitutional prohibition on the US government regulating the decisions of religious bodies in respect of their ministers (Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission, 132 S Ct 694 (2012)). For more detailed information on the scope of the constitutional and legislative protection of religious groups in the United States see Michael McConnell, ‘Reflections on Hosanna-Tabor’ (2012) 35 Harvard Journal of Law and Public Policy 821; Carolyn Evans and Anna Hood, ‘Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights’ (2012) 1(1) Oxford Journal of Law and Religion 81, 83–94.
employment decision that is not unreasonable against a person who openly acts in a work situation in a way that they knew or should have known was contrary to the school’s religion, and it is a genuine occupational requirement that the person acts consistently with the school’s religion when in the work environment.\textsuperscript{13} A determination of the reasonableness of the employment decision depends on all the circumstances of the case including whether the school’s conduct was ‘harsh or unjust or disproportionate to the person’s actions’ and ‘the consequences for both the person and the employer should the discrimination happen or not happen’.\textsuperscript{14} A religious school is not able to make an adverse employment decision on the grounds of age, race or impairment, and the school can by agreement remove its ability to make adverse employment decisions on any ground.\textsuperscript{15}

Tasmania allows a religious school to make adverse employment decisions on the grounds of religion if it is in ‘order to enable, or better enable, the educational institution to be conducted in accordance with [the religion’s] tenets, beliefs, teachings, principles or practices’.\textsuperscript{16} A general protection is also provided for employment decisions made by persons on the grounds of religion if religious observance or practice is a ‘genuine occupational qualification’ for the position.\textsuperscript{17} Additional protection is provided to religious institutions if they are required by their religion to ‘discriminate against another person on the ground of gender’.\textsuperscript{18}

South Australia protects employment decisions of religious schools made on the grounds of chosen gender or sexuality if the decision is based on the school’s religion, and the school provides a written policy on its position to persons to be interviewed or offered employment and any other person who requests a copy.\textsuperscript{19} Religious schools are also permitted to make adverse employment decisions in relation to persons in a same-sex domestic partnership.\textsuperscript{20} Further protection is provided to bodies established for religious purposes for conduct ‘that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion’.\textsuperscript{21}

New South Wales provides a broad protection to any school that is a ‘private educational authority’, which would include the vast majority of religious educational institutions in NSW.\textsuperscript{22} Under the provisions, religious schools are permitted to make employment decisions on the grounds of sex, transgender status, marital or domestic status, disability, and homosexuality that would otherwise be unlawful.\textsuperscript{23} No exceptions are provided to religious schools on the grounds of race, age or a person’s responsibilities as a carer.\textsuperscript{24} As religion is not an attribute protected in

\textsuperscript{13} \textit{Anti Discrimination Act 1991} (Qld) ss 25(2)–(3).
\textsuperscript{14} Ibid s 25(5).
\textsuperscript{15} Ibid ss 25(6)–(7).
\textsuperscript{16} \textit{Anti-Discrimination Act 1998} (Tas) s 51(2).
\textsuperscript{17} Ibid s 51(1).
\textsuperscript{18} Ibid s 27(1)(a).
\textsuperscript{19} \textit{Equal Opportunity Act 1984} (SA) s 34(3).
\textsuperscript{20} Ibid s 85Z(2).
\textsuperscript{21} Ibid ss 50(ba)–(c).
\textsuperscript{22} \textit{Anti-Discrimination Act 1977} (NSW) s 4 (definition of ‘private educational authority’).
\textsuperscript{23} Ibid ss 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c).
\textsuperscript{24} Ibid ss 8, 49ZYB, 49V.
the Anti-Discrimination Act 1977 (NSW), an adverse employment decision made by a religious school on the grounds of religion does not breach the NSW Act.\(^\text{25}\)

### III THE OPT-IN MODEL

Under the opt-in model religious schools can register with the government to obtain the protections for employment decisions that the school authorities consider are necessary to safeguard the religious identity and commitments of the school. The registration process would require the religious school to indicate their religion, the particular attributes on which the employment decision may need to be made in order to protect the religious commitments of the school (for example, race, gender, sexuality, marital status, etc), and whether the school wants all or only some of the employment positions to be covered by the protections provided under anti-discrimination legislation. The appropriate government body to manage the registrations of religious schools may vary between jurisdictions, although the bodies established under anti-discrimination legislation in each jurisdiction may be particularly suited to the role as they may already have a statutory function in resolving complaints concerning discrimination, undertaking investigations into the operation of the legislation, and educating the community about anti-discrimination laws.\(^\text{26}\)

A key feature of the opt-in model is that the registration system is optional. The religious schools that want protections under anti-discrimination legislation are required to register, while other religious schools that do not want any protections are not required to take any action. A religious school that has registered for protections can opt-out of the protections or reduce or expand the extent of the protections at any time. Any religious school that registers for protections is required to provide the government with a document indicating the grounds on which they have sought protections and explaining their understanding of why their religious commitments require them to make employment decisions taking these grounds into account. The religious schools must ensure that this document is available for members of the public to access from their websites and from the premises of the schools.

Registration provides protection to religious schools for employment decisions made on the basis of the specified attributes if the authorities of the religious school believed in good faith that it was important to make the decision due to the religious commitments of the school. The protections cover any decision relating to employment including the decision to employ, manage,

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\(^{25}\) Although the Act defines ‘race’ to include ‘ethno-religious’ origin—a term that includes groups such as Jews—this has been held to not allow discrimination complaints on the grounds of religion: *A on behalf of V and A v NSW Department of School Education* [2000] NSWADTAP 14, [16]. It should also be noted that section 351(1) of the *Fair Work Act 2009* (Cth) prohibits an employer from taking adverse action against an employee or prospective employee on a variety of grounds including religion. However, this prohibition is limited in its application to religious schools as the prohibitions do not apply in any jurisdiction where the conduct is not unlawful under that jurisdiction’s anti-discrimination legislation: *ibid* 351(2)–(3). A complaint concerning an employment decision of a religious school can also be made to the Australian Human Rights Commission. Such a complaint is limited in its effectiveness as the Commission has no coercive powers and can only attempt to conciliate the matter between the parties and provide a report on the matter to the Commonwealth Attorney-General: *Australian Human Rights Commission Act 1986* (Cth) ss 31(b), 32(1)(b).

\(^{26}\) See, eg, *Anti-Discrimination Act 1977* (NSW) ss 90, 119.
and dismiss an employee on the basis of an attribute specified in the registration document. If an employment decision is covered by the protections obtained through the registration process then a person adversely affected by the decision cannot use the employment decision to support a discrimination complaint against the religious school. Under the opt-in model the executive is provided with the power to modify or remove any registration granted to address the possibility that religious schools will abuse the protection provided.

The next part provides a detailed discussion of the key elements of the opt-in model and includes at various parts an explanation regarding why the opt-in approach is likely to be superior to alternative approaches.

IV THE MERITS OF THE OPT-IN MODEL

A An Inclusive Approach to the Nature of Religious Schools

Under the opt-in model any school based on a religious or a non-religious worldview can legally make employment decisions on the basis of an employee’s compatibility with the school’s religious identity (their ‘mission fit’). The opt-in model does not just provide the protections to schools founded on established religions, but also respects minority religions, new religions and non-religious worldviews — that is, systems of beliefs about reality and ethics that are of such fundamental importance to adherents that the worldviews are of a quasi-religious nature. On the appropriateness of recognising non-religious worldviews as religions Shah, Franck and Farr state:

Even where people are not religious in a conventional sense, they frequently have deeply held convictions about ultimate reality. Perhaps they believe that all of life is somehow sacred. Perhaps they are deeply convinced that every person has a god-like freedom and dignity. Perhaps they believe that a benevolent, pervasive force or spirit suffuses the universe. In any case, such convictions are deeply held. And they are religious.27

An example of non-religious worldviews that could be considered to have obtained this status could be the worldview of humanists who have formed a group that is committed to explicit philosophical principles including the non-existence of God, the dignity of the human person, and the importance of showing profound respect for non-human life. If such a group wanted to establish a school based on their worldview then it is to be expected that they would want the ability to select employees for mission fit and hire employees who adhere to, or at least respect, their core principles. Such a group would likely register their school for protections as an inability to take into account an applicant’s religious and ethical beliefs could substantially undermine the ability of the school to hire employees who are able to effectively educate and inspire students and other individuals within the school according to the school’s worldview.

The importance of respecting both religious and non-religious worldviews has been recognised in Australian law. Of particular relevance is the adoption of this approach in a range of anti-discrimination Acts, which use the inclusive phrase ‘religion or creed’ in regulating the

employment decisions of religious schools. On the scope of the term ‘creed’, Madgwick J in *Hozack v Church of Jesus Christ of Latter Day Saints* held that ‘if there be an institution conducted in accordance with the tenets of what, as a matter of “arid characterisation”, could be called a “creed” and which opposed established religions, its adherents too would be entitled to the same broad protection [as that provided to religious institutions]’.

This kind of approach has also been adopted by the United States Supreme Court. In *United States v Seeger* the Court was required to determine if three persons with a conscientious objection to military service were able to rely upon an exception granted to persons on the grounds of ‘religious training and belief’, which Congress had defined as belief in ‘relation to a Supreme Being involving duties superior to those arising from any human relation’. The Court held that it was important to adopt a broad approach to the worldviews included in the exemption and that the applicants qualified for the exemption as their beliefs occupied the same place in their life ‘as an orthodox belief in God holds in the life of one clearly qualified for exemption’. Importantly, one of the applicants, Seeger, was included within this protection even though he was uncertain about the existence of a Supreme Being. This broad approach was reaffirmed by the United States Supreme Court in *Welsh v United States*, which involved an applicant who also had a conscientious objection to military service. The Court held that the applicant qualified for the exemption even though he considered, at least during the early stage of proceedings, that his worldview was not religious. On the limited relevance of the applicant stating that his beliefs were non-religious the Court declared that very few registrants are fully aware of the broad scope of the word “religious” … and accordingly a registrant’s statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were “certainly religious in the ethical sense of the word”.

The merits of an inclusive approach are also affirmed under international law, which places States under an obligation to demonstrate respect for both religious and non-religious

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29 (1997) 79 FCR 441, 445. A similar approach has been adopted in legislation enacted in other jurisdictions. In the United Kingdom, for example, ‘religion’ is defined in section 2(3)(a) of the *Charities Act 2006* (UK) as including ‘(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god’.


32 Ibid 185–7.


34 Ibid 341–2.

35 Ibid 341. It should be noted that this inclusive approach to the scope of religious liberty did not receive majority support in the subsequently decided case of *Wisconsin v Yoder*, 406 US 205 (1972) where the majority held that a conviction that is ‘philosophical and personal rather than religious … does not rise to the demands of the Religion Clauses’: 216. However, the decision on this aspect of this case was not unanimous with Douglas J specifically affirming the broad definition of ‘religion’ adopted in *Seeger* and *Welsh* stating that ‘I adhere to these exalted views of “religion” and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race’: 249.
worldviews. For example, the Human Rights Committee held that the right to religious liberty includes both religious and non-religious worldviews and that States are obliged under Article 18 of the *International Covenant on Civil and Political Rights* to protect religious liberty according to this broad interpretation of the right.\(^\text{36}\) In their General Comment 22 the Committee stated:

> Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.\(^\text{37}\)

It is accepted that there are significant difficulties in proposing criteria that can clearly distinguish between non-religious worldviews and specific commitments that are not aspects of a worldview, and that difficult cases will inevitably arise where the appropriate classification of a conviction will be uncertain. In such circumstances the appropriate approach will normally be for the registration of the school to be accepted considering that the registration can always be subsequently reviewed by the State if it becomes apparent that the school cannot legitimately be considered to be based on a religious or non-religious worldview.

**B The Supervisory Role of the Government**

Under the opt-in model the executive plays the key role in ensuring that the protections provided to religious schools are not abused.\(^\text{38}\) If a particular religious school registers for broader protections than what can be justified by the school’s religion then the executive would be able to modify or remove the registration of the religious school. It is expected that the power to prohibit religious schools from obtaining the protections would rarely be used. However, it would be useful in a range of situations including when it appeared that a school was promoting hatred or violence or was attempting to fraudulently abuse the protections. The de-registration power would also be useful for the protection of students and employees at religious schools in situations where it became clear that the conduct of a particular religious school was harming their psychological or physical wellbeing. Deregistration from the protections would also be another option available to the State in attempting to reform a school, and would be a less drastic measure compared to other options available to the State such as denying the school funding or closing down the school. As there would be no specific criteria that the executive would have to satisfy to modify the protection provided to religious schools it would simply be at the executive’s discretion regarding when it was appropriate to modify a religious school’s registration.

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\(^{36}\) Human Rights Committee, *General Comment No 22: The right to freedom of thought, conscience and religion* (Art. 18), 48\(^\text{th}\) sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

\(^{37}\) Ibid [2].

\(^{38}\) As the opt-in model provides protection to both religious and non-religious worldviews any subsequent reference to religion or religious schools should be understood as also referring to non-religious worldviews and schools based on these worldviews.
The executive would only be able to modify or remove the registration of a religious school through enacting a statutory rule, which would provide Parliament with an important role in deciding whether a school would be denied particular protections for its employment decisions. In NSW, for example, statutory rules can be disallowed by either House of Parliament so any decision by the executive to deny a particular school protection would be subject to Parliamentary oversight.\textsuperscript{39}

Under the opt-in model the role of courts would be restricted to determining whether a school is based on a religious or non-religious worldview, whether the grounds on which the employment decision was made were protected under the school’s registration, and whether the school authorities believed, in good faith, that it was important to make the employment decision due to the religious commitments of the school. If the person adversely affected by the employment decision is successful in convincing the court that the school is not based on a worldview, that the employment decision was based on a ground not protected by the registration, or that the authorities did not consider that the decision was required due to the school’s religious commitments then the protections would not apply to that decision and the complainant would be able to access the standard remedies available under anti-discrimination legislation. In the majority of cases it is to be expected that the school authorities would easily be able to provide sufficient evidence to prove their genuine belief that it was important to make the employment decision in question, yet the possibility of court review of the decision on this ground would be important to reduce the likelihood of the protections being abused.

An example where the protections could be abused would be in a situation where a religious school obtains registration on particular grounds and then subsequently loses its religious identity over a number of years. The absence of any review mechanism for employment decisions would allow persons to still be excluded on particular grounds even though the decisions were no longer being made on the grounds that the decision was important due to the religious commitments of the school. The example demonstrates the importance of court involvement because in such a situation the justification for the protections has been undermined as it is no longer supported by a range of rights, especially the right of religious freedom.

Under the opt-in model courts do not have a role to play in determining whether a particular theological or ethical view should be considered to be part of a religion, nor do they play a role in deciding whether the school authorities had an adequate basis for considering that it was important that the employment decision was made to protect the religious commitments of the religious school. Providing these roles to courts often requires them to address a range of challenging legal and theological issues including the identity of the controlling entity of the school, the school’s religion, the beliefs that should be attributed to the religion, the importance and religious nature of various teaching and non-teaching positions within religious schools, and the impact of employing a person who is not committed to the religion on the religious school’s ability to remain faithful to its religious commitments and develop a supportive religious environment.

\textsuperscript{39} \textit{Interpretation Act 1987} (NSW) s 41.
As registration with the government would provide a religious school with protections for its employment decisions, there would normally be no need to determine the individuals or bodies that control the religious school. There would also be no need to engage in a detailed analysis of the school’s religion as the registration document would indicate the school’s religion and clearly state the protections that the school authorities consider necessary.

The situation under the opt-in model approach is substantially different to that which would exist under alternative approaches involving greater court involvement such as a ‘genuine occupational requirement’ approach or a ‘religious susceptibilities/sensitivities’ approach. Courts in applying these tests will often be required to address a range of theological issues including issues such as the doctrines to be attributed to a religion, the religious content of an employment position, the theological significance of individual attributes, and whether those attributes prevent a person from being able to fulfil the inherent requirements of an employment position.

Some of the practical difficulties that courts can encounter when required to determine these theological issues were illustrated in OW & OV v Members of the Board of the Wesley Mission Council. The case concerned a Christian foster care agency’s refusal to provide foster care services to a same-sex couple on the grounds that it would be contrary to their religious beliefs. The Christian organisation attempted to rely on a provision in the Anti-Discrimination Act 1977 (NSW) that provides a defence to an act of a religious organisation ‘that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion’. The respondent provided a number of different descriptions of their religion, but the Tribunal held that the respondent was claiming that their religion was ‘the religion of the Uniting Church as practised by Wesley Mission’. The Tribunal rejected the respondent’s claim and held that the Act did not recognise Christian denominations and that the relevant religion for the purposes of the Act was Christianity, but that even if the Act did recognise denominations the relevant religion was the ‘religion of the Uniting Church’ and that the further specificity claimed by the respondent could not be accepted. On appeal the Tribunal’s approach was rejected and the Appeal Panel held that the relevant religion for the purposes of the provision was Wesleyanism, a term the Appeal Panel used to refer to the more precise religious beliefs of the respondent. On a further appeal to the NSW Court of Appeal the use of the label ‘Wesleyanism’, or any religious label, was considered inappropriate with their Honours holding that the preferable approach was to simply focus on the religious commitments of the respondent at the time of the decision to not provide foster care services. When the matter was reheard by the Tribunal detailed evidence was given about the respondent’s religious beliefs at the time of the decision, the influence of the teachings of John Wesley, and the position

40 A situation could arise where the control of a religious school was claimed by multiple parties and there was a dispute regarding the appropriateness of the school registering for the protections or registering for protection on particular grounds. Although such a situation is likely to be rare it could be resolved by the courts in the same way that they would resolve any dispute regarding who has ownership and control over any legal entity.
41 [2010] NSWADT 293.
42 Anti-Discrimination Act 1977 (NSW) s 56(d).
43 OV v QZ (No.2) [2008] NSWADT 115 [88].
44 Ibid [89]–[121].
45 Members of the Board of the Wesley Mission Council v OV and OW (No 2) [2009] NSWADTAP 57, [18], [40].
46 OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155, [53]–[55].
of the respondent’s religious commitments within the broader Uniting Church. The case is a useful example of how the apparently simple task of determining an organisation’s religion can in reality be a complex and time consuming endeavour for the court and parties.

A further criticism of courts addressing theological issues is that it is fundamentally inappropriate for a secular court to be placed in a position where it is required to provide a legal resolution of issues that are essentially theological. The requirement for a secular court to address these issues can be seen as an unjustifiable interference by the State with the right to religious liberty of the adherents of the school’s religion. The inappropriateness of courts attempting to resolve theological issues was emphasised by the United States Supreme Court in *Serbian Eastern Orthodox Diocese v Milivojevich* when it refused to intervene in a decision made by church authorities to dismiss a bishop and reorganise a diocese. The Court held that attempting to determine whether the decision was theologically justifiable would entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judiciary to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But … religious controversies are not the proper subject of civil court inquiry, and … a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.

A similar position was adopted in *EEOC v Catholic University of America* where the United States Supreme Court held that State involvement in the decision of the Catholic University of America to not grant tenure to a theology lecturer was not only in violation of the freedom of religion clause but also the non-establishment clause. The Court found that being required to evaluate the merits of the evidence provided by different theological experts required the Court to play an inappropriately intrusive role in the operation of the religious group and was in violation of the right to religious liberty.

The Canadian Supreme Court addressed this issue in *Syndicat Northcrest v Amselem* (‘*Syndicat Northcrest*’), which concerned an attempt by the managers of an apartment complex to prevent a Jewish person from annually building a hut (a succah) on their balcony for a nine day period in order to fulfil a religious obligation. On the appropriate approach that courts should adopt when confronted with theological issues Iacobucci J held that claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same

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47 OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADT 293, [18]–[20].
48 For additional cases that demonstrate the difficulties that courts encounter when attempting to address theological issues see *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (22 December 2004), *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998) and *Walsh v St Vincent de Paul Society Queensland [No 2]* [2008] QADT 32 (12 December 2008).
50 Ibid 713. Importantly in the case the Supreme Court did not reject the possibility that court review of the validity of the conduct of a religious body would be appropriate in situations involving fraud or collusion: 713. Such a position is consistent with the role provided to the judiciary under the opt-in model that allows courts to assess whether the employment decision was made in good faith due to the school’s religious commitments.
51 83 F3d 455, 467 (1996).
52 Ibid 466–7.
religion, nor is such an inquiry appropriate for courts to make … the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, precept, ‘commandment’, custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.54

The merits of such an approach was affirmed in R v Secretary of State for Education and Employment (Respondents) ex parte Williamson (Appellant), which involved the House of Lords rejecting a claim by parents and teachers of Christian schools that a legal prohibition on corporal punishment violated their religious liberty. 55 On the importance of courts not playing a substantive role in determining the religious beliefs of adherents Lord Nicholls stated that

[w]hen the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith … But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion.56

Providing courts with a role in determining whether a theological or ethical view is part of a particular religion involves a profound violation of the right to religious liberty. The adherents within a religious group should be recognised as the only individuals who can determine the content of their religion. The State has a legitimate role to play in regulating the expression of religious beliefs to the extent that is ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.57 However, providing courts with a role in determining the beliefs of religious groups is inconsistent with a State’s obligation to respect the right to religious liberty.

There are further reasons why this allocation of roles between the three arms of government is superior to alternative possibilities. A court focused approach encounters the problems that courts have to wait until the matter is raised with them, they will typically have less time and financial resources to devote to investigating the issues, and they will be limited in their ability to receive submissions from experts and other members of the public on the legitimacy of the claims made by the religious school. It is preferable that the executive, under the supervision of the legislature, is given the central role in determining whether a school should lose its protections under anti-discrimination legislation due to the greater resources available to the executive, its ability to play a more active, ongoing role in ensuring that the protections are not abused by schools, and the likelihood that any decision made will more closely reflect the range

54 Ibid [43], [50].
55 [2005] UKHL 15 (24 February 2005) [52], [86].
of community views on the issue considering the greater number and diversity of individuals involved in decisions made by the executive.

It is arguable that another advantage to assigning the executive to play the key role in the issue is that they are more democratically accountable to the community. If they make a decision that is considered inappropriate by the community then they can be held responsible for it at the next election. However, the merits of this argument would likely be strongly contested considering that many would consider that the lack of direct accountability to the people is one of the key reasons why significant human rights conflicts should be resolved by the courts as they can focus solely on the merits of the issue and not have their judgment inappropriately influenced by considerations relating to re-election.

An alternative way in which the opt-in model could be structured would be to allow religious schools to register for any protections they consider necessary without any government review of the registration decision, while retaining court oversight of religious schools to ensure that their employment decisions are made in good faith. Such an approach has not been adopted as it fails to impose sufficient safeguards to ensure that religious schools do not abuse the protections. The supervisory function given to the executive under the proposed model would allow it to play an essential role in minimising the extent to which protections obtained through registration are abused. If a religious school makes a claim for protection on grounds that a majority of adherents of that religion consider to be unjustified then this would likely result in significant criticism of the school’s decision from both within and outside of the religious, which may lead to the school modifying its registration or the executive intervening to deny the school protection on that ground.

A key aspect of the opt-in model is that the State should normally defer to religious adherents regarding the philosophical and ethical commitments of their religion, and should avoid becoming involved in a theological assessment of whether a particular claim made by a religious adherent is actually justified by the sources of authority for the religion. The State should also show substantial respect for claims made by religious adherents that their particular religion requires a specific cultural environment in which their religious obligations can be adequately met.

Although there should be considerable deference shown by the State to religious adherents regarding their commitments, there is a need for the State to be involved in a limited way to ensure that the right to religious liberty is not abused through fraudulent claims. The ability of the executive to modify or remove the protections provided to religious schools is the central measure to ensure schools do not abuse the protections provided. A further safeguard is that religious school authorities can be required to prove to the courts that they believed in good faith that it was important to make the employment decision considering the religious commitments of the school. In the vast majority of cases this should not be a difficult burden for the school authorities to discharge as they will normally be able to rely on documentary evidence and support from other adherents to sufficiently demonstrate the sincerity of their religious convictions and their belief that it was important to make the relevant employment decision considering these convictions.
In determining the sincerity of a person’s belief the courts should avoid taking excessive measures to ensure that the school authorities are sincere in their claim. Instead the courts should simply focus on determining whether the person has an honest belief that it was important to make the employment decision due to the religious commitments of the school. On the appropriate approach that should be adopted by courts Iacobucci J in Syndicat Northcrest held that

the court’s role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings. Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant’s testimony … as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.\(^{58}\)

The role given to the courts under the opt-in model should significantly reduce the likelihood that individuals will abuse the protections provided through fraudulent claims. Such an outcome is particularly likely due to the ability of courts to require school authorities to provide evidence of the sincerity of their religious beliefs and to demonstrate that the school authorities believed in good faith that it was important to make the particular employment decision due to the religious commitments of the school.

C The Broad Protection Provided to Religious Schools

Under the opt-in model a school can register for protections for employment decisions on any ground and for any employment position at the religious school. Critics would likely consider it to be controversial that registration could provide religious schools with such broad protections. In particular, some could be expected to argue that even if most of the grounds commonly protected by anti-discrimination legislation should be included there should no exception on the ground of a person’s race. Such an argument was made by the Anglican Diocese of Sydney in its submission to the inquiry into the consolidation of Commonwealth anti-discrimination legislation:

There is almost universal acceptance within the community that all forms of discrimination on the grounds of race which cause detriment are wrong. It is therefore appropriate that a broad approach be taken to the matters that may constitute racial discrimination rather than limiting it to particular areas and activities. There are sincerely held differences of opinion in the community on matters of sexual practice. There is nowhere near universal acceptance that it is wrong to discriminate on the grounds of sexual orientation, gender identity or marital status in all contexts.\(^{59}\)

However, it is important to recall that what supporters of religious schools are seeking is not the ability to impose a detriment on a person on the basis of a particular attribute, but rather they are seeking the ability to create an authentically religious educational environment to assist the school in its ability to provide an effective religious education and formation.

\(^{58}\) [2004] 2 SCR 551, [52]–[53].

\(^{59}\) Anglican Diocese of Sydney, Submission No 178 to the Commonwealth Attorney-General's Department, Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws, 2 February 2012, 10.
This issue was confronted by the Supreme Court of the United Kingdom in *R (on the application of E) v Governing Body of JFS* ("JFS"), which concerned a refusal by an Orthodox Jewish school to enrol a student whose mother’s conversion to Judaism was not recognised as valid according to the Orthodox Jewish faith as understood by the Office of the Chief Rabbi, but was recognised as valid by other branches of the Jewish faith. The school’s decision could not be unlawful on the basis that it involved religious discrimination as religious schools were permitted under the *Equality Act 2006* (UK) to make decisions regarding the admission of students on the grounds of religion. However, a majority of the Supreme Court held that the school’s decision to exclude the student was made on the grounds of ‘ethnic origin’ and that this violated the legal prohibition on discrimination on the grounds of race, which was defined in the *Racial Relations Act 1976* (UK) as including ‘colour, race, nationality or ethnic or national origins’.

The majority of the judges in the case who found against the religious school made this clear in their judgments, emphasising that they were not holding that those involved with the decision to exclude the student from enrolling in the school were acting inappropriately. Lord Phillips, for example, stated that ‘[n]othing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy of [the school] in particular or the policies of Jewish faith schools in general, let alone as suggesting that these policies are “racist” as that word is generally understood’. This point was also made by the Australian Christian Lobby in its submission to the inquiry into the consolidation of Commonwealth anti-discrimination legislation:

> [t]hose exercising their freedom of religion do not seek to discriminate on the basis of sexual orientation or gender identity but rather seek to employ staff most suited to the religious environment of the employer. What is sought is freedom to positively select individuals for employment on the basis of the particular religion of the employer, as appropriate to support the religious aims of the religious body.

Furthermore, under the opt-in model regulations can always be introduced to temporarily or permanently deny a religious school the benefit of protections for their employment decisions. Consequently if a religious school’s views on race or any other attribute are inappropriate then the government is able to intervene to deny them the protection to make employment decisions on the basis of specific attributes. Such intervention would be appropriate if a group that considered particular races to be inferior attempted to establish a religious school and registered for protections. A further safeguard is provided by the courts whose role it is to determine whether the worldview is a religion and whether the school authorities believed, in good faith, that it was important to make the relevant employment decision due to the school’s religious commitments. A racist group attempting to abuse the protections could always be challenged in court and may be unlikely to satisfy the court that these elements have been satisfied.

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60 [2009] UKSC 15 (16 December 2009) [5]–[7].
61 *Equality Act 2006* (UK) ss 59(1)–(2).
62 *Race Relations Act 1976* (UK) s 3(1); *JFS* [2009] UKSC 15 (16 December 2009), [46], [71], [92], [124], [149].
D Registration Details of Religious Schools are Publicly Accessible

Another important aspect of the opt-in model is that the details concerning which schools have registered for protections, the grounds on which the protections have been provided, and an explanation regarding why they consider these protections to be necessary would be in the public domain and accessible online or in hardcopy by members of the public from the religious schools. Such an approach has already been adopted in South Australia, and was supported by the Senate Legal and Constitutional Affairs Legislation Committee in its review of the draft consolidation bill of Commonwealth anti-discrimination legislation and the Law Institute of Victoria in a policy document prepared for the Victorian election in 2014.

The requirement to produce a public document would have a number of advantages. Persons considering applying for employment at a particular religious school would be able to access the document to determine the grounds, if any, on which the religious school has sought protections. This would be of value in assisting potential applicants make informed decisions regarding whether they want to apply to work for the religious school, and help avoid the situation encountered in Thompson v Catholic College, Wodonga where the applicant was not aware before she started her employment that adherence to the ethical beliefs of the school was considered to be an essential element of her employment by the school authorities. If the registration of the school includes a ground that may be relevant to the potential applicant then they are able to make an informed decision as to whether they want to continue with the application knowing that the school will have the ability to make an adverse employment decision on that ground.

The requirement to register for specific protections and produce a public document explaining why the school is registering for anti-discrimination legislation protections on particular grounds could also assist applicants in understanding how a religious school is likely to rely on the protections. For example, an Orthodox Christian school would likely register for anti-discrimination legislation protection on the grounds of gender as they consider particular religious leadership roles can only be performed by men and so would want protection for employment positions at the school that involve conducting religious ceremonies. However, such a school may not want these protections to apply to other employment roles, and so a public document detailing their religious commitments would be helpful to women considering applying to the school as it would provide them with a detailed understanding of how a school intends to rely on the protections.

A public document addressing the protections provided to a religious school and the need to have these protections would also be useful for the courts as a religious school would find it difficult to justify the good faith requirement of the protections if their decision contradicted their commitments expressed in the public document. For example, if the Orthodox school indicates in the public document that it considers gender to be significant for employment positions

65 Equal Opportunity Act 1984 (SA) s 34(3).
involving religious worship but not for teaching and non-teaching roles then it would be likely that a court would reject an attempt by the school to rely on the protections to justify an employment decision that excluded a woman from a teaching and non-teaching role on the basis of her gender. Similarly the requirement to produce a public document justifying a school’s need for the protections would assist the executive in determining whether to remove particular protections from a religious school.

The requirement for a religious school to produce a public document may also improve community cohesion as protections granted to individuals and groups under anti-discrimination legislation can be viewed with hostility by other members of the community not covered by the protections. Under the models currently used in Australian jurisdictions religious schools are not required to explain to the community their need for protections for their employment decisions. The requirement under the opt-in model for religious groups to produce a document explaining their need for these protections could serve the valuable role of defusing community tension through educating community members about the particular challenges and commitments of the religious group and the reasons why their schools need protections for their employment decisions. The message contained in the documents produced by religious schools is likely to be in the form of desiring to create an authentic religious community, rather than an expression of hostility or contempt towards certain individuals or groups. The likelihood of schools adopting this approach is supported by an empirical study conducted by Evans and Gaze into the reliance by religious schools on protections provided under anti-discrimination legislation. The authors stated that in none of their interviews did the interviewee speak with hostility or contempt for people from other religions. Instead, the desire to have solely coreligionists as staff members was at least expressed in positive terms as the desire to create a community of shared values, rather than negative terms as the desire to exclude others who are undesirable, wrong-minded or less worthy.68

Further the public nature of the registration system and the ability of religious schools to modify or withdraw from any protections granted might stimulate debate within religious communities about whether particular protections are actually required by the religion. Such debate could lead to some religious communities reflecting more deeply on whether their commitments are authentic expressions of their religion, and if so, how best to explain those commitments to those who adopt different views. The flexibility of the registration system would also be useful for religious communities that have revised their theological understanding of the significance of particular attributes. Christian denominations, for example, that conclude that there is no significant theological difference between different genders or sexualities would be able to modify their registration to ensure the protections more closely comply with their new theological understanding.

A further advantage of the opt-in model compared to alternative models is that it would produce valuable evidence indicating the number of religious schools that want protections and the particular type of protections sought. This evidence would be useful to government bodies, non-government organisations, and a wide range of individuals. The information would be particularly useful to persons considering whether they want to send their children to the school.

E An Appropriate Respect for Religious Liberty and the Right to Equality

A major problem with approaches such as the model used in NSW is that protections are provided to non-government schools, whether they are religious or non-religious, on most grounds covered by anti-discrimination legislation and for all employment positions regardless of whether such protections are desired by schools. The opt-in model better respects both the right to religious liberty and equality through restricting the protections so that they are only provided to religious schools and through adapting the protections to the actual needs of religious schools. However, the opt-in model also avoids two of the major flaws of court-based approaches: inadequate protection of a school’s ability to select for mission fit, and the involvement of courts in complex legal and theological issues.

The opt-in model demonstrates appropriate respect for the importance of allowing religious schools to select teaching and non-teaching employees according to their mission fit through allowing religious schools to determine for themselves the grounds and the employment positions where mission fit is relevant and to register for protections accordingly. Providing this role to religious schools rather than to courts avoids the problem involved in a court-based approach where many teaching and non-teaching employment positions may be held to not have a sufficiently significant religious component to justify excluding individuals with poor mission fit from employment.

The capacity to periodically amend the nature of the registration is an important feature of the opt-in model that ensures that a school’s ability to select employees for mission fit is appropriately protected. The ability to alter the scope of the registration is useful considering that views regarding the significance of attributes can change within religious groups, and anti-discrimination legislation can be amended to cover additional grounds that may be significant to some religious schools. The possibility of an expansion in coverage is particularly likely in jurisdictions such as NSW as the Anti-Discrimination Act 1977 (NSW) currently does not prohibit a range of grounds that are prohibited by anti-discrimination legislation in other Australian jurisdictions. The Equal Opportunity Act 2010 (Vic), for example, prohibits a variety of additional grounds including employment activity, lawful sexual activity, physical features, political belief or activity, and religious belief or activity.69 The ability to amend the nature of the registration would allow religious schools to adapt the protections provided through the registration process to ensure that their ability to select employees for mission fit is adequately protected.

69 Equal Opportunity Act 2010 (Vic) s 6.
A legitimate concern about the opt-in model is the likelihood that some religious schools may attempt to claim additional protections that cannot be justified according to the school’s religion. However, the public nature of the registration process would significantly reduce the likelihood of this occurring as the details of the school’s registration would likely be closely examined by community members — both within and outside of the religious group — and by the executive, which would place pressure on religious schools to avoid making claims for protections that could not be justified.

As the ability to select employees for mission fit is already provided to a variety of different groups constituted on grounds such as race, gender and sexuality,70 a significant argument in favour of the opt-in model is that it better respects the right to equality compared to alternative approaches that do not provide similar protection to groups constituted on the grounds of religion. Under the opt-in model once a religious school has been registered they can make employment decisions on the basis of mission fit in the same way as many other groups.

The opt-in model could be criticised for failing to adequately respect the right to equality as it does impose additional regulations on religious schools not imposed on other groups. However, this differential treatment can be justified on account of the scope of the protections provided to religious schools considering that there are more than 1000 non-government schools in NSW employing more than 40 000 individuals.71 The capacity for such a large number of people to be adversely affected justifies the State playing a greater role in regulating religious schools to ensure that they do not abuse the protections provided to them. It could also be argued that the additional features of the opt-in model are important safeguards to implement in regulating all groups, and that the preferable approach to adopt in ensuring equal treatment of groups is to amend the legislation to use the opt-in model for regulating all groups.

70 Under section 20A(3) of the Anti-Discrimination Act 1977 (NSW), for example, a registered club established with the principal object of providing benefits to a particular race is able to exclude persons not of that race from becoming members of the club. This protection is provided to clubs irrespective of whether the racial group on which the club is established has historically suffered from discrimination. A similar protection is also provided under section 34A(3) of the Act to registered clubs where membership of the club is only available to a particular gender. While section 27 of the Equal Opportunity Act 2010 (Vic) permits political parties to ‘discriminate on the basis of political belief or activity in the offering of employment’. In addition to the exceptions specified in anti-discrimination legislation specific exemptions from the operation of anti-discrimination provisions can be granted to organisations. The Anti-Discrimination Board of NSW, for example, granted an exemption from the Anti-Discrimination Act 1977 (NSW) to an arts organisation to allow them to consider the race of the applicants in making employment decisions so that they could employ Indigenous staff members to provide services to the Indigenous community: Anti-Discrimination Board of New South Wales, Current section 126 exemptions (18 November 2014) <http://www.antidiscrimination.justice.nsw.gov.au/adb/adb1_antidiscriminationlaw/adb1_exemptions/exemptions_126.html>. A similar commitment was also demonstrated by the Victorian Civil and Administrative Tribunal, which granted an exemption from the Equal Opportunity Act 1995 (Vic) to allow a gay club to refuse entry to persons who did not identify as homosexual males so that the club could preserve its distinct identity and create an environment where it could meet the needs of its patrons: Peel Hotel Pty Ltd (Anti Discrimination Exemption) [2007] VCAT 916; Peel Hotel Pty Ltd (Anti Discrimination Exemption) [2010] VCAT 2005.

A further benefit of the opt-in model is that it avoids the undesirable situation existing under alternative approaches where neither the religious school nor its employees are certain about their legal position. Once a religious school has registered for protections it will be able to make employment decisions on the grounds of mission fit without fear of litigation. Providing this confidence to religious schools is desirable to ensure that they are not inappropriately discouraged from attempting to build authentic religious communities — a particular problem for smaller religious schools that have limited resources to defend discrimination actions.

The opt-in model would also benefit employees as they will know in advance the position of the religious school. If the school has not registered for protections then a person will know that the school cannot make an adverse employment decision on various grounds. Further if a school has registered for protections then an employee will know that the school considers these grounds significant and so can decide to seek employment elsewhere, or work for the school knowing that an adverse decision may be made on those grounds and with the benefit of this knowledge take financial and non-financial steps to reduce the adverse impact of such a decision if it is ever made.

There will inevitably be some individuals who suffer from an adverse employment decision made by religious schools that would be permitted under the opt-in model. However, this is the same result that occurs for the similar protection provided to groups constituted on grounds such as race, gender and sexuality. The protection provided to these groups is often justified on the grounds of the right to equality. However, it is important to note that religious groups can justifiably claim similar protection as religion is an attribute that is protected in the same way that many other attributes are protected under international human rights instruments. For example, Article 26 of the International Covenant on Civil and Political Rights states that ‘[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law … the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion … or other status’.72 Similarly, under Article 2 of the International Covenant on Economic, Social and Cultural Rights an obligation is imposed on States to protect rights contained in the Covenant ‘without discrimination of any kind as to race, colour, sex, language, religion … or other status’.73 Further the possibility of the executive intervening to remove or modify the protections would place ongoing pressure on religious schools to not abuse the protections, and to ensure that when they do rely on the protections they do so in a way that is respectful of any persons who may be adversely affected.

Considering all of these factors the extent and nature of any harm caused by the opt-in model might be significantly less than could be expected. Furthermore, the nature of the harm would be similar to that caused by protections provided to other groups, and can be supported on the basis that the harm suffered by those excluded from different groups can be justified on the basis of rights such as the right to equality and religious liberty.

V Conclusion

The opt-in model avoids a major problem of approaches such as those adopted in NSW of providing excessive protections to religious schools. Under the opt-in model the protections provided are limited to schools based on religious or non-religious worldviews and are adapted to the particular needs of each religious school substantially reducing the number of individuals who could be harmed from an adverse employment decision. The opt-in model also has important safeguards to prevent religious schools abusing the protections provided to them especially the public nature of the registration process and the significant supervisory role of both the executive and the judiciary.

The opt-in model is also superior to court-based approaches as it demonstrates a more appropriate respect for the right to religious liberty. The flexible nature of the registration process permits religious schools to register for the protections they need to employ persons on the basis of mission fit, while also allowing the registration to be easily amended to account for any theological changes that may occur within particular religious groups. The model also appropriately avoids violating the right to religious liberty by not providing courts with the role of determining the doctrines of religious groups. Furthermore, as a range of other groups constituted on various grounds are provided with strong protections under anti-discrimination legislation, the opt-in model also demonstrates a more appropriate respect for the right to equality through avoiding approaches to regulating religious schools that have the potential to substantially undermine the ability of religious schools to fulfil their religious objectives.
A FORGOTTEN FREEDOM:
PROTECTING FREEDOM OF SPEECH IN AN AGE OF POLITICAL CORRECTNESS

AUGUSTO ZIMMERMANN* AND LORRAINE FINLAY**

This article considers the challenges of protecting freedom of speech in an age of political correctness. After explaining the importance of free speech for democracy and why the most effective way of responding to hate speech is through the protection of free speech, the article then examines the original proposals contained in the Exposure Draft of the Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth). The article concludes that the failure to repeal s 18C of the Racial Discrimination Act 1975 (Cth) is a missed opportunity, with the proposed amendments being a significant improvement over the existing legislation and providing for an appropriate re-orientation towards the protection of freedom of speech.

I INTRODUCTION

In recent years there have been numerous attempts to restrict and limit freedom of speech in Australia, most often in the name of encouraging tolerance, social harmony and ‘responsible’ public debate. Some examples have included the proposed consolidation of Commonwealth anti-discrimination laws in 2012,¹ the media reforms proposed by the Finkelstein Report,² and the mandatory internet filter proposed by former Minister for Broadband, Communications and the Digital Economy Senator Stephen Conroy.³ Indeed, the Australian Human Rights Commissioner

* LLB, LLM, PhD (Mon) Senior Lecturer in Constitutional Law and Legal Theory, Murdoch Law School; Commissioner, Law Reform Commission of Western Australia. The authors wish to express their appreciation to Penny Bond for her comments and assistance with the final draft of this paper. This paper builds on a paper originally presented by Dr Zimmermann at the Annual International Law and Religion Symposium (Provo, UT, 9 October 2012) as well as on research originally presented by Dr Zimmermann in a presentation entitled ‘Vilification Laws’ at the Free Speech 2014 symposium hosted by the Australian Human Rights Commission in Sydney on 7 August 2014.

** BA (UWA), LLB (UWA), LLM (NUS), LLM (NYU), Lecturer in Constitutional Law, Murdoch Law School.


Tim Wilson recently described freedom of expression as one of four foundational ‘forgotten freedoms’ that ‘are being taken for granted and are consequently compromised’.  

The (then) Opposition Leader, Tony Abbott, appeared to signal renewed efforts to re-assert the importance of protecting freedom of speech in an address given to the Institute of Public Affairs in August 2012. In this address he referred to freedom of speech as ‘not just an academic nicety but the essential pre-condition for any kind of progress.’ He went on to observe:

Freedom of speech is an essential foundation of democracy. Without free speech, free debate is impossible and, without free debate, the democratic process cannot work properly nor can misgovernment and corruption be fully exposed. Freedom of speech is part of the compact between citizen and society on which democratic government rests. A threat to citizens’ freedom of speech is more than an error of political judgment. It reveals a fundamental misunderstanding of the give and take between government and citizen on which a peaceful and harmonious society is based.

In terms of specific policy announcements, Abbott announced that a Coalition Government would repeal s 18C of the Racial Discrimination Act 1975 (Cth) (‘RDA’) ‘in its current form’. Following the election, in March 2014, the Government released an Exposure Draft for community consultation outlining its proposed amendments to the RDA which the Attorney-General stated were ‘an important reform and a key part of the Government’s freedom agenda. It sends a strong message about the kind of society that we want to live in where freedom of speech is able to flourish and racial vilification and intimidation are not tolerated’.

These proposed reforms proved highly controversial. After several months of public debate the Government announced in August 2014 that it would no longer pursue the amendments. This was done at a press conference announcing proposed new counter-terrorism measures, with the Prime Minister commenting:

When it comes to counter-terrorism everyone needs to be part of ‘Team Australia’ and I have to say that the Government’s proposals to change 18C of the Racial Discrimination Act have become a complication in that respect. I don’t want to do anything that puts our national unity at risk at this time and so those proposals are now off the table. This is a call that I have made. It is, if you like, a
leadership call that I have made after discussion with the Cabinet today. In the end leadership is about preserving national unity on the essentials and that is why I have taken this decision.

This article considers the challenges of protecting freedom of speech in an age of political correctness through an examination of the original proposals contained in the Exposure Draft of the Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) (‘Exposure Draft’). These proposed reforms provide a useful case study by highlighting the conflict that can emerge between protecting freedom of speech and restrictions imposed through hate speech legislation. The article ultimately concludes that the failure to repeal s 18C is a missed opportunity, with the proposed amendments being a significant improvement over the existing legislation and providing for an appropriate re-orientation towards the protection of freedom of speech. It further contends that the most effective way of responding to hate speech is through the protection of free speech, with exposure through public debate and criticism being a more powerful long-term tool for combating intolerance than its attempted suppression through legal sanction.

II THE IMPORTANCE OF FREEDOM OF SPEECH

The history of freedom of speech can be traced back to the ancient Greeks, who believed that freedom of speech (parrhêsia) was a basic right of the citizen. Indeed, the Greeks believed ‘a slave could not speak his mind but a free person could’. What made the trial of Socrates so notorious is that it ‘is the only case in which we can be certain that an Athenian was legally prosecuted not for an overt act that directly harmed the public or some individual—such as treason, corruption or slander—but for alleged harm indirectly caused by the expression and teaching of ideas’. 

Freedom of speech has long been recognised as a fundamental human right, and one that is a foundational requirement for the full realisation of other human rights. For example, the United Nations Human Rights Committee has described the importance of this freedom as follows:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

According to Plato’s Apology, the vote to convict Socrates was very close: had 30 of those who voted for conviction cast their ballots differently, he would have been acquitted. (So he was convicted by a majority of 59. Assuming, as many scholars do, that the size of his jury was 501, 280 favoured conviction and 221 opposed it). It is reasonable to speculate that many of those who opposed conviction did so partly because, however little they cared for what Socrates thought and how he lived, they cherished the freedom of speech enjoyed by all Athenians and attached more importance to this aspect of their political system than to any harm Socrates may have done in the past or might do in the future. The Athenian love of free speech allowed Socrates to cajole and criticize his fellow citizens for the whole of his long life but gave way — though just barely — when it was put under great pressure.
13 Human Rights Committee, General Comment No 34, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) (citations omitted).
Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

In fact, freedom of expression is a necessary condition for the protection of minority interests and ought to be viewed as a mechanism against the concentration of power. It is a misconception to assume that free speech disadvantages minority groups and favours those with more power. As Tim Wilson correctly stated, ‘anyone who has studied a skerrick of history knows that protecting free speech is about giving voice to the powerless against the majority and established interests’. This so being, the less perceptible consequence of anti-discrimination laws is to prevent people ‘from drawing distinctions that are not sanctioned by their government arbiters’. The final result, as Dr Ben O’Neill of the University of New South Wales points out, ‘is the loss of a liberal society—the establishment of governments that act in the name of “human rights” but use this to enforce mandated viewpoints and “acceptable” opinion’.

III ELIMINATING HATE SPEECH

Absolute free speech under all circumstances can never be a possibility. There are easily demonstrable exceptions where reasonable limits to speech may provide greater service to freedom than open discourse. For example, speech advocating or inciting direct acts of violence and direct attacks on the physical integrity of another person should never be protected. Speech can also be controlled to a somewhat greater degree in times of national crisis such as in a time of war. This was clearly acknowledged by (then) Opposition Leader Tony Abbott in his Freedom Wars speech:

Freedom of speech can’t be absolute. A persuasive case can be made to limit people’s freedom to publish material that might breach national security, prejudice a fair trial, or deliberately mislead consumers about the performance of a particular product; but there is no case, none, to limit debate about the performance of national leaders. The more powerful people are, the more important the presumption must be that less powerful people should be able to say exactly what they think of them.

Amongst the most controversial questions about free speech is the proper treatment of hate speech. Many insults use coarse language in a highly derogatory way. Such insults contain language that can be deeply offensive and so have a negative effect on public communication by endangering the civility of discourse. However, the civility of discourse does not constitute a sufficient basis for general restrictions on the matter through which the free exchange of ideas are expressed. A democratic government, as Professor Kent Greenawalt puts it, ‘may forbid uncivil remarks in formal settings like the courtroom, but expression in open public settings may not be curtailed on that basis’.

It would be undemocratic, therefore, to argue that mere verbal insult should be punished in the same way as actual urgings of illegal violent action. In a real democracy citizens must have the

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16 Ibid.
17 Abbott, above n 5.
right to choose the words that best reflect their personal feelings and ‘strong words may better convey to listeners the intensity of feeling than more conventional language’. Above all, a true democracy requires that people must be strong enough to tolerate robust expressions of disagreement and personal opposition. As such, the government may even permit such things as a ban of some words on daytime radio or television, but it should not sustain any general prohibition of all forms of speech simply because they are thought to be offensive.

While the idea of inciting violence links the expression of thoughts to actions, the idea of hate speech links the expression of thoughts to no more than simply thoughts. This amounts to the fabrication of a new crime of opinion analogous to the crime that used to be committed by ‘enemies of the people’ in the former Soviet Union. Similarly, hate speech laws allow the government to demarcate the things that citizens are allowed to say. It is one of the great ironies of the recent past that neo-Marxists and post-modernists have convinced the governments of Western democracies to abandon the liberal vision of freedom of speech, whereas the oppressed people of countries with official Marxist ideologies have never achieved any reasonable form of free speech.

The above fact underlines the importance of the debates prior to the drafting of the human rights declarations and covenants in the United Nations on whether there should be—when it comes to protection for freedom of expression—an exception for ‘incitement to violence’ or, more broadly, an exception for ‘incitement to hatred’ as the Soviet Union and its totalitarian bloc of communist nations maintained. As Chris Berg points out, the drafting history of the protection of freedom of expression in these declarations:

... does not leave any doubt that the dominant force behind the attempt to adopt an obligation to resist freedom of speech under human rights law was the Soviet Union ... When it came to draft the binding International Covenant on Civil and Political Rights, this was not the ascendant view. The Soviet Union proposed extending those restraints to ‘incitement to hatred’ ... Suddenly, States were responsible for the elimination of intolerance and discrimination.

Passed with the pretence of inhibiting intolerance, one of the most effective means by which free speech can be silenced is under the cover of laws against racial discrimination. A leading example is s 18C of the RDA, with the recent debate about repealing this section being an illuminating example of the significant restrictions that have been imposed on freedom of speech in Australia in the name of harmony and tolerance.

The proposal to repeal s 18C sparked debate that the proposed reforms amounted to ‘a green light to racism’ and would send ‘a dreadful message to the people of Australian that bigotry is okay’. It was argued that the proposed reforms represented:

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19 Ibid 16 (citations omitted).
20 Ibid 5 n 2.
22 Berg, above n 11, 176.
25 Victorian Multicultural, Faith and Community Organisations on Behalf of Their Communities, Submission Regarding the Exposure Draft of the Freedom of Speech (Repeal of s 18C) Bill 2014 (11 April 2014) Ethnic
[a] watering down or perceived dilution of the RDA [which] would send the wrong message to potential offenders that hate speech was becoming more acceptable in our society, opening the door to more abuse, and to potential victims that their right to live free from racial or religious vilification, abuse and intolerance was diminished.

This follows an all too familiar script, with claims of racism and bigotry being easy to throw around and proving incredibly effective in stifling public debate. However, supporters of the repeal of s 18C are certainly not condoning racism or promoting such behaviour. Nor do they fail to acknowledge the enormous harm that racial vilification or hatred causes both to individual victims and the broader community. The question surrounding s 18C is not whether Australians have the ‘right to be racist’ but rather whether they have the right to sue each other for racism, and where the legal bar should be set. As was observed by Tim Wilson:

This isn’t a debate about whether racial vilification is socially acceptable or not. It’s about where the law sits. And part of the problem is that it fuses the idea of social acceptability as speech and the law, when there always should be a reasonable separation between the two.

Of course, there will likely always be bigots and racists. This is the basic cost of living in a true democracy—a point which has been made by Salman Rushdie, the British novelist who was put under an Islamic sentence of death because he had insulted Muslim sensibilities:

The idea that any kind of free society can be constructed in which people will never be offended or insulted is absurd. So too is the notion that people should have the right to call on the law to defend them against being offended or insulted. A fundamental decision needs to be made: do we want to live in a free society or not? Democracy is not a tea party where people sit around making polite conversation. In democracies people get extremely upset with each other. They argue vehemently against each other’s positions.

Rushdie goes on to conclude:

People have the fundamental right to take an argument to the point where somebody is offended by what they say. It’s no trick to support the free speech of somebody you agree with or to whose opinion you are indifferent. The defence of free speech begins at the point when people say something you can’t stand. If you can’t defend their right to say it, then you don’t believe in free speech. You only believe in free speech as long as it doesn’t get up your nose.

In our view, broad legal prohibitions on racially offensive speech will never themselves be successful in actually eliminating racism from our society, and may even be counter-productive by not allowing such ideas to be exposed and challenged in the course of public debate. Exposing and criticising bad ideas goes a lot further to finally defeating them than simply trying to ban them. Racism must be confronted and defeated not by taking legal action against people, but by reasoned and open debate. As was famously noted by Brandeis J, ‘the remedy to be

Communities’ Council of Victoria


28 Ibid.
applied is more speech, not enforced silence’. Legislation will ultimately not change the hearts and minds of racist individuals. Conversation and education are far more effective tools when you are trying to build a tolerant and harmonious society.

This point was eloquently stated by the Hon Ron Merkel QC when considering the need for racial vilification laws in Australia:

Civil libertarians in the US argue that attempting to bury racist speech underground may only make martyrs of the speakers and solidify the attitudes they express. History tells us that censorship invites—and incites—resistance. Nothing in our national experience suggests that silencing evil has ever corrected it. They add that to eradicate racism we need to listen to the words which are expressed, to delve beneath them, to find our own words of reply and explanation, before we can even begin to make the changes we seek.

On the other hand, for those who defend the right to such speech the lesson is clear. Those who seek to protect the right of racists to express their views have a corresponding duty to expose those views for the evil they represent. It is through the process of exposure and education rather than prohibition that we can achieve a tolerant and understanding community.

When ideas are forcibly repressed they cease being exposed and challenged in the course of public debate. Perhaps the most compelling evidence in support of this point is pre-Nazi Germany. The Weimar Republic of the 1930s had several laws against ‘insulting religious communities’ and these laws were fully applied to prosecute hundreds of Nazi agitators, including Joseph Goebbels. Far from halting National Socialist ideology, those laws helped Nazis achieve broader public support and recognition, and ultimately assisted the dissemination of racist ideas. As Brendan O’Neill points out:

The Nazis turned their prosecutions for hate speech to their advantage, presenting themselves as political victims and whipping up public support amongst aggrieved section of German society, their future social base. Far from halting Nazism, hate speech legislation assisted it.

Naturally, nobody denies the harm of hate speech, but speech rights are most necessary for the weak, not the powerful. Conversely, the restriction of individual viewpoints is a serious infringement of democratic values, and the gains from hate speech laws are tenuous. Any benefits of such laws are outweighed by the chilling effects to freedom of speech and democracy. Under democratic theory, one might say, ‘open discourse is more conducive to discovering the truth than is government selection of what the public hears. Free statement of personal beliefs and feelings is an important aspect of individual autonomy’.

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32 Ibid.
33 Greenawalt, above n 18, 5.
IV  THE CASE FOR REFORMING s 18C

Under the existing s 18C, it is unlawful for a person to do an act (other than in private) if the act ‘is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people’ where ‘the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group’. This is an extremely broad prohibition and represents an extraordinary limitation of freedom of speech. Human rights lawyer Julian Burnside QC argues ‘existing racial discrimination laws go too far by making it an offence to upset people’, correctly stating that ‘the mere fact that you insult or offend someone properly should not, of itself, give rise to legal liability’.

There are four key issues identified in this paper with s 18C in its current form. The first is the inclusion of the words ‘offend, insult, humiliate’, which sets the harm threshold at a dangerously low level. The second is the test applied when judging conduct that arguably breaches s 18C, with judges considering the conduct in question not by reference to community standards but rather by the standards of the alleged victim group. The third is that s 18C fails to actually specifically address racial vilification, which is a curious omission given the original intent underpinning the introduction of the section. Finally, the overriding qualification that the acts in question must have been ‘said or done reasonably and in good faith’ if the s 18D exception is to be applied creates a potentially disproportionate chilling effect.

After considering these four specific issues, the article goes on to briefly consider possible constitutional considerations in relation to the implied freedom of political communication, as well as discussing Australia’s international human rights obligations in relation to both freedom of expression and protecting against hate speech.

A Removing ‘Offend, Insult, Humiliate’ from s 18C

The inclusion of the words ‘offend, insult, humiliate’ in the present s 18C sets a harm threshold that is far too low. Indeed, when recommending the creation of a civil offence of ‘incitement to racial hostility’ before the introduction of the RDA, the Human Rights and Equal Opportunity Commission ‘stressed that the threshold for prohibited conduct must be higher than “expressions of mere ill will” or conduct which results in “hurt feelings or injured sensibilities”, as this can lead to a large number of trivial complaints’. As was noted by David Marr, ‘[v]igorous public
discussion in a free society is impossible without causing insult and offence’. To this end, the full costs of prohibiting conduct that is reasonably likely to ‘offend, insult, humiliate’ are unknown, with the chilling effect of these broad prohibitions being largely immeasurable.

The key words used in the existing s 18C, namely ‘offend, insult, humiliate’, are imprecise and largely subjective in nature. Attempts to define these words with any degree of precision ‘become a circular and question-begging exercise’. For example, courts have struggled to provide a sufficiently certain legal standard for decisively identifying ‘insulting’ speech, with Lord Reid concluding in Brutus v Cozens that ‘[t]here can be no definition. But an ordinary sensible man knows an insult when he sees or hears it’.

In applying s 18C the courts have suggested that the words ‘to offend, insult, humiliate or intimidate’ denote profound and serious effects, not to be likened to mere slights and that reference to the Second Reading Speech by the Attorney-General suggests that the section should be applied ‘in a way that deals with serious incidents only’. At the same time, however, it has been emphasised that ‘it is appropriate that the words be given their ordinary English meanings’, which quite clearly has the potential to incorporate ‘mere slights’ and extends the reach of the section well beyond the most serious incidents of racial vilification. For example, it was acknowledged in Bropho v Human Rights and Equal Opportunity Commission that the words of s 18C are ‘open textured’, ‘sometimes used in ordinary parlance to describe a level of response to another person’s conduct which is relatively minor’ and ‘a long way removed from the mischief to which Art 4 of CERD is directed’. Indeed, it has been emphasised by the courts that ‘[i]t would be wrong ... to place a gloss on the words used in s 18C’. There is a clear disconnect here between the intention of Parliament to only prohibit serious acts of racial hatred, and the express wording of the legislation which sets a much lower harm threshold through the use of words such as ‘offend’ and ‘insult’.

The potentially broad ambit of these words can be illustrated by some of the claims that have been made under s 18C. For example, in the recent case of Hamlin v The University of Queensland, the first complaint made was that an academic providing a mid-semester examination briefing for about 400 students ‘did nothing to stop the lecture or advise ... that the laughter was inappropriate’ when the lecture theatre ‘erupted into laughter’ after being advised that the Australian Medical Council had recommended that more indigenous content needed to

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43 Ibid (citations omitted).
44 Ibid. See also Clarke v Nationwide News Pty Ltd trading as The Sunday Times (2012) 201 FCR 389, 404 [65] (Barker J).
be incorporated into the medical program at the University. A further complaint in this case was that histology slides containing increased melanocytes (which are the cells responsible for dark pigmentation of skin) that were used at the medical school were labelled ‘Aboriginal Skin’, which the complainant alleged was ‘falsely portraying all Aboriginal people as black’.

Although in this particular case the application was ultimately summarily dismissed, the very fact that a claim could be made on the basis of these facts in the first place highlights the problems with the low harm threshold established by s 18C in two respects. Firstly, for a period of some six months the University of Queensland faced legal proceedings alleging racial discrimination. In many respects, ‘the process is the punishment’ particularly in a context where an allegation of racism inevitably carries with it special opprobrium in the community. Secondly, there is no way to accurately measure the indirect chilling effect that such legislation may have, when legal action can be commenced based on occurrences that fall well short of the types of serious and egregious examples of racial hatred that the community would ordinarily view as justifying intervention by the State.

Further, there are ‘a smaller but still significant number of cases [where] there has been a finding that s 18C has been offended without any harm threshold analysis or reasoning whatsoever’. In a critical evaluation of cases brought under s 18C, Dan Meagher has identified at least five such matters, concluding that the legal rule in s 18C is closer to a ‘personal discretion to do justice’. He observes that: This practice alone gives the appearance of arbitrary and unprincipled decision-making. However it may be the regrettable but inevitable consequence of having to apply an indeterminate harm threshold to a range of controversies of varying degrees of seriousness.

Given the democratic imperative that citizens should be allowed to speak openly and publicly about their personal convictions, the present notion of ‘being offended’ as encapsulated in s 18C is dangerously emotive. According to the Hon James Spigelman QC, ‘protecting people’s feelings against offence is not an appropriate objective for the law’. He reminds us that ‘[t]he freedom to offend is an integral component of freedom of speech. There is no right not to be offended’. Spigelman also observes that there is no ‘international human rights instrument, or national anti-discrimination statute in another liberal democracy, that extends to conduct that is merely offensive’.

51 Meagher, above n 40, 231.
53 Meagher, above n 40, 235–6 (citations omitted).
54 Ibid 235 (emphasis in original).
56 Spigelman, above n 55.
57 Ibid.
Although real tolerance demands reflection, restraint and a respect for the rights of other people to find their way to their own truth, in today’s public discussion, ‘the connection between tolerance and judgment is in danger of being lost due to the current cultural obsession with being non-judgemental’. In a democracy, the citizen’s right to speak publicly about his or her innermost convictions implies that those adhering to other convictions must also be free to present their arguments in an equally public manner. This is the basic cost of living in an authentic democracy.

The construction of a ‘right’ for people not to feel offended means the end of free speech and of the free exchange of ideas. John Stuart Mill explained why the suppression of free speech harms not only the speaker but all of humanity.

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error ... We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

Hate speech legislation is clearly designed to impose an environment of ‘tolerance’ that penalises any strong disapproval of a person’s values or beliefs on racial, religious and/or politico-ideological grounds. However, nobody who lives in a democratic society should expect to be exempt from the possibility of facing criticism. Of course, it is understandable that advocates of a ‘multicultural society’ would prefer people to moderate their claims so as to avoid comments that might cause offence to others, but to require citizens to have their speech controlled in the name of ‘tolerance’ is to go too far. As correctly understood, democracy is firstly about the discussion of conflicting or opposing ideas—a fact that requires a certain freedom of unqualified speech, which is particularly critical when responsible citizens must decide on questions of political values, faith and truth. Accordingly, a citizen’s personal opinion may not be the most politically correct, but he or she must still have the right to manifest it without the risk or threat of persecution, even if such opinion is found to be erring or ‘offensive’ to someone.

**B Judging Conduct by Objective Community Standards**

One of the changes proposed by the Exposure Draft was the express use of objective community standards to determine whether an act is reasonably likely to racially vilify or intimidate. That is, the proposed amendment provided that whether an act was reasonably likely to have this effect was ‘to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community’.

Under the existing s 18C, judges have judged the conduct in question not by community standards but by the standards of the alleged victim group. While the courts have regularly

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60 Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) – Exposure Draft.
confirmed that the test to be applied is an objective one, in that the subjective effect on the individual complainant is not determinative, this objective test has not been defined as one of ordinary community standards but rather a test determined by reference to the effect on a particular racial, national or ethnic group.\(^\text{62}\) That is, "it is necessary first to consider the perspective under consideration, which is to say the hypothetical person in the applicant’s position or the group of which the applicant is one."\(^\text{63}\) In Clarke v Nationwide News Pty Ltd this was referred to as the 'reasonable victim perspective'.\(^\text{64}\) This 'reasonable victim' test further lowers an already minimal harm threshold, and adds a further element of imprecision and uncertainty, increasing the section’s potential chilling effect on speech. The proposed use of ordinary community standards is a more appropriate test to be applied in this context.

### C Prohibiting Racial Vilification

The Exposure Draft appropriately raised the harm threshold that would need to be met before an act would be considered unlawful. It would no longer be unlawful to ‘offend, insult, or humiliate’ someone because of their race. Instead, the draft amendment leaves the word ‘intimidate’ and it adds ‘vilify’ for the first time. The word ‘vilify’ is defined in this context as to ‘incite hatred against a person or group of persons’. When the current s 18C provision was originally introduced, the Attorney-General informed the Parliament that the Racial Hatred Bill 1994 (Cth) (‘Racial Hatred Bill’) was ‘about the protection of groups and individuals from threats of violence and the incitement of racial hatred’\(^\text{65}\). Given this background, it is curious that vilification was not originally included in the specific legislative provisions.

Indeed, there appears to be ‘considerable dislocation that exists between the stated intent of the Parliament regarding the Racial Hatred Bill … and the provisions which ultimately constituted the [RDA]’.\(^\text{66}\) This much was acknowledged by Bromberg J in Eatock v Bolt when it was noted that:\(^\text{67}\)

Both the words utilised in s 18C and the legislative context in which Part IIA was enacted, demonstrates that the mischief which those provisions seeks to address is broader than conduct inciting racial hatred and extends to conduct at a lower level of transgression to the objective of promoting racial tolerance.

Ultimately Bromberg J saw the competing human rights in this particular case as being freedom of expression and ‘the right to be free of offence’,\(^\text{68}\) the latter of which is simply not an

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\(^{64}\) (2012) 201 FCR 389, 401–3 [50]–[59] (Barker J).

\(^{65}\) Commonwealth, Parliamentary Debates, House of Representatives, 15 November 1994, 3336 (Michael Lavarch).

\(^{66}\) Meagher, above n 40, 231.


\(^{68}\) Eatock v Bolt (2011) 197 FCR 261, 342 [350] (Bromberg J).
established or recognised human right at law. Amending the RDA so that it actually prohibits racial vilification and incitement of racial hatred more appropriately targets the legislation towards the type of behaviour it was initially designed to prevent.

D Exceptions under s 18D

The existing s 18D of the RDA provides for a range of exceptions to s 18C, with the overriding qualification that the acts in question must have been ‘said or done reasonably and in good faith’. The proposed amendments would have removed these requirements, and instead inserted a broader defence, with proposed sub-section (4) providing:

This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

The removal of the ‘reasonably and in good faith’ qualification and the broad nature of the proposed sub-section (4) defence were controversial suggestions, and yet justified, both in light of the way that the existing qualification has been interpreted and the stated aim of strengthening the protection provided to freedom of speech. While these proposed reforms should not be debated through the prism of a single case, the decision in Eatock v Bolt provides a clear demonstration of the subjective nature of the existing s 18D defence. In reaching the conclusion that Mr Bolt’s conduct lacked ‘objective good faith’, Bromberg J relied upon a ‘lack of care and diligence [as] demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which [his Honour] identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides’. In this way, the existing qualifications of ‘reasonably and in good faith’ have become ‘ambiguous terms of art a judge could use to decide some speech on political, social, or cultural topics didn’t actually qualify for the exemption.’

A law which disallows a person from voicing comments deemed ‘offensive’ to another person creates undue fear and intimidation on those who wish to express their ideas and opinions freely. Such laws pose a chilling effect on free speech, and this is certainly part of the reason some Australians are increasingly reluctant to join public conversations about controversial and sensitive issues involving, for example, race and religion. As Spigelman comments:

A freedom that is contingent on proving, after the event, that it was exercised reasonably or on some other exculpatory basis is a much reduced freedom. Further, as is well known, the chilling effect of the mere possibility of legal processes will prevent speech that could have satisfied an exception.

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69 RDA s 18D.
70 Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth) – Exposure Draft.
71 (2011) 197 FCR 261.
72 Ibid 358 [425] (Bromberg J).
74 Spigelman, above n 55.
It has been argued that the proposed sub-section (4) ‘provides an exemption to the section so broad as to effectively nullify the prohibition against racial vilification or intimidation’. Those criticising this proposed amendment have emphasised ‘the need to limit freedom of expression to protect against the harm of racial vilification’. Indeed, academic analysis of the existing s 18D has tended to argue that the existing exemptions are already overly broad and undermine the capacity of the RDA to protect against racial vilification. This is not a view to which we subscribe. While it is certainly acknowledged that the right to freedom of expression is not absolute, restrictions to this freedom must be narrowly defined and ‘may not put in jeopardy the right itself’. In General Comment No 34, the United National Human Rights Committee re-emphasised that when imposing restrictions on the exercise of freedom of expression ‘the relation between the right and restriction and between norm and exception must not be reversed’.

When considering the existing s 18D and the proposed sub-section (4) it is important to keep in mind that these are not, strictly speaking, ‘exceptions’ to acts that are otherwise unlawful. Rather, the existing s 18C and the proposed sub-section (3) are themselves restrictions on the right to freedom of expression, and the qualifying sections seek to define the limits of those original restrictions. Viewed in this light, a broad qualification such as that outlined in proposed sub-section (4) is entirely appropriate. This point was made in relation to the existing s 18D by French J in Bropho v Human Rights and Equal Opportunity Commission:

Section 18D places certain classes of acts outside the reach of s 18C. ... It is important however to avoid using a simplistic taxonomy to read down s 18D. The proscription in s 18C itself creates an exception to the general principle that people should enjoy freedom of speech and expression. That general principle is reflected in the recognition of that freedom as fundamental in a number of international instruments and in national constitutions. It has also long been recognised in the common law albeit subject to statutory and other exceptions. ... Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.

E  Constitutional Considerations

Whilst the Constitution does not contain a comprehensive declaration of rights, some rights are deemed implicit in the basic law. The High Court of Australia has found an implied right to freedom of political communication as a means of invalidating legislation on constitutional

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78 Human Rights Committee, General Comment No 34, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [21].
79 Ibid (citations omitted).
grounds, holding that the right to speak freely on matters of public importance lies at the very foundation of our democratic system. In *Australian Capital Television Pty Ltd v The Commonwealth*, Mason CJ held that freedom of communication (and discussion) in relation to public and political affairs is an indispensable element in a democratic society. His Honour argued for the ‘indivisibility’ of freedom of communication as related to public and democratic issues:

Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community ... The concept of freedom to communication with respect to public affairs and political discussion does not lend itself to subdivision ... The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion ...

This argument was expanded in *Coleman v Power*, where the majority argued that a law cannot, consistently with the implied freedom of political communication, prohibit speech of an insulting nature without significant qualifications. For example, McHugh J held that ‘insults are a legitimate part of the political discussion protected by the Constitution’ and that, insofar as the insulting words are used in the course of political discussion, ‘[a]n unqualified prohibition on their use cannot be justified as compatible with the implied freedom’. Gummow and Hayne JJ concurred and commented that ‘[i]nsult and invective have been employed in political communication at least since the time of Demosthenes’. Kirby J also concurred and added that ‘Australian politics has regularly included insult and emotion, calumny and invective’, and that the implied freedom must allow for all of this.

Just how offensive political communication can be was considered by the High Court in *Roberts v Bass*. During the course of that judgment (which dealt with untrue allegations made against a member of the South Australian Parliament), Kirby J declared that the implied freedom of political communication protects insults, abuse, and ridicule made in the process of the political communication. His Honour stated: ‘Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self interest’. Of course, the natural implication of decisions such as *Roberts v Bass* and *Coleman v Power*, as observed by Nicholas Aroney, is that ‘absent qualifications of the kind relied upon by the majority, laws which prohibit religious vilification will infringe the implied

82 (1992) 177 CLR 106.
83 Ibid 139–42 (Mason CJ).
85 Ibid 54 [105] (McHugh J).
86 Ibid.
87 Ibid 78 [197] (Gummow and Hayne JJ).
88 Ibid 91 [239] (Kirby J).
90 Ibid 63 [171] (Kirby J).
freedom of political communication’. The same must also logically follow in relation to laws prohibiting offensive racial speech, such as s 18C.

It is interesting to observe that the constitutional validity of the existing s 18C and s 18D has never been directly tested before the High Court of Australia. When the current provisions were originally introduced, the Bills Digest produced by the Parliamentary Research Library noted that the Government appeared to rely on the external affairs power under s 51(xxix) of the Constitution to provide a source of power for the Racial Hatred Bill. It expressly concluded that the provision that became s 18C was more vulnerable to constitutional challenge than other sections of the Racial Hatred Bill. This conclusion was primarily based on an assessment that the scope of s 18C extended beyond what was required by Australia under its existing treaty obligations, noting specifically that.

There is no requirement in proposed s 18C that the act include ideas based on racial superiority or hatred, or incite racial discrimination or violence, nor is there a requirement that it involve the advocacy of racial hatred or incite hostility. There appears to be quite a wide chasm between racial hatred and ‘offending’ a person by an act, where one of the reasons for the act was the race of a person.

Therefore, in addition to the potential constitutional problems arising from the implied freedom of political communication, it appears that there may also be issues relating to whether the specific provisions are supported by a valid constitutional head of power. The external affairs power appears to be the head of power that most directly and fully engages with the existing provisions. For the external affairs power to be validly relied upon where domestic legislation claims to give effect to an international treaty obligation, the legislation must be capable of being reasonably considered to be ‘appropriate and adapted’ to the treaty obligations.

But where a law is to be justified under the external affairs power by reference to the existence of a treaty or a convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the

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94 The conclusion that the low harm threshold under s 18C establishes a disproportionate ‘overreach’ that is problematic from the perspective of the implied right to freedom of political communication under the Australian Constitution is examined in more detail in, for example, Asaf Fisher, ‘Regulating Hate Speech’ (2006) 8 UTS Law Review 21, 43–5.
95 The interpretation of these sections has been before the High Court on two occasions, being special leave applications in Transcript of Proceedings, Hagan v Trustees of the Toowoomba Sports Ground Trust [2002] HCA Trans 132 (19 March 2002) and Transcript of Proceedings, Bropho v Human Rights and Equal Opportunity Commission [2005] HCA Trans 9 (4 February 2005). In the former, the constitutional issue was never raised. In the latter, special leave was refused by majority, although Kirby J would have granted special leave partly due to the possible significance of the constitutional issues potentially raised by the case.
96 Department of the Parliamentary Library (Cth), above n 38, 11–2.
97 Ibid 12.
98 Airlines of NSW Pty Ltd v New South Wales (No 2) (1965) 113 CLR 54, 86 (Barwick CJ); Commonwealth v Tasmania (1983) 158 CLR 1, 138 (Mason J), 259–60 (Deane J); Richardson v Forestry Commission (1988) 164 CLR 261, 289 (Mason CJ and Brennan J).
99 (1965) 113 CLR 54, 86 (Barwick CJ).
legislative authority, it is for this Court to determine whether particular provisions, when challenged, are appropriate and adapted to that end. The Court will closely scrutinize the challenged provisions to ensure that what is proposed to be done substantially falls within the power.

As will be described below, the existing s 18C provision appears to go considerably further than the obligations imposed on Australia to protect against racial vilification and hatred under either the International Covenant on Civil and Political Rights\(^{100}\) or the International Convention on the Elimination of All Forms of Racial Discrimination.\(^{101}\) There appears to be a real issue as to whether s 18C in its existing form would be reasonably considered to be ‘appropriate and adapted’ to these treaty obligations. By contrast, the proposed amendments appear to be more directly tailored towards Australia’s international human rights obligations and therefore fall more obviously within the scope of the external affairs power.

A complete analysis of the constitutional validity of the existing s 18C is beyond the scope of this paper. At the very least, however, it can be said that there must be serious doubts as to whether s 18C would survive a constitutional challenge in its present form. In our view, the low harm threshold set by the inclusion of the words ‘offend, insult, humiliate’ raises real questions both as to whether s 18C would be fully supported by the external affairs power and whether it infringes the implied freedom of political communication under the Constitution.

F Australia’s International Treaty Obligations

Australia’s international obligation to protect freedom of expression stems from art 19 of the Universal Declaration of Human Rights\(^{102}\) and art 19 of the ICCPR. While art 19(3) expressly states that the exercise of this right carries with it ‘special duties and responsibilities’\(^{103}\) and it is acknowledged that the right is not absolute, it is also clear that any restrictions on the right must be strictly limited as ‘any restriction on freedom of expression constitutes a serious curtailment of human rights’.\(^{104}\)

It is not a coincidence that during debates prior to the drafting of the UNDHR, it was the Soviet bloc that proposed these types of ‘hate speech’ limitations to freedom of speech. Indeed, the formulation of ‘hate crime’ is analogous to the crimes of opinion committed by the ‘enemies of the people’ in communist countries.\(^{105}\) Thankfully the Soviet bloc was defeated during those deliberations and the UNDHR recognises the right to freedom of opinion and expression. According to Chris Berg of the Institute of Public Affairs:\(^{106}\)

\(^{100}\) International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).
\(^{102}\) Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (‘UNDHR’).
\(^{103}\) ICCPR art 19(3).
\(^{104}\) Human Rights Committee, General Comment No 34, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [24].
\(^{105}\) Berg, above n 11, 175-6
\(^{106}\) Ibid 175.
The human rights movement to restrict hate speech and racial discrimination was an ideological power play by the Communist Bloc that was looking for human rights to approve the suppression of political dissent. The adoption of hate speech restrictions was not intended to liberate minorities (as many contemporary human rights advocates claim), but to restrain democrats.

It is acknowledged that Australia does also have international treaty obligations to protect against racial vilification and hatred. These are, however, strictly defined obligations. For example, art 20(2) of the ICCPR provides that ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.107 Similarly, art 4(a) of the Racial Discrimination Convention provides that States Parties shall declare unlawful:

all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.108

Both of the above provisions are aimed at protecting against specific examples of racially motivated harm, namely racial vilification and hatred. Indeed, art 4 specifically provides that in implementing these obligations States Parties must show ‘due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention’,109 which expressly includes the right to freedom of opinion and expression.

Under international human rights law, there is no general right to protection from being offended. Hence, in his 2012 Human Rights Day Oration to the Australian Human Rights Commission, Spigelman commented that ‘[n]one of Australia’s international treaty obligations require us to protect any person or group from being offended. We are, however, obliged to protect freedom of speech’.110 The existing s 18C and s 18D appear to extend well beyond the scope of Australia’s international treaty obligations to protect against racial vilification and hatred. In particular, the use of ‘offend, insult, humiliate’ under s 18C and the ‘reasonably and in good faith’ qualification under s 18D are arguably more expansive than obligations imposed under an ordinary reading of the text of the above treaties.

There is a broader obligation under art 2 of the Racial Discrimination Convention that States Parties ‘condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms ...’.111 This is strikingly similar to the provision found in art 2 of the Convention on the Elimination of All Forms of Discrimination against Women which provides that States Parties ‘condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a

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107 ICCPR art 20(2).
108 Racial Discrimination Convention art 4(a).
111 Racial Discrimination Convention art 2.
The art 2 obligations relating to the elimination of both racial discrimination and discrimination against women are similarly broad, and yet the domestic speech restrictions that are applied in relation to sexist speech are much more narrowly defined than those relating to racist speech. The domestic prohibitions established under s 18C of the RDA and s 28A of the SDA are not analogous. While both ‘sexual harassment’ and the behaviour prohibited under s 18C use similar phrasing such as ‘offend’ and ‘humiliate’, the contexts are entirely different. Firstly, sexual harassment is not generally prohibited under the SDA, but is subject to prohibition in specifically defined circumstances, such as in the workplace or educational facilities. Secondly, sexual harassment requires that the conduct in question is directed towards the person harassed and does not relate generally to acts done because of a person’s gender. By contrast, s 18C provides a general prohibition on public acts and is therefore significantly broader in the restrictions it places on freedom of speech. As was observed when s 18C was originally introduced:\[114\]

If men and women could bring complaints to the Human Rights and Equal Opportunity Commission on the basis that statements made in the media or elsewhere relating to the characteristics of members of one sex are offensive, then there would be a flood of complaints almost every day.

It is our view that the proposed amendments are consistent with Australia’s international treaty obligations relating to the prohibition of racial vilification and hatred. In fact, the proposed amendments appear to be an improvement over the existing provisions in terms of meeting Australia’s international human rights obligations, in that they are more appropriately tailored to our specific obligations under the Racial Discrimination Convention and more expansive in their protection of freedom of expression.

V CONCLUSION

Freedom of expression remains, in many respects, a ‘forgotten freedom’ in Australia. It is all too easily compromised, qualified and left undefended, particularly when the speech in question is offensive. Moreover, freedom of expression is a meaningless freedom if all that is protected is benign or sanitised speech. The true test of the freedom is whether we are prepared to protect offensive speech, knowing that we may also then invoke that same freedom to ourselves criticise ideas with which we disagree.


\[114\] Department of the Parliamentary Library (Cth), above n 38, 11.
There is no doubt that hate speech has the power to cause significant harm but hateful ideas will never be defeated solely through laws banning their expression—they will just be hidden away from public view. In fact, the inability to directly and publicly confront these views ultimately weakens our society by allowing hateful views to persist unchallenged. This is the real tragedy of s 18C and the failure to proceed with its reform. If s 18C is meant to protect us from racism and bigotry then it has been wholly unsuccessful in this endeavour. Instead, the provision actually makes it harder to fight against racism and bigotry by attempting to entirely remove sensitive debates from the public arena.

In our view, there are many reasons to recommend the proposed amendments to s 18C. The existing section is potentially vulnerable to constitutional challenge as it sets the harm threshold far too low by prohibiting acts that are reasonably likely to offend, insult or humiliate. This problem is compounded when the conduct in question is judged by the standards of the alleged victim group, rather than by objective community standards. The low harm threshold potentially raises questions of constitutional validity, both in terms of the implied right to freedom of political communication and whether the legislation can reasonably be considered to be ‘appropriate and adapted’ to Australia’s treaty obligations.

For the reasons outlined in this paper, it is important not to lose sight of the need to reform s 18C, even despite the recent retreat from this position by the federal government. Furthermore, reforming s 18C should be seen not as a sufficient step on its own, but merely as one step towards re-asserting the importance of freedom of expression in Australia. Ultimately, the failure to protect freedom of expression weakens our democracy, and limits our ability to fully realise other human rights.

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In this impressive work, Stu Woolman sets out to provide an original theoretical foundation for South African constitutional law and jurisprudence by drawing on arguments from contemporary philosophy as well as empirical findings from the sciences and social sciences. The interdisciplinary sweep of the book is remarkable: the ground traversed includes philosophy of mind and action, neuroscience, behavioural economics, consciousness studies, evolutionary epistemology, choice architecture, social capital theory, experimental governance, development theory and the capabilities approach.

Woolman believes that if we fail to avail ourselves of the best work being done in these fields, then ‘errant understandings’ implicit in the unexamined ‘folk’ theories upon which most of us have been brought up, and which continue to shape our thinking, will undermine future progress in the development of South African constitutional law. It is of particular importance, Woolman argues, that we should break existing ‘metaphysical bottlenecks’ regarding the nature of the self, consciousness, free will and what he calls ‘the social’ — the way we are connected to other ‘selves’ through our social structures and institutions. Central to Woolman’s account of these matters is the idea that ‘the self, and its various narratives, is thoroughly a function of physical capacities and social practices over which I have little control or choice’.

With greater clarity on what kinds of individuals we are, the limits to our freedom, and what binds us together, Woolman believes we will have a sounder basis for constitutional theory and practice. He argues, in particular, that an understanding of the theoretical advances in the disciplines mentioned above supports an approach to constitutional theory and practice based upon the notions of experimentalism and flourishing.

Woolman explains that experimentalism recognises that there are limits to conscious individual and collective planning. It accepts that ‘much of our knowledge is tacit, that we suffer from significant cognitive biases, and that the informal aggregation of knowledge along with a formal commitment to reflexivity with regard to our collective wisdom often produces better results’. At the same time, ‘experimentalism is quite immodest about the possibility of genuine change

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1 This review has also been published in (2014) 30(3) South African Journal on Human Rights with the permission of the journal’s editor.
3 Ibid 15.
5 Ibid 44.
when multiple experiments regarding the same problems are allowed to occur and accurate information about the results of these experiments is pooled and then disseminated.\(^7\)

How can we encourage experimentation and the learning to which it leads in the constitutional context? Woolman highlights the importance of two central ideals: shared constitutional interpretation and ‘participatory bubbles’.\(^8\) In so far as the first is concerned, he argues that constitutional interpretation should be a joint venture between the judiciary and the political branches of government: experimentalism eschews excessive deference in the form of ‘judicial avoidance’,\(^9\) while simultaneously not being guilty of the hubris of ‘Dworkinian maximalism’.\(^10\) In so far as the second is concerned, experimentalism encourages participation on the part of individuals and communities via ‘small-scale bubbles of limited participatory democracy regarding the content of individual constitutional norms’.\(^11\)

Woolman goes on to argue that by providing information about ‘what works best’,\(^12\) experimentalism is the most reliable route to human flourishing — a value to which the Constitution of the Republic of South Africa Act 1996 (South Africa) is implicitly committed, in his view, and which is less problematic than the value of freedom. By flourishing, Woolman means the ability of individuals, groups and communities to give life meaning, along with the provision of the material resources and immaterial goods that make this possible.\(^13\) Woolman argues that the principles of experimentalism and the concept of flourishing implicitly inform certain South African institutional arrangements, doctrines and judicial decisions, that they help to explain certain developments in education and housing law in South Africa, and that they should be employed more explicitly, more consistently and more extensively in the on-going elaboration of South African constitutional law. These parts of the book provide a hands-on demonstration of the potential of the theoretical material covered earlier in the book to enliven and enrich legal analysis.

A substantial part of the book is devoted to the arguments by means of which Woolman outlines his conception of the self and human freedom. Recognising the large philosophical issues upon which much of the argument rests, Woolman often pursues these matters in lengthy footnotes, while reserving the body of his text for the main thrust of his argument. This enables readers to keep the bigger picture in mind, while giving them the option of choosing to engage with various theoretical questions in more detail in the footnotes. These footnotes are a remarkable feature of the book.

It would be a mistake for me to try to summarise the arguments by which Woolman arrives at his philosophical conclusions — and in fact the task would be impossible in the space I have available. It is best to leave readers to explore for themselves Woolman’s lengthy and complex explorations on these fascinating subjects. I will, however, offer a few comments regarding his discussion of human freedom.

\(^7\) Ibid.
\(^8\) Ibid 204–5.
\(^10\) Ibid 199.
\(^11\) Ibid 208.
\(^12\) Ibid 80.
\(^13\) Ibid 382.
The traditional philosophical problem of free will arises because of two propositions that both seem undeniable, but which appear to be in conflict. The first is that human beings are subject to the same deterministic laws as the rest of nature, and the second is that human beings are free to act as they choose — that given any chosen action of mine, I could in the same circumstances (or causal state of affairs) have chosen to act differently. The first proposition seems undeniable, because our actions are caused by nerve impulses from our brains to our limbs, while our brains in turn are causal systems which are presumably ‘closed’ — that is, every brain event, like every other event in nature, is caused by prior physical events. (It seems impossible that a brain event could just ‘happen’ without a cause.) But in that case we are determined — hence we are not free to choose what we do. The proposition that we are free to choose, on the other hand, seems equally undeniable.

Woolman’s response to this problem is strongly influenced by the account of freedom defended by American philosopher Daniel Dennett in his book *Elbow Room: The Varieties of Free Will Worth Wanting*. Dennett argues that determinism is compatible with freedom in one sense of that word. Of course, determinism is not compatible with freedom if freedom is understood as the freedom to do otherwise than we in fact do (all the prior causal circumstances remaining the same). Determinism is, however, compatible with the freedom we associate with weighing alternatives, deciding what we want to do, and then doing it: I do not regularly find that as I am about to do what I want to do, my body simply does something else.  

According to Dennett, the justification for explaining someone’s actions in terms of their intentions is that it works: this is an effective way of explaining and predicting human behaviour — one we use all the time and which it would be impossible for us to do without. Similarly, the justification for explaining events in the brain by pointing to their physical causes is that this is a good way of explaining and predicting those events. Since these two kinds of explanation are justified on independent grounds, they are evidently compatible.

That is Dennett’s solution to the free will problem: because we can effectively explain and predict human actions by postulating intentions as their causes, we are justified in saying, independently of what is happening in people’s brains, that some human actions occur because they were intended by the agent. In this sense we are free — and this is the only sense of ‘free’ Dennett thinks worth worrying about. It does not matter that we do not possess contra-causal free will — the ability to intervene in the causal order. Our free will consists in our responsibility for those events that are our intentional actions.  

Dennett further supports this compatibilist view by pointing out that human beings have control over their behaviour in another important sense — one that is, again, independent of whether those actions are physically determined. This is that humans can learn by trial and error to avoid actions that have bad consequences and to favour actions that lead to better consequences. This capacity for control is strongly associated with the idea of freedom, and it is simply a fact that

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15 Ibid 26–8.
we have this capacity. Hence it is compatible with the determinism prevailing over brain events.\textsuperscript{16}

Woolman adopts Dennett’s account of free will, and is particularly attracted to Dennett’s idea that people learn through trial and error to adopt behaviour that promotes human flourishing. He also embraces another idea Dennett emphasises, namely, that our freedom is not unconditional but subject to constant threats, such as coercion at the hands of others, and the desperation created by poverty and hunger. This provides the basis for a critique of cases such as \textit{S v Jordan}\textsuperscript{17} and \textit{Volks v Robinson},\textsuperscript{18} with Woolman arguing that the Constitutional Court in these cases exaggerated the extent to which sex workers freely choose to engage in sex work and parties to non-marital cohabiting relationships freely choose not to marry, respectively.\textsuperscript{19}

Another related strand in Woolman’s thinking, also concerning the limits of human freedom, follows from our ‘unchosen’\textsuperscript{20} nature as selves — the heavily engaged or situated character of our existence. Woolman agrees with Ludwig Wittgenstein in \textit{Philosophical Investigations} that we are from the outset, as a condition of living, committed to established ‘forms of life’, which we do not choose but are simply part of the world as we find it. In the same vein, Woolman endorses Heidegger’s remark in \textit{Lectures on the History of the Concept of Time} that the practices we share with others are constitutive of our ‘being’ and that this ‘common world’ is always ‘already given’.\textsuperscript{21} These points about the involuntary nature of associational commitments are also used for purposes of critique. For instance, Woolman argues that in \textit{Prince v President, Cape Law Society}\textsuperscript{22} the Constitutional Court exaggerated the extent to which Rastafarians freely choose to engage in ‘deviant’ practices.\textsuperscript{23}

This brings me to a point of disagreement with Woolman. It seems to me that when he criticises ‘folk psychology’, he misidentifies what philosophers call folk psychology, identifying it with a much more problematic set of beliefs that are more deserving of the criticisms he makes of folk psychology. I believe we should reserve the term ‘folk psychology’ for the deeply entrenched ways we have of describing, predicting and explaining human behaviour using intentional

\textsuperscript{16} Ibid 29.
\textsuperscript{17} [2002] 6 SA 642 (Constitutional Court). This case concerned the constitutionality of the \textit{Sexual Offences Act 23 of 1957} (South Africa) which, inter alia, criminalised prostitution, and in criminalising prostitution made the prostitute the primary offender and the customer an accomplice at most. The Constitutional Court concluded that the relevant provisions of the Act did not violate the rights to human dignity, economic activity, privacy and equality.

\textsuperscript{18} [2005] 5 BCLR 466 (Constitutional Court). This case concerned the constitutionality of legislation dealing with the maintenance of surviving spouses, which excluded permanent life partners who were not legally married from protection in terms of that legislation. The majority of the Constitutional Court found that the differentiation between married and unmarried life partners did not amount to unfair discrimination; neither was the right to dignity of surviving partners of life partnerships violated.

\textsuperscript{19} Woolman, above n 2, 22–3, 173–4.
\textsuperscript{20} Ibid 44.
\textsuperscript{21} Ibid 45.

\textsuperscript{22} [2002] 2 SA 794 (Constitutional Court). This matter concerned the constitutionality of a prohibition on the use or possession of marijuana. The applicant had been restricted from becoming an attorney on the basis that he had been previously convicted for possession of marijuana and had expressed his intention to continue to use the drug as part of the practice of his religion. The Constitutional Court concluded that the prohibition did not violate the applicant’s right to freedom of religion.

\textsuperscript{23} Woolman, above n 2, 118.
language (‘intends’, ‘believes’, ‘wants’, ‘strives’, ‘proposes’, ‘argues’, and so on), and that we should distinguish this system of concepts from what Woolman, wrongly it seems to me, calls ‘folk psychology’ — namely, the very different view according to which a person is a kind of free-floating ‘soul’ not subject to the laws of nature, hence not part of the body, but which inhabits the body and steers it around like a vehicle by interfering with the causal order from which this ‘soul’ stands apart. Woolman criticises this ‘Cartesian’ view for reasons that I believe to be entirely sound. However, unlike Cartesianism, which is hardly coherent, what I am calling folk psychology is, it seems to me, none other than a ‘form of life’, hence a part of our ‘situatedness’ in the world which we cannot simply discard. Here I would recall Dennett’s point that we need the concept of intention to explain and predict behaviour — a basic capacity we surely cannot do without and without which very little can make sense.

I therefore believe that Woolman needs to distinguish between Cartesianism and folk psychology — the latter consisting in our established intentionalistic way of speaking and thinking about human beings. If one throws out the baby (folk psychology) with the bathwater (Cartesianism), one opens the door to the view that free will is an illusion and that the notion should be altogether abandoned. There are occasional signs in Woolman’s discussion that he is attracted to this view. If so, I believe he should resist that impulse, because I do not think that it coheres with his overall position. For example, it is inconsistent with Dennett’s compatibilism — the view that free will is not an illusion, notwithstanding the deterministic universe. And Woolman’s rapport with Dennett on the question of freedom fits well with his overall purposes. Dennett’s conception of free will — as a capacity that works within significant constraints and is guided by trial and error — is well suited to Woolman’s experimental approach to the interpretation and development of constitutional law in South Africa.

I will end with some remarks on the fruitfulness of Woolman’s distinctive way of doing constitutional theory. The distinctiveness of his methodology can best be appreciated by reference to a contemporary debate in metaphilosophy concerning the extent to which philosophical lessons can be learnt from scientific and social scientific research. Three candidate views on this matter have been usefully described as ‘separatism’, ‘replacement’ and ‘engagement’.

On the separatism model, the subject matter of philosophy is fundamentally different from that of the sciences and social sciences and philosophy should operate entirely independently of these empirical disciplines. On the replacement model, advances in science will make philosophy redundant. By contrast with both of these, the engagement model advocates cross-disciplinary engagement between philosophy and the empirical disciplines, with philosophers recognising that empirical work can have implications for philosophy (by, for instance, constraining or supporting possible theoretical options), and with empirical researchers recognising that philosophy has particular strengths in the formulation of hypotheses, the construction of abstract theoretical frameworks and the assessment of methodologies.25

24 See, eg, ibid 82–7.
In my view, Woolman’s book demonstrates the virtues of the engagement approach in the area of constitutional theorising. One does not have to agree with his conclusions to appreciate that he has given us a fully elaborated, working model of how an understanding of science and social science can help us to rethink our vision of the purpose of a constitution and its interpretation. Woolman has shown us a new way to go about the task of constitutional theorising. This is a very large achievement and a substantial advance in knowledge.

Denise Meyerson
Professor of Law
Macquarie Law School, Macquarie University

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CONTRIBUTORS

Upendra Baxi LLB (GU), LLM (Bombay), LLM (Berkeley), SJD (Berkeley) is Emeritus Professor of Law, University of Warwick, UK. Professor Baxi's current areas of teaching and research include comparative constitutionalism, social theory of human rights, human rights responsibilities in corporate governance and business conduct, and the materiality of globalisation. Professor Baxi graduated from Rajkot (Gujarat University) and read Law in the University of Bombay. He holds LLM degrees from that University and the University of California at Berkeley, which also awarded him a Doctorate in Juristic Sciences. He has been awarded Honorary Doctorates in Law by the National Law School University of India, Bangalore, and the University of La Trobe, Melbourne. Professor Baxi has taught various courses in law and science, comparative constitutionalism and social theory of human rights at the University of Sydney, Duke University, The American University, Washington DC, the New York University Law School Global Law Program, and the University of Toronto. He has been Director's Guest Fellow at the Nantes University Institute of Advanced Studies and a Senior Fellow of the Institute of Law as Culture at the University of Bonn. He is also a Member of the Editorial Board of the Macquarie Law Journal.

Peter Cain LLB (QUT) is a Lecturer with the National Centre for Ports and Shipping of the Australian Maritime College, a specialised institute of the University of Tasmania. Peter lectures within the Department of Maritime and Logistics Management, which has a maritime, freight transport and international logistics focus. He teaches in various legal and policy fields. Peter had previous government and private legal practice experience for over 15 years before joining the Australian Maritime College in 2004.

He can be contacted at p.cain@amc.edu.au.

Francesca Dominello BA LLB (Macq), LLM (Research) (UNSW) is a Lecturer in Law at the Macquarie Law School, Macquarie University, Sydney, Australia. She is also a PhD candidate in the Faculty of Arts and Social Sciences at the University of New South Wales. Her thesis examines the political functions of recent state apologies to Indigenous peoples in Australia, Canada and the United States.

Lorraine Finlay BA (Hons) (UWA), LLB (Hons) (UWA), LLM (NUS), LLM (NYU) is a Lecturer in the School of Law at Murdoch University. She is currently the Director of Mooting and teaches Constitutional Law and International Human Rights. Before joining Murdoch University she worked as a State Prosecutor with the Western Australia DPP and at the High Court of Australia, initially as a Legal Research Officer and later as an Associate to the Hon Justice Heydon. She is a former Singapura Scholar, being awarded a dual LLM from New York University and the National University of Singapore as part of the NYU@NUS program.

She can be contacted at l.finlay@murdoch.edu.au.
Grace Li LLB (CSUPL), LLM (UTS), PhD (UTS) is a Senior Lecturer in Law at the University of Technology, Sydney (UTS). She has also completed a Graduate Certificate in Business Administration (GCBA) and a Graduate Certificate in Higher Teaching and Learning (GCHTL). Dr Li’s research has been focused on telecommunications law and policy. She has many publications and she presents regularly at national and international conferences. In addition, Dr Li also does research in the areas of company law and international legal education.

She can be contacted at Grace.li@uts.edu.au.

Timothy Lou BAPFIN is a Compliance Analyst in banking and financial services currently completing a law degree at Macquarie University. He is RG 146 (Tier 1) compliant and has applied the skills from his finance degree as an Equity Analyst for Investing for Charity in 2011-13. He is also a keen mooter, competing in the Philip C Jessup International Law Moot Court Competition in 2013. Timothy’s interdisciplinary background in law and finance has sparked his interest in litigation funding.

Denise Meyerson BA (Witwatersrand), LLB (Cape Town), B Phil (Oxon), D Phil (Oxon) is a Professor in the Macquarie Law School at Macquarie University and an Honorary Research Associate in the Law Faculty at the University of Cape Town. Her research interests are principally in the areas of jurisprudence, the theoretical foundations of public law, comparative constitutionalism and human rights law. Her books include False Consciousness (Clarendon Press, 1991), Rights Limited: Freedom of Expression, Religion and the South African Constitution (Juta, 1997) and Jurisprudence (Oxford University Press, 2011). She co-edited Law and Religion: God, the State and the Common Law (Routledge, 2005).

Lyma Nguyen LLB (UQ), BA (UQ), LLB (UBC), GDLP, LLM (ANU) is a Barrister at William Forster Chambers in the Northern Territory. Before joining the private bar, she worked for six years at the Office of the Commonwealth DPP. In 2009, Lyma was admitted to the Bar Association in the Kingdom of Cambodia as International Civil Party Counsel practising before the Extraordinary Chambers in the Courts of Cambodia. Since then she has provided pro bono legal services to over 100 victims of the Khmer Rouge regime, including foreign nationals and members of the Cambodian diaspora from Australia, New Zealand and the United States, and ethnic minority victims. In 2012, Lyma was enlisted by the Department of Foreign Affairs and Trade as a Law and Justice Civilian Expert on the register of the Australian Civilian Corps. In 2013, she received the Prime Minister’s Executive Endeavour Award in recognition of her work at the Khmer Rouge Tribunal.

Sophie Riley LLB (Syd) LLM, PhD (UNSW) GradCertHed (UTS) is a Senior Lecturer in Law at the University of Technology Sydney (UTS). She teaches corporate law, environmental law and animal law. Her research interests include environmental law, animal law and legal education. She has received two teaching awards with Grace Li for innovative teaching and in 2014 she won the Lyndal Taylor Award for Sustained Excellence in Teaching and Learning in
the Faculty of Law at UTS. Dr Riley is also the co-chair of the Teaching and Capacity Building Committee of the Legal Academy of the International Union for the Conservation of Nature. More recently, Dr Riley joined the newly-formed Centre for Compassionate Conservation at the University of Technology as a member of the executive board and as the lead legal researcher. With respect to legal education, Dr Riley is particularly interested in internationalisation of the curriculum from the perspective of how students develop intercultural skills.

Christoph Sperfeldt MA (FSU Jena) is a PhD scholar at the Centre for International Governance and Justice (CIGJ) at the Australian National University. Before joining CIGJ, Christoph worked largely in the fields of human rights and transitional justice, with a focus on Southeast Asia. He has been Regional Program Coordinator at the Asian International Justice Initiative, a joint program of the East-West Center and UC Berkeley’s War Crimes Studies Center, where he has supported regional human rights and justice sector capacity-building efforts in the ASEAN region. Prior to this, Christoph was Senior Advisor with the Gesellschaft für Internationale Zusammenarbeit (GIZ) in Cambodia. In this capacity, he worked from 2007 to 2010 as an Advisor to the Cambodian Human Rights Action Committee and, from 2010 to 2011, as Advisor to the Victims Support Section of the Extraordinary Chambers in the Courts of Cambodia.

Malcolm Voyce LLB (Auck), MA, PhD (Lond), PhD (Macq) is an Associate Professor at the Macquarie Law School. He teaches in the areas of taxation law, law and religion and jurisprudence. He has recently published in the areas of Sharia law, Buddhism and Succession Law.

Greg Walsh, BSc LLB, GDLP (ANU), LLM (Syd) is a Lecturer at the University of Notre Dame Australia. He is currently a postgraduate student at Curtin University writing a thesis on the protections provided to the employment decisions of religious schools under anti-discrimination legislation.

Please contact the author at greg.walsh@nd.edu.au to provide commentary on the article.

Augusto Zimmermann, LLB (PUC-Rio), LLM cum laude (PUC-Rio), PhD (Monash), is a Senior Lecturer and former Associate Dean (Research) and Director of Postgraduate Studies in the School of Law at Murdoch University. He is also a Law Reform Commissioner with the Law Reform Commission of Western Australia, President of the Western Australian Legal Theory Association, and a Vice-President of the Australian Society of Legal Philosophy. Dr Zimmermann is a prolific writer of many books and articles. He has been awarded the 2012 Vice Chancellor’s Award for Excellence in Research, and has also been awarded two consecutive Murdoch School of Law Dean’s Research Awards, in 2010 and 2011. Dr Zimmermann has been included, together with only twelve other Australian academics and policy experts, in the prestigious ‘Policy Experts’ group, the Heritage Foundation’s directory for locating
knowledgeable authorities and leading policy institutes actively involved in a broad range of public policy issues, both in the United States and worldwide.

He can be contacted at a.zimmermann@murdoch.edu.au.