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Communicative Justice and COVID-19: Australia's Pandemic Response and International Guidance

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Abstract

This article is driven by concerns over communicative justice and the author's earlier research finding that only a patchy framework of laws and policies guides decision-making for Australian governments' multilingual public communications. The article investigates the additional guiding role of international law, specifically the *International Covenant on Economic, Social and Cultural Rights* and recent commentary by international organisations, alongside an original, empirical case study of Australian governments' COVID-19 communications. In analysing the Australian case study in light of the international guidance, the article concludes that although Australian COVID-19 communications were available in a relatively high number of languages, they were characterised by inefficiencies and limited community input or strategic planning, leaving Australia arguably falling short of progressively realising its right-to-health obligations.

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I Introduction: A Pre-Existing Problem Highlighted by the COVID-19 Pandemic

This article constitutes a practically oriented synthesis of empirical Australian data and rarely overlapping linguistic, legal and health sciences scholarship. A 'communicative justice' frame directs this research to draw on knowledge from across disciplines in order to solve real problems through inquiry into their social contexts. In response to health inequalities, communicative justice scholar and anthropologist Charles Briggs draws together disparate fields of scholarship, pursuing '*communicative justice in health* [by] seeing how health inequities are entangled with health/communicative inequities'.[1] Such a frame highlights that communications about healthcare have differential impacts and that these differences contribute to injustices in access to healthcare and health outcomes. This article develops that idea, using an Australian case study to explain that greater communicative justice could, and should, be achieved through the interaction of international law's specific language rights and health rights. This article seeks to promote positive change in Australia's law and policy framework about multilingual health communications, and in the resulting communications practices, by highlighting useful guiding commentary from international bodies in response to the COVID-19 pandemic and about the international right-to-health obligations held by Australia.

Concerns about multilingual crisis communications have been commonplace throughout the COVID-19 pandemic.[2] The pandemic brought an acute dimension to a pre-existing problem with the public communications that Australian state and federal governments provide to a public that is linguistically diverse. Although multilingual government communications exist — 'more than 1500 resources addressing public health information had been produced in almost 60 languages' by the New South Wales ('NSW') government alone during the first 18 months of the pandemic[3] — there have been reasons to doubt whether Australian governments' communications reached non-English-dominant audiences.

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1 Charles L Briggs, 'Towards Communicative Justice in Health' (2017) 36(4) *Medical Anthropology* 287, 287 (emphasis in original).

2 A concise overview of the COVID-19 pandemic's development throughout 2020, and responses to it, is provided in World Health Organisation ('WHO'), *Looking Back at a Year That Changed the World: WHO's Response to COVID-19* (2021) ('*WHO's Response to COVID-19*'). See also Independent Panel for Pandemic Preparedness and Response ('Independent Panel'), *COVID-19: The Authoritative Chronology, December 2019 – March 2020* (Background Paper, May 2021).

3 Laura Chung, 'Meet the Man with 30 Dictionaries Translating COVID-19 Public Health Messaging', *The Sydney Morning Herald* (online, 18 August 2021) <https://www.smh.com.au/national/nsw/meet-the-man-with-30-dictionaries-translating-covid-19-public-health-messaging-20210817-p58jkd.html>.

For instance, it was reported that some communications in languages other than English ('LOTEs') were not kept up to date,[4] were poorly translated[5] and lacked key information,[6] and that intended audiences may not have known that government information in LOTEs was there to be found.[7] These were problems before the COVID-19 pandemic, too. Australia's Chief Scientist reported that a 2011

> review of Australia's public health response to the H1N1 pandemic found a need for 'consistent approaches to engaging with high-risk communities' including Indigenous people and those from non-English-speaking backgrounds' …[8]

My and Alyssa Severin's 2019–20 study of NSW government web-based communications ('NSW study') also highlighted inconsistency in engaging with people who have non-English-speaking backgrounds.[9] Another problem is the belief, held by some leaders, that multilingual public pandemic communications are not a government responsibility, a view exemplified by a NSW Police deputy commissioner's statement in 2021 that it is incumbent upon families and friends to explain COVID-19 rules to non-English speaking people.[10]

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4 See, eg, Erwin Renaldi and Jason Fang, 'Victoria's Coronavirus Information Mistranslated and Outdated for Migrant Communities', *ABC News* (online, 27 October 2020) <https://www.abc.net.au/news/2020-10-27/victoria-migrants-concerned-covid-19-information/12815164>.

5 See, eg, Stephanie Dalzell, 'Government Coronavirus Messages Left "Nonsensical" after Being Translated into Other Languages', *ABC News* (online, 13 August 2020) <https://www.abc.net.au/news/2020-08-13/coronavirus-messages-translated-to-nonsense-in-other-languages/12550520> ('Government Coronavirus Messages').

6 See, eg, Youssef Saudie, 'COVID Vaccinations Are Free for Everyone in Australia, but Some Refugees May Fall through the Cracks', *ABC News* (online, 23 May 2021) <https://www.abc.net.au/news/2021-05-23/can-refugees-asylums-seekers-in-australia-get-the-covid-vaccine/100135134>.

7 See, eg, Tom Stayner, 'New COVID-19 Communication Campaign Boosted for Multicultural Communities', *SBS News* (online, 18 March 2020) <https://www.sbs.com.au/news/covid-19-communication-campaign-boosted-for-multicultural-communities>. See also Rachael Dexter, 'COVID-19 Information Bypasses Melbourne's Non-English Speakers', *The Age* (online, 17 May 2020) <https://www.theage.com.au/national/victoria/covid-19-information-bypasses-melbourne-s-non-english-speakers-20200517-p54tq4.html>; Bang Xiao, Tahlea Aualiitia, Natasya Salim and Samuel Yang, 'Misinformation about COVID Vaccines Is Putting Australia's Diverse Communities at Risk, Experts Say', *ABC News* (online, 4 March 2021) <https://www.abc.net.au/news/2021-03-04/covid-19-vaccine-misinformation-cald-communities/13186936>.

8 Letter from Alan Finkel to Greg Hunt, 17 May 2020, appendix ('*Rapid Research Information Forum: What Motivates People to Download and Continue to Use the COVIDSafe App?*') 4 <https://www.science.org.au/sites/default/files/rrif-covid19-covidsafe-app.pdf>.

9 Alexandra Grey and Alyssa A Severin, 'Building towards Best Practice for Governments' Public Communications in Languages Other Than English: A Case Study of New South Wales, Australia' (2022) 31(1) *Griffith Law Review* 25 ('NSW Case Study'). See also Department of Aboriginal and Torres Strait Islander and Multicultural Affairs (Qld), *Language Services Policy Review* (Report, 2014); Department of Health (WA), *Delivering A Healthy WA: Review of Language Services in the WA Health System* (Final Report, April 2008).

10 *COVID-19 Update 11th July 2021* (NSW Health, 11 July 2021) <https://vimeo.com/573532868/27cf4b2922>.

Problems with governments' multilingual public health communications are not unique to Australia; nor are the health inequalities that communicative injustices exacerbate. Researchers overseas have noted:

> Multilingual crisis communication has emerged as a global challenge during the COVID-19 pandemic. Global public health communication is characterized by the large-scale exclusion of linguistic minorities from timely high-quality information.[11]

Thus, stories of language barriers to information during the pandemic emerged worldwide, as well as stories of community organisations initiating efforts to overcome communication hurdles,[12] and of effortful government responses.[13] (Australian efforts to improve are detailed in Part III.) Further, the experience of the pandemic around the world indicates that when people cannot access reliable government information, they often turn to social media for information from non-government sources, including both true information ill-suited to their local circumstances and false information.[14] This has been described by the Director-General of the World Health Organization ('WHO') as an 'infodemic' running alongside the pandemic.[15]

Moreover, and beyond the COVID-19 context, diverse sources indicate that differential health outcomes correlate to the language of public health communications. In general, '[p]opulation studies in Australia and worldwide … show that … [l]ow health literacy [is] more common in older adults, among those from a non-English speaking background … and can be further reduced under high stress'.[16] This is not to claim that language is the

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[11] Ingrid Piller, Jie Zhang and Jia Li, 'Linguistic Diversity in a Time of Crisis: Language Challenges of the COVID-19 Pandemic' (2020) 39(5) *Multilingua* 503, 503. See also 'COVID-19 Crisis: Vital That Authorities Also Communicate in Regional and Minority Languages', *Council of Europe* (Web Page, 20 March 2020) <https://www.coe.int/en/web/portal/-/covid-19-crisis-vital-that-authorities-also-communicate-in-regional-and-minority-languages> ('COVID-19 Crisis').

[12] See also examples from around the world in the COVID-19 archives of the linguistics research website *Language on the Move* <https://www.languageonthemove.com/tag/covid-19/>. My own research has looked into community-led initiatives in Australia, too, such as Humans Like Us which created a digital library 'Videos in 35 Languages: Coronavirus and Handwashing' <https://www.humanslikeus.org/coronavirus> in response to the inaccessibility of public health information for the refugee and asylum seeker communities with whom the group was working.

[13] See, eg, Piller, Zhang and Li (n 11).

[14] See, eg, Esther Chan, 'Vaccine Misinformation in Papua New Guinea Draws on Distrust of Authorities', *First Draft* (online, 2 April 2021) <https://firstdraftnews.org/articles/vaccine-misinformation-in-papua-new-guinea-draws-on-distrust-of-authorities>; Piller, Zhang and Li (n 11) 505. Internationally, see Fintan Burke, 'The Dangers of Misinformation and Neglecting Linguistic Minorities during a Pandemic', *Horizon* (online, 16 April 2020) <https://ec.europa.eu/research-and-innovation/en/horizon-magazine/dangers-misinformation-and-neglecting-linguistic-minorities-during-pandemic>.

[15] Tedros Adhanom Ghebreyesus, quoted in John Zarocostas, 'How to Fight an Infodemic' (2020) 395(10225) *The Lancet: World Report* 676, 676.

[16] Kirsten McCaffery, Danielle Muscat and Jan Donovan, 'An Urgent Call for Governments to Improve Pandemic Communications, and Address Health Literacy Concerns', *Croaky Health Media* (online, 7 April 2020) <https://www.croakey.org/an-urgent-call-for-governments-to-improve-pandemic-communications-and-address-health-literacy-concerns>.

only determinant in unequal COVID-19 outcomes. Rather, not speaking the dominant language intersects with being not from the dominant race, lower socio-economic status, social exclusion and less safe workplaces. *Those* are recognised internationally as key social determinants of ill-health generally[17] and of comparatively worse COVID-19 infection and fatality rates specifically.[18] Differential COVID-19 outcomes can therefore be understood as highlighting linguistic exclusion as one dimension of the social determinants of ill-health.

While large studies on differential health outcomes of COVID-19 were limited at the time of writing,[19] smaller studies and respectable media sources indicated that being from a non-English speaking background was linked to low COVID-19 physical and mental health outcomes in Australia. To illustrate, the Victorian government came under fire throughout 2020 for not engaging with 'multicultural communities, who were disproportionately affected with the virus during the deadly second wave'[20] and when a 'hard lockdown' (that is, no leaving home) was abruptly imposed on nine towers of public housing in Melbourne in July 2020, it was enforced with a strong police presence but with delays in interpreting and translating information to the towers' many non-English-dominant asylum seeker and refugee residents. This reportedly increased their trauma, distress, confusion and distrust.[21]

Further, the established knowledge from crisis studies is that crises can both exacerbate and be exacerbated by pre-existing vulnerabilities — including linguistic vulnerabilities — and that this causes a 'cascade' of

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17 See further Richard G Wilkinson and Michael Marmot, The Social Determinants of Health: The Solid Facts (WHO, 1999); Commission on Social Determinants of Health, Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health (Final Report, WHO, 2008).

18 See, eg, in the United Kingdom, Public Health England, *Disparities in the Risk and Outcomes of COVID-19* (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908434/Disparities_in_the_risk_and_outcomes_of_COVID_August_2020_update.pdf>; Smitha Mundasad, 'Black People "Twice as Likely to Catch Coronavirus"', *BBC* (online, 12 November 2020) <https://www.bbc.com/news/health-54907473>. See also Independent Panel, *COVID-19: Make It the Last Pandemic* (Report, 2021) 43 <https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf> ('*Make It the Last Pandemic*').

19 Although see, eg, Ingrid Piller, 'Covid-19 Forces Us To Take Linguistic Diversity Seriously' in Gerhard Boomgaarden (ed), *Twelve Perspectives on the Pandemic* (De Gruyter, 2020) 12, 15; Kirsten McCaffery et al, 'Disparities in COVID-19–Related Knowledge, Attitudes, Beliefs and Behaviours by Health Literacy' (2020) 30(4):30342012 *Public Health Research & Practice* 1, 2.

20 Bridget Rollason, 'Multilingual Women Are Countering Vaccine Hesitancy in Victoria's Culturally Diverse Communities', *ABC News* (online, 16 May 2021) <https://www.abc.net.au/news/2021-05-16/workers-hired-to-counter-vaccine-hesitancy-migrant-communities/100141280>.

21 Morgan Liotta, 'Tower Lockdown "Confusion and Distress" Could Have Been Prevented: GP', *News GP* (online, 6 August 2020) <https://www1.racgp.org.au/newsgp/clinical/tower-lockdown-confusion-and-distress-could-have-b>.

unequal impacts.[22] This is a useful way to conceive of the COVID-19 pandemic's longevity and its unjustly varied impacts. A prescient early-2020 work by leading crisis translation scholars 'considers language barriers in the context of multi-dimensional cascading effects that widen existing vulnerabilities or engender new ones by means of miscommunication'.[23] Similarly, another has noted:

> Linguistic minorities are typically considered more vulnerable than the general population partly because of language barriers and structural inequality, but, when compared to other socially vulnerable groups such as women, children, and the elderly, this particular group has been under-investigated.[24]

These concerns spurred my inquiry into the law and policy framework for multilingual, public pandemic communications in Australia, and whether that framework, not only the communications themselves, could be improved. There was little existing research, but the answer indicated by the research which did exist was that the framework at the national and state levels did not offer much guidance. Shortly before the COVID-19 pandemic, Severin and I audited the law and policy framework underpinning multilingual public government communications in NSW, reviewing the sparse existing literature and adding empirical research.[25] We identified 91 Acts containing the term 'English' and/or 'language' which we then analysed, along with formal and publicly available policies affecting language and public communications. Our study found a dearth of either legislation or policy. We also identified shortfalls in the rules and policies that did exist, including the ambiguous role of NSW's statutory multicultural principle about linguistic diversity; haphazard legislative requirements for 'plain', 'simple' and/or 'understood' language; and a lack of accountability

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[22] Gianluca Pescaroli and David E Alexander, 'A Definition of Cascading Disasters and Cascading Effects: Going beyond the "Toppling Dominos" Metaphor' (2015) 3(1) *GRF Davos Planet @ Risk* 58, 62.

[23] Sharon O'Brien and Federico M Federici, 'Crisis Translation: Considering Language Needs in Multilingual Disaster Settings' (2020) 29(2) *Disaster Prevention and Management* 129, 131 <https://doi.org/10.1108/DPM-11-2018-0373>. O'Brien and Federici explain that 'cascades are events that depend, to some extent, on their context, and thus their diffusion is associated with enduring vulnerabilities': at 130.

[24] Shinya Uekusa, 'Disaster Linguicism: Linguistic Minorities in Disasters' (2019) 48(3) *Language in Society* 353, 354 (citations omitted). Like Uekusa, I use 'linguistic minority' in line with the meaning given in Fernand de Varennes, Special Rapporteur on Minority Issues, *Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc A/75/211 (21 July 2020) 5–19 [15]–[70]. See also Office of the High Commissioner for Human Rights ('OHCHR'), 'UN Expert Clarifies Concept of Minorities to Ensure Their Protection in International Law' (Press Release, 23 October 2020). This builds on the pre-existing tendency in international language rights commentary to understand 'minority' both numerically and in terms of relatively low socio-political status or power: Fernand de Varennes, *Language, Minorities and Human Rights* (Kluwer Law International, 1996) 129.

[25] Alexandra Grey and Alyssa A Severin, 'An Audit of NSW Legislation and Policy on the Government's Public Communications in Languages Other than English' (2021) 30(1) *Griffith Law Review* 122 ('Audit of NSW Legislation and Policy').

mechanisms for non-compliance. We therefore warned that relying on informal and post-hoc departmental policies for the decision-making and production of multilingual public communications was unsuited to equitably fulfilling the needs of all NSW constituents. Such issues were foreshadowed overseas in research revealing a contraction in multilingualism on Norwegian government websites when 'pressure towards homogenization' becomes the (perverse) response to increased diversity.[26]

The COVID-19 pandemic then presented another reason and another opportunity to investigate public communications practices and the frameworks behind them. I therefore undertook the Australian case study reported here in Part III. The data was also published within a submission to a parliamentary inquiry in 2020,[27] but this is its first scholarly publication, and here the data is contextualised within media reports on pandemic communications up to early 2022, and analysed anew. Specifically, the empirical findings are analysed in Part IV in relation to the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'),[28] to which Australia is a signatory, and related recent commentary from international organisations. The *ICESCR* includes a right to non-discrimination on the basis of language ('linguistic non-discrimination') and rights to health.

As a state party, Australia has an obligation to continually work to improve its realisation of economic, social and cultural ('ESC') rights; this means Australia should take stock of the international commentary responding to the COVID-19 pandemic, with which this article helps. The article's review and identification of emergent shared expectations is presented as a useful recapitulation for other researchers as well as being central to this article's suggestions for improving Australia's public health communications.

The commentary I reviewed comprises publications from international organisations which are influential but not binding in international law, including the following:

- general comments from the Committee on Economic, Social and Cultural Rights ('CESCR') (that is, interpretative statements on articles of the *ICESCR*);[29]

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[26] Maimu Berezkina, '"Language Is a Costly and Complicating Factor": A Diachronic Study of Language Policy in the Virtual Public Sector' (2018) 17 *Language Policy* 55, 55.

[27] Alexandra Grey, Submission No 156 to Senate Select Committee on COVID-19, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic*.

[28] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 24 March 1976) ('*ICESCR*').

[29] Findings and recommendations on complaints of alleged breaches, and concluding observations to country reports over the next few years, may provide further influential (not binding) CESCR commentary on public pandemic communications.

- reports by special rapporteurs; and
- guidelines, plans and reports from international officeholders and organisations, including the WHO, the Independent Panel for Pandemic Preparedness and Response ('Independent Panel'), and the Council of Europe's Committee of Experts of the *European Charter for Regional or Minority Languages* ('Committee of Experts').

This commentary is not binding but is accorded weight — particularly the CESCR's comments — in determining what progressive realisation of *ICESCR* rights entails. I also reviewed less-influential commentary, including scholarship and international organisations' press releases.

Australia's relevant *ICESCR* obligations are introduced in Part II, along with an explanation of multilingualism in Australia. Australia's position is that it is compliant with the *ICESCR*,[30] and its Ambassador to the United Nations ('UN') recently told the Human Rights Council that 'governments must ensure COVID-19 response measures comply with international human rights obligations'.[31] After examining the empirical case study, however, this article concludes in Part V that Australia is arguably not compliant in its realisation of linguistic non-discrimination in the progressive realisation of the right to health, and that the international commentary is instructive about that progressive realisation. That is, there have been communicative injustices in Australia during the pandemic; these should be ameliorated given Australia's *ICESCR* obligations; and they could be ameliorated by heeding the international guidance. The article ends by identifying outstanding questions to be pursued to develop the emerging body of communicative justice literature, and the need for governments themselves to partner in such research.

II Background

A *Relevant* ICESCR *Obligations*

Australia has obligations under art 12 of the *ICESCR* in relation to the *progressive realisation* of the right to health and healthcare which include

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[30] Jessie Hohmann, 'Toward a Right to Housing for Australia: Reframing Affordability Debates through Article 11(1) of the International Covenant on Economic, Social and Cultural Rights' (2020) 26(2) *Australian Journal of Human Rights* 292, 294, citing CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Fifth Periodic Reports of States Parties Due in 2014: Australia*, UN Doc E/C.12/AUS/5 (16 February 2016) [24]–[27].

[31] Latika Bourke, 'Australia Warns World Not to Trample on Human Rights during Pandemic', *The Sydney Morning Herald* (online, 24 June 2021) <https://www.smh.com.au/world/europe/australia-warns-world-not-to-trample-on-human-rights-during-pandemic-20210623-p583qr.html>.

providing public information about health issues. Right-to-health obligations are obviously important in the context of a pandemic. The issue of *multilingual* health communications is pressing because the obligation under art 2 of the *ICESCR* regarding non-discrimination in the enjoyment of *ICESCR* rights is *immediate*, not progressive. Unlike the progressive realisation obligations imposed on states by most of the *ICESCR*, art 2(2) 'imposes various obligations which are of immediate effect' including 'the "undertaking to guarantee" that relevant rights "will be exercised without discrimination"'.[32] Article 2(2) expressly names 'language' as an unlawful ground of discrimination. This provision has a 'dynamic relationship' with art 12 of the *ICESCR* on the right to health.[33] We can say in summary that the *ICESCR* provides *a right to linguistic non-discrimination in the enjoyment of the right to health*.[34]

It is not in question that 'States Parties to the *ICESCR* are obliged to take whatever steps are necessary to ensure that the substantive obligations they assume under the [Covenant] are carried out'.[35] Moreover, the Special Rapporteur on Health has recently reinforced that states are compelled to *keep examining* the adequacy of non-discriminatory access to information and care, that discrimination is often intersectional, and that it requires structural and systemic redress.[36] Thus, Australia cannot 'set and forget' in satisfying its *ICESCR* obligations; rather, the *ICESCR* imposes on Australia an *ongoing* 'obligation to move as expeditiously and effectively as possible towards' the full realisation of the art 12 health rights.[37] Because of the immediacy of the art 2(2) obligation to avoid discrimination on the basis of language, linguistic non-discrimination should be a feature of Australia's steps towards fuller realisation of the right to health.

Yet progressive realisation invokes a question of proportionality; the *ICESCR* undertaking of states parties is to take steps using 'all appropriate

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32 *CESCR General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990) ('*CESCR General Comment No 3*') [1].

33 Ibid.

34 The *ICESCR* right to freedom from linguistic discrimination builds on art 2 of the *Universal Declaration of Human Rights* which states: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as … language': *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948). This right is transformed into an obligation upon states parties by art 2(2) of the *ICESCR* ('The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to … language'), and similarly by art 2(1) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

35 Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1) *UNSW Law Journal* 193, 201–2.

36 Tlaleng Mofokeng, Special Rapporteur on the Right to Health, *Strategic Priorities of Work*, UN Doc A/HRC/47/28 (7 April 2021).

37 *CESCR General Comment No 3* (n 32) [9].

means'.[38] For example, the degree of use of a minority language in education is held to the progressive but proportional standard of being 'reasonable and justified'.[39] There has been relatively little guidance on what is proportionate for states in meeting the information/communication obligations that form part of the right to health, and there is no international case being brought which would clarify the standard for pandemic communications realising *ICESCR* obligations, to my knowledge. This under-examination may be due to common but misplaced assumptions that social rights are non-justiciable. Nevertheless, international commentary has noted that there are interacting *ICESCR* rights to linguistic non-discrimination in access to health and healthcare since (at least) the 2012 *Report of the Independent Expert on Minority Issues*, which declared that public health information 'should be available in minority languages'.[40] More recently, but before this pandemic, international law scholar Jacqueline Mowbray expanded the argument that the prohibition on linguistic discrimination in art 2(1) interacts with the right to health in art 12 to require states to provide translations from their dominant/majority language so that linguistic minorities can access health services.[41] But key questions remain. These include whether it is proportionate for a government to exclude the languages of smaller communities in order to afford public health communications in more widely used languages, and questions as to the quality of multilingual communications. The COVID-19 pandemic has prompted development of some answers, in terms of both state practice and normative international commentary. However, without new international jurisprudence evaluating that new commentary a standard has not crystallised. That commentary is distilled in Part IV below because the progressive realisation of Australia's *ICESCR* obligations requires us to *keep re-assessing* how non-discriminatory health rights are implemented here. Together, this guidance could supplement Australia's patchy law and policy framework about multilingual public health communications and help Australia maintain its *ICESCR* obligations — if our governments are willing to accord it their attention.

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38 *ICESCR* (n 28) art 2(1). See also *CESCR General Comment No 3* (n 32) [3].

39 Fernand de Varennes, Special Rapporteur on Minority Issues, *Education, Language and the Human Rights of Minorities*, UN Doc A/HRC/43/47 (9 January 2020).

40 Rita Izsák, Report of the Independent Expert on Minority Issues, UN Doc A/HRC/22/49 (31 December 2012).

41 Jacqueline Mowbray, 'Translation as Marginalisation? International Law, Translation and the Status of Linguistic Minorities' in Gabriel González Núñez and Reine Maylaerts (eds), *Translation as Public Policy: Interdisciplinary Perspectives and Case Studies* (Routledge, 2017) 32. In parallel, leading crisis translation scholars have noted 'the recent call to consider communication of crucial and timely information in crisis management as a human right' and described economic arguments for 'risk reduction and prevention' through multilingual communications as 'sit[ting] alongside the rights-based notion that whatever the status of one's spoken language, information in a crisis is a fundamental human right': O'Brien and Federici (n 23) 130, 134 (citations omitted).

B *Who Would Multilingual, Public Pandemic Communications Serve in Australia?*

A significant proportion of the Australian public use a LOTE as their dominant language. The Census counts these people through the proxy measure of households in which a LOTE is spoken, whether in addition to or instead of English.[42] In 2016, a LOTE was spoken in 38.2% of Greater Sydney households and 22.2% of all Australian households.[43] Australia's most-spoken LOTEs are Mandarin and Arabic. However, most migrants speak English, even if they do not speak English *at home*: only a reported '6 per cent either speak little English or none at all'.[44] Most people moving to Australia know some English or learn it over time,[45] but they may not be able to understand complicated information in English, particularly written information. Moreover, there are new migrants who have not yet acquired much English, and some groups of migrants who will have a harder time learning English than others, regardless of their own willingness, including older people, women who mainly work in the home, and people whose workplaces do not allow for interaction in English.

Further, some languages share many features with English while others do not: the greater the linguistic divide to be bridged, the harder it typically is to learn English. For example, our two most spoken LOTEs, Mandarin and Arabic, notably use different written scripts to English, making bi-literacy harder to obtain. In addition to low- and non-English speaking migrants, there are Australian-born first language speakers of Aboriginal languages who have low English proficiency and Deaf Australians whose first or strongest language is Auslan, not English.[46] Moreover, there are Australian-born first language speakers of English with

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42 The Census, despite its drawbacks, offers the best data on multilingualism in Australia.

43 Australian Bureau of Statistics, *2016 Census QuickStats* (Web Page) <https://www.abs.gov.au/census/find-census-data/quickstats/2016/1GSYD#cultural>.

44 Tasha Wibawa, 'Push for Multilingual COVID-19 Resources to Help Elderly People Who Don't Speak English', *ABC News* (online, 21 March 2020) <https://www.abc.net.au/news/2020-03-21/coronavirus-information-limited-language-cald-australia/12063104>.

45 'In 2016, the majority (73%) of permanent migrants spoke a language other than English at home. Humanitarian migrants [since 2000] were most likely to speak a language other than English at home at 94%, followed by Family (73%) and Skilled (69%) migrants. Permanent migrants who spoke a language other than English at home generally reported a high level of proficiency in spoken English at 83%. Reflecting the eligibility criteria of migrants who enter Australia under the Skill stream, Skilled migrants had the highest levels of English proficiency at 92%. Those in the Family and Humanitarian streams, who arrive under different eligibility criteria and circumstances, had lower rates of English proficiency at 73% and 66% respectively': Australian Bureau of Statistics, *Understanding Migrant Outcomes: Insights from the Australian Census and Migrants Integrated Dataset, Australia* (Web Page) <https://www.abs.gov.au/statistics/people/people-and-communities/understanding-migrant-outcomes-insights-australian-census-and-migrants-integrated-dataset-australia/latest-release>.

46 Users of sign languages such as Auslan should be recognised as members of linguistic minorities: OHCHR, 'UN Human Rights Expert Calls for Recognition of Rights of Users of Sign Languages as Minorities' (Press Release, 22 September 2020).

certain low proficiencies (for example, illiteracy). Thus, overall, there remain many segments of the Australian public for whom communications in English, especially written English, will be inaccessible or hard to understand, *even though* most people in Australia speak at least some English.

Although these segments of the Australian public with low or no English proficiency are minorities, communicating with them has been of heightened importance because of the nature of the COVID-19 crisis:

> [I]ndividual outcomes have greater influence on the overall course of the COVID-19 pandemic than is the case in most other disasters … [M]inimizing the personal risk of individuals [is] deeply intertwined with the overall risk to the community.[47]

It has therefore been extremely important for overall public safety that official, public communications about COVID-19 be disseminated *even to those with no or low English proficiency*. It is also a matter of equality and justice. To quote one of Australia's leading healthcare communications researchers, from the start of the pandemic until now, an outstanding question is: 'Are the right languages being targeted for the most vulnerable population[s]?'[48]

Yet this is an aspect of the pandemic response which has been challenging for Australia. A telling anecdote is that by early 2021, speakers of one of Australia's most common LOTEs (itself a major world language) were still regularly calling a popular, community-run radio station that broadcasts in this language asking whether one had to pay to get a COVID-19 test.[49] The information that COVID-19 tests were free was important for encouraging people to get tested, which was crucial because the Australian strategy against COVID-19 relied on the early identification and containment of infections. Australian federal and state governments had placed translated COVID-19 fact sheets in this language on their websites, and had produced videos about COVID-19 in this language. Yet the informant's report suggested both that a core fact about testing was not reaching a large minority language population, despite the production of government materials in LOTEs, and that people's go-to source of information was a LOTE-medium radio station rather than an official government source. This resonates with a reported story of a Mandarin-speaking community leader who had lived in Australia for decades but had no idea that Australian governments produced any information (about COVID-19 or other topics) in Mandarin; she relied instead on information in

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47 Piller, Zhang and Li (n 11) 506.

48 Robyn Woodward-Kron, quoted in Stayner (n 7).

49 My informant from the radio station does not wish to be identified, and so I have not named the language. Similar confusion in refugee communities in Australia is reported by Saudie (n 6).

Mandarin, regardless of its source, circulating on the communication app WeChat.[50] When we examine the accessibility of such information in the case study, it becomes clearer why LOTE-using communities in Australia may not access government-produced multilingual information, and may not even know it exists or expect it to exist.

III Australian COVID-19 Case Study

In 2020, I began a case study of official COVID-19 communications in Australia ('Australian case study'). This was prompted by the emerging findings of my earlier NSW study (introduced in Part I) and by research undertaken by a non-government organisation in Australia early in 2020 which indicated that LOTE speakers were not able to access sufficient, reliable information about the pandemic:

> A small yet concerning survey of 200 people conducted over the past month by Cohealth — a Melbourne not-for-profit community health organisation focused on migrant communities — found that one in five, or close to 22 per cent, of their clients did not understand COVID-19 information, or had not received it at all.[51]

My case study was also prompted by reports that Indigenous media organisations across Australia needed to 'drop everything' to translate public pandemic communications into Aboriginal languages because the pandemic communications were 'being produced in Canberra and they don't know the local languages out here', with delays expected in regard to both written and oral messaging: 'It's going to take probably a week by the time they sort out the scripts, and by the time we get here and record them, it's going to be a week away'.[52] A week is a long time in a COVID-19 outbreak. That communities in the Northern Territory rely on these languages should not have presented an unexpected challenge. This example of a lack of planning for LOTE communications suggested that my earlier findings about the lack of a LOTE communications decision-making framework in NSW[53] were echoed in other Australian jurisdictions, with serious consequences.

My case study collected original data on the NSW and federal governments' public pandemic communications through in-person and online fieldwork, as well as through exploratory interviews conducted by phone and email with community sector workers engaged in using or creating public pandemic communications in LOTEs. Government and

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50 Renaldi and Fang (n 4).

51 Dexter (n 7).

52 Oliver Gordon, Scott Mitchell and Jessica Hill, 'Central Australia Records First Coronavirus Cases as Indigenous Organisations Prepare Health Messages', *ABC News* (online, 28 March 2020) <https://www.abc.net.au/news/2020-03-28/battle-to-keep-coronavirus-out-of-remote-communities-translation/12084886>.

53 Grey and Severin, 'NSW Case Study' (n 9).

media reports on Australian communications were collected from early 2020 onwards to contextualise the data. Most reports were about the NSW, Victorian and federal governments' communications, owing to the locations of COVID-19 outbreaks.

I began in-person fieldwork in May 2020, a few months into Australia's COVID-19 pandemic experience, when rules were being changed and public health information was regularly being updated in English after the first lockdowns. This was an important time for disseminating information. I first examined physical signage and then online communications. I examined public signage about COVID-19 in a sample of four Sydney suburbs. I selected suburbs with more than double the national rate of households in which a LOTE is spoken: Chatswood, Artarmon, Strathfield and Burwood. Given the public health rules in place at the time, many other areas were not accessible for in-person fieldwork, and surveying four suburbs expended my available time and health risk tolerance. Within the four sample suburbs, I quantified instances of multilingualism and recorded both the languages used and the positioning of signage about COVID-19.[54] For comparison, non-pandemic signage in LOTEs was also documented.

I then examined online public health communications from the federal and NSW governments on Twitter, YouTube and the official websites of:

- the federal government;
- the federal Department of Health;
- the NSW Department of Health ('NSW Health'); and
- the NSW Multicultural Health Communication Service ('NSW MHCS').

I chose online communications because they were especially important at the time; access to information displayed in public or transmitted via in-person communications was reduced as public activity was restricted. I chose these specific social media handles and channels because of their official status and prominence. A larger scale study would have yielded more data, but was neither feasible nor necessary given that my initial purpose was to submit timely information to a mid-2020 Senate inquiry into the federal government's responses to COVID-19.[55]

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[54] Dr Hanna Torsh, a colleague from Macquarie University, Department of Linguistics, assisted in this fieldwork.

[55] Grey, Submission No 156 to Senate Select Committee on COVID-19 (n 27). The submission is also discussed in Alexandra Grey, 'Multilingual Australia Is Missing Out on Vital COVID-19 Information. No Wonder Local Councils and Businesses Are Stepping In', *The Conversation* (online, 29 June 2020) <https://theconversation.com/multilingual-australia-is-missing-out-on-vital-covid-19-information-no-wonder-local-councils-and-businesses-are-stepping-in-141362>.

A *Key Findings*

My and Alyssa Severin's pre-pandemic research in NSW, Australia's most populous state, had found that online public communications from 24 NSW government departments and agencies were unpredictable and inconsistent in their language choices, not aligned with the linguistic profile of the public, likely to be in English, and likely to be communicated in writing across departments and agencies.[56] Overall, my COVID-19 case study found the same shortcomings in NSW and federal pandemic public health communications.

1 *Physical Signage Findings*

Although both the federal Department of Health and NSW Health produced English and LOTE posters about COVID-19 which were free to download,[57] none were widely displayed in the four sample suburbs. English-medium signage from NSW Health was, likewise, not widely displayed. The A4 version of the federal government's 'Keeping Your Distance' poster, in English (see Figure 1), was more commonly displayed than any other government COVID-19 signage, even in shopfronts that otherwise used LOTE signage.

The A4 version of the federal government's 'Keeping Your Distance' poster, in English (see Figure 1), was more commonly displayed than any other government COVID-19 signage, even in shopfronts that otherwise used LOTE signage.

Moreover, the case study found that in NSW some local governments were undertaking LOTE-medium communication of public health information via their own public signage, but other local governments were not, despite serving equivalently high proportions of LOTE-using households. The leading example in this study was Strathfield Council, which produced and displayed many large posters in English, Mandarin and Korean in hub areas (see Figure 2).

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[56] Grey and Severin, 'NSW Case Study' (n 9).

[57] See, eg, NSW Health's Simplified Chinese COVID-19 poster 'Who To Call' [*Chinese*] <https://www.health.nsw.gov.au/Infectious/covid-19/Documents/poster-call-sc.pdf> and its other LOTE resources, available through the NSW MHCS website <https://www.mhcs.health.nsw.gov.au>; and the federal Department of Health's 'Keeping Your Distance' poster which was available in 2020 in English, Mandarin (in simplified and traditional characters) and many other languages: <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/translated-coronavirus-covid-19-resources>. In 2023, only the Greek translation of this poster, published on 3 April 2020, remains available on the website: 'Coronavirus (COVID-19) – Keeping Your Distance' [*Greek*], *Australian Department of Health* (Web Page, 4 April 2023) <https://www.health.gov.au/resources/publications/coronavirus-covid-19-kratate-tin-postasi-sas-keeping-your-distance>.

Figure 1: 'English language 'Keeping Your Distance' poster from the federal Department of Health outside Chatswood's Westfield Mall, Sydney (18 May 2020, photograph by author).

Figure 2: Trilingual pandemic signage from Strathfield Council at an exit from Strathfield Train Station onto Strathfield Square, Sydney (May 2020, photograph by author). The top sign is in English and Mandarin; the bottom in English and Korean

Such local government public health signage chiefly communicated the message of social distancing, rather than the regularly changing rules and details of the official public health response. In this case study, LOTE-medium COVID-19 signage was, overall, less often a government publication than a non-government (unofficial) publication (see Figure 3).

Figure 3: Bilingual (English and Mandarin) pandemic signage ('A Guide to the Public Prevention of the Corona Virus Disease in Australia') from a consortium of local LOTE media companies, displayed in a shop window, Burwood Road, central Burwood, Sydney (May 2020, photograph by author).

2 *Website Findings*

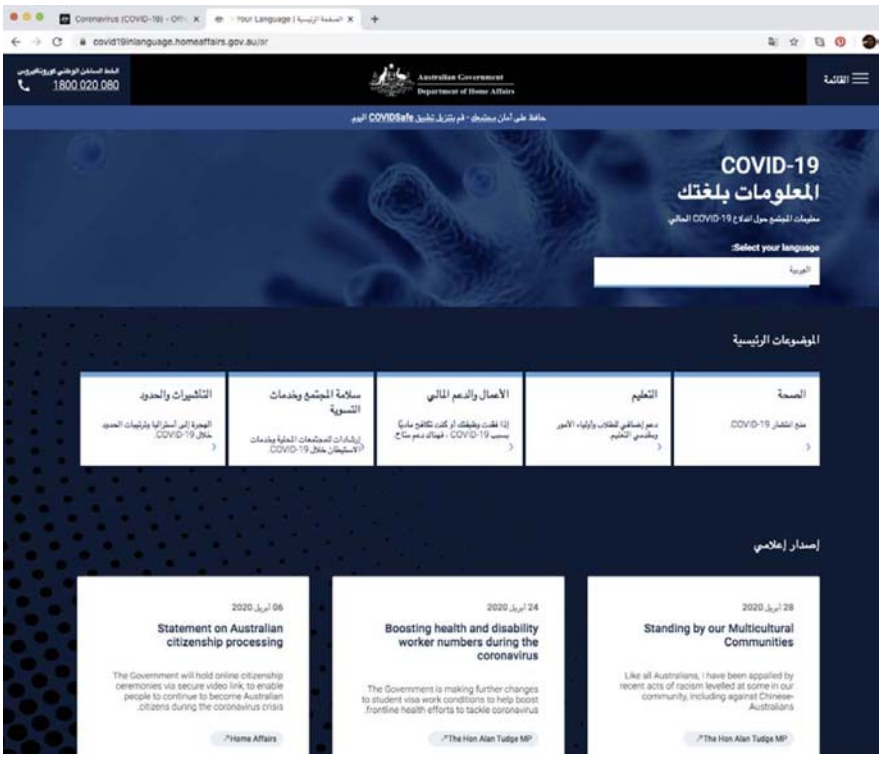
Turning now to online communications, the case study found that public health information about COVID-19 in LOTEs, including downloadable information, did exist on the federal and NSW government websites. However, it was located within webpages that were in English, was difficult to search for, and was given opaque and inconsistent labels.

Of the four websites studied, the federal government website's public health information about COVID-19 in LOTEs appeared to be the most accessible to a non-dominant user of English. This accessibility was achieved in two ways. One was via a prominent 'Check the latest information in your language' link on the home page (https://www.gov.au), albeit in English (see Figure 4).

Figure 4: LOTE resources could be accessed via the 'Check the latest information in your language' link in the middle of the federal government home page (26 May 2020).

The other was via the 'Select your language' menu on the 'COVID-19 Information in your Language' webpage,[58] which listed each available language in both English and that language's script, increasing readability for those with difficulties reading English. Selecting a language converted this webpage's text, providing detailed public health information in a LOTE (see Figure 5).

Figure 5: The webpage displayed after selecting 'Arabic / [*Arabic*]' from the 'Select your language' drop-down menu on the federal government's 'COVID-19 Information in Your Language' webpage (26 May 2020).



[58] 'COVID-19 Information in your Language', *Australian Department of Home Affairs* (Web Page, 26 May 2020) <https://www.homeaffairs.gov.au/covid19inlanguage>.

By contrast, on the federal Department of Health home page (https://www.health.gov.au), there was no mention of or link to any information in a LOTE (about COVID-19 or anything else). Scrolling to the bottom of this English-only page, I found the words 'Check our collections of resources and translated resources for more information about COVID-19' hyperlinked to the 'Translated Coronavirus (COVID-19) Resources' webpage.[59] The latter webpage began with notices in English about the COVIDSafe app's availability in LOTEs, and hyperlinked the words 'You can also visit our YouTube channel to view SBS's COVID-19 video in various languages'. However, it also included a list of bilingual hyperlinks such as 'Coronavirus (COVID-19) resources in Korean ([*Korean*])'. Each link took the user to a bilingual page with multiple, downloadable resources in a LOTE, including fact sheets, infographics, posters and videos.

A note on the SBS videos mentioned above: these are COVID-19 'explainer' videos in dozens of languages, produced in 2020 and available on the SBS website[60] and the federal Department of Health's YouTube channel. These were not updated for every change of information, but new videos were added such as 'Australia's Three Step Plan for Reopening after COVID-19' and videos about the 2021 COVID-19 vaccine rollout. The YouTube viewer numbers are publicly available, and were relatively low at the time of the case study. For example, the SBS video on COVID-19 in Mandarin hosted on the federal Department of Health's YouTube channel was viewed 415 times between 30 March and 26 May 2020. The SBS video in Arabic hosted on the same channel had 1,587 views in the same period. Both numbers of views seem low given these are Australia's two most-spoken LOTEs and given both videos were hyperlinked on the federal Department of Health's 'Translated Coronavirus (COVID-19) Resources' webpage.[61]

The NSW Health and NSW MHCS websites did not make public health resources in LOTEs readily accessible. The main websites of NSW Health were the NSW Health home page (https://www.health.nsw.gov.au) and the NSW Health 'COVID-19 (Coronavirus)' webpage.[62] If a user of these webpages clicked on the red button labelled 'NSW Gov COVID-19', they would reach a third NSW Health webpage titled 'HELP US SAVE LIVES'.[63] None of the three websites provided a 'choice of language' button

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59 'Translated Coronavirus (COVID-19) Resources', *Australia, Department of Health* (Web Page, 26 May 2020) <https://www.health.gov.au/resources/collections/resources/translated?f%5B0%5D=field_related_conditions_disease%3A9669> (no longer available).

60 'Coronavirus Explained in Your Language', *SBS* (Web Page, 19 May 2020) <https://www.sbs.com.au/ondemand/coronavirus-explained-in-your-language>.

61 'Translated Coronavirus (COVID-19) Resources' (n 59).

62 'COVID-19 (Coronavirus)', *NSW Health* (Web Page, 21 May 2020) <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/default.aspx>.

63 'Help Us Save Lives', *NSW Health* (Web Page, 21 May 2020) <https://www.nsw.gov.au/covid-19>.

or language menu, or made any mention of LOTE resources.[64] Moreover, these NSW Health webpages did not make any explicit mention of, or link to, the NSW MHCS website.

On the MHCS website (https://www.mhcs.health.nsw.gov.au), I encountered a different barrier to finding COVID-19 information in LOTEs: the home page's 'Quick Link' to 'Multilingual Resources' did not link to COVID-19 resources but rather to a database of all MHCS publications.[65] This database was searchable; however, if you searched the name of a language, the results were only listed in English. Only by clicking on an English-medium search result could a user reach a list of multiple resources in LOTEs, and then browse them for COVID-19 information.

These findings about websites' poor accessibility align with media reports,[66] and build on two other small, contemporaneous studies revealing accessibility problems in the readability of government webpages, even those in English. In the first study, Health Literacy Hub scholars examined the federal Department of Health website in early 2020, finding that 'basic first principles for a responsive health literate approach have not been followed' and that readers would need an average of 14 years of schooling (in English) to understand the complexity of the text.[67] The scholars noted that, by contrast: 'International guidelines for good communication (such as those from the Centers for Diseases Control and Prevention in the US, and the World Health Organization) recommend achieving a grade 8 reading score or less for the general population and grade 5 for lower literacy populations for written health information.'[68] In the second study, leading applied linguist Ingrid Piller assessed two NSW government COVID-19 websites — titled 'What You Can and Can't Do under the Rules' and 'Public Health Orders and Restrictions' — using similar, accepted measures of readability. She found that '[w]ith a Flesch Reading Ease score of 48.1 and 33.2 both are considered difficult to read, at the reading level of a college

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64 The 'COVID-19 (Coronavirus)' webpage (n 62) did, however, contain links to LOTE resources. If a user scrolled down to the last of its six distinct boxes of links (labelled 'Service providers') and then clicked on the last hyperlink within this box ('Print and web resources'), they would reach NSW Health's webpage for LOTE resources on COVID-19. In small print on that webpage, under the headings 'Fact Sheets and Brochures' and 'Home and Hotel Isolation' was a note 'Also available in:' followed by a list of language names, in English, each hyperlinked to a LOTE fact sheet.

65 'Resource Search', *NSW MHCS* (Web Page, 21 May 2020) <https://www.mhcs.health.nsw.gov.au/publications>.

66 See, eg, Rollason (n 20) quoting Adele Murdolo, executive director of the Multicultural Centre for Women's Health: 'Even though information was being translated into different languages, it was just sitting on websites and during the COVID shutdown we were unable to reach many migrant women through digital or social media, particularly in public housing.'

67 McCaffery, Muscat and Donovan (n 16).

68 Ibid.

student'.[69] As Piller concludes: '[T]hat key information about COVID-19-related restrictions are out of the reach of more than 13.7% of the Australian population — irrespective of whether English is their main language or not — is concerning'. Moreover, an ABC investigation found that, while the Victorian Department of Health and Human Services website included COVID-19 information in more than 57 languages,

> [t]hose pages were out of date and didn't reflect the information on the English website. They also linked back to the English website for critical information, such as where to get tested and the reopening roadmap. In one instance, a key point on the Indonesian page was instead translated into Turkish.[70]

3 *Twitter Findings*

Finally, my case study examined the dissemination of official public health information about COVID-19 via three Twitter feeds: @healthgovau (federal Department of Health), @NSWHealth (NSW Health) and @mhcsnsw (NSW MHCS). These were studied over three fortnights during the early government response to the COVID-19 pandemic: 12–25 February 2020, 11–24 March 2020 and 22 April – 5 May 2020. Key results include the finding that the federal Department of Health, NSW Health and the NSW MHCS increased their Twitter usage in 2020, but all three Twitter feeds were maintained primarily in English. Moreover, important changes in NSW's COVID-19 restrictions in April and May 2020 were not consistently met with an increase in the number of multilingual tweets (that is, tweets including at least one LOTE in the text or image). Rather, during one relevant fortnight of changing restrictions (22 April – 5 May 2020), for example, multilingual tweets about COVID-19 became a *smaller* proportion of both NSW feeds: see Figure 6.

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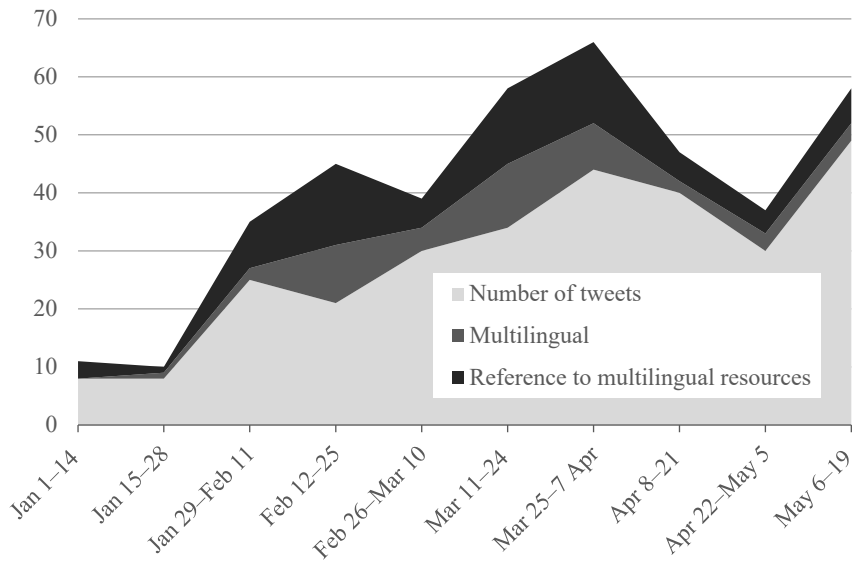
[69] Ingrid Piller, 'Does Every Australian Have an Equal Chance to Know about Covid-19 Restrictions?', *Language on the Move* (Blog Post, 1 September 2020) <https://www.languageonthemove.com/does-every-australian-have-an-equal-chance-to-know-about-covid-19-restrictions/>.

[70] Renaldi and Fang (n 4).

Figure 6: Multilingual COVID-19 Information from NSW MHCS on Twitter, 2020



As the number of @mhcsnsw's tweets increased in response to COVID-19, the MHCS's use of at least one LOTE within this Twitter feed did generally increase, however. This is shown in the 'Multilingual' series in Figure 6. This multilingual tweeting was most common in the fortnights 12–25 February and 11–24 March, corresponding to two high-profile outbreaks of COVID-19 linked to travellers from China and Iran. There was also an increase in @mhcsnsw's tweets referring to multilingual public health information resources (produced by the NSW government and by SBS) during these times. This increase is shown in the 'Reference to multilingual resources' series in Figure 6. Sometimes these references to multilingual information were within multilingual tweets, and sometimes within English-only tweets.

The feed @NSWHealth was more widely followed that @mhcsnsw, with 44,800 followers (equivalent to 0.59% of the NSW population), and it tweeted more often than @mhcsnsw. Despite producing a greater number of tweets, the multilingual tweets from @NSWHealth were fewer in number than the multilingual tweets from @mhcsnsw.

While the federal @healthgovau feed was more active than either of the NSW feeds and had many more followers, multilingual tweets remained consistently absent from @healthgovau from February through to May 2020,

even though its total volume of tweets increased.[71] Although the federal Department of Health had produced fact sheets, posters and other resources relating to COVID-19 in LOTEs by May 2020, it did not mention them at all in its tweets during the periods studied.

B *Contextual Voices and Sources*

Supplementing my data, I assembled media reports of problems with the multilingual reach of Australian governments' COVID-19 information from numerous media outlets citing spokespeople from community organisations, peak bodies and public health professionals. These reveal that the federal government ran a COVID-19 communications campaign costing some $30 million (including English-medium communications; there is no reported figure specifically for LOTE communications).[72] Yet problems with the multilingual reach of federal public pandemic communications persisted throughout 2020, with examples from Afghan, African, Chinese, Greek, Korean, and Muslim Women's community groups.[73] In mid-2020, the chief executive of the Federation of Ethnic Community Councils Australia was reported as saying:

> Unfortunately, often what we see in government policy and programs for multicultural communities and other vulnerable community members is always a band-aid solution … It's always an afterthought, rather than, let's

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[71] Across the three studied periods, the only multilingual tweet from @healthgovau was on 14 February 2020, itself in English but attaching a video with visible subtitles in Simplified Chinese characters. The video was spoken in English and presented the federal Minister for Health talking with federal MP Gladys Liu about the need to keep frequenting Chinese shopping areas in Australia. The tweet itself made no explicit mention of COVID-19. The tweet still appears in the feed of former Minister for Health Greg Hunt: @GregHuntMP (Twitter, 14 February 2020, 3:00 AEST) <https://twitter.com>. The 23 listed retweets for this tweet include one from @healthgovau (federal Department of Health), which is listed last.

[72] Stayner (n 7). Wibawa (n 44) reports: 'A spokesperson from the Department of Health told the ABC they were not able to provide a specific figure on how much of the $30 million would be allocated to resources in other languages.'

[73] For example, in March 2020: 'Adbul Khaliq Fazal, chairperson of the Afghan Australian Association of Victoria, told the ABC he hadn't been able to find any Government COVID-19 resources in Pashto. "We received limited information from the [health] department ... they [should be providing] accurate and reliable information to all Australian communities," he said': Wibawa (n 44). Also in March, 'Federation of Ethnic Communities' Councils of Australia (FECCA) chairperson Mary Patetsos told SBS News further in-language [LOTE] guidelines were needed. "Community information is critical at this point in time" ... [She] cited the Greek community and fast-growing African communities as other groups that would benefit from in-language guidelines': Stayner (n 7). In addition, 'The Korean Society of Sydney's Daniel Han said their community held some concern the translated factsheets would not be updated efficiently ... "they feel that the guidelines communicated by the government are not detailed enough": Stayner (n 7). In June 2020, a review by Muslim Women Australia 'of on-the-ground experiences of CALD [culturally and linguistically diverse] communities during the pandemic found the lag in information "led to heightened levels of anxiety, a greater reliance on non-official sources of information and a greater level of confusion"': Stephanie Dalzell, 'Government Warned of Coronavirus "Missed Opportunity" to Protect Migrant Communities before Victorian Spike', *ABC News* (online, 24 June 2020) <https://www.abc.net.au/news/2020-06-24/government-warned-failing-engage-migrant-communities-coronavirus/12384800> ('Government Warned'). In October 2020, see Renaldi and Fang (n 4).

> say, bringing in vulnerable members of the community early to make sure the solution we're trying to design is inclusive of everyone.[74]

Around the same time, the National COVID-19 Health and Research Advisory Committee reported to the federal government that migrants were less likely to receive public health information than others in Australia because government engagement was sporadic, and that this was increasing migrants' risks of contracting COVID-19 and transmitting it unwittingly.[75] The Committee advised the nation's Chief Medical Officer that 'community representatives [told] the panel they were involved in Australia's COVID-19 response "on an ad-hoc basis or not at all"'.[76] The Committee's public report of May 2020 concluded: 'Communication materials should be translated by accredited translators and tailored communications are necessary to increase participation in COVID-19 public health measures'.[77] It noted that 'some languages spoken by migrants and refugees lack a formal written language … Provision of information in oral forms will not only allow better understanding, but encourages distribution through established social media and WhatsApp groups'.[78] And yet, when a spike of cases occurred the following month in Victoria,

> [t]he company engaged by the Victorian government to manage crisis communication with the state's 1864 confirmed virus cases was only asked to communicate in languages other than English [some days in], with insiders admitting language had been a 'blind spot'.[79]

Moreover, the insufficient multilingualism of government communications re-emerged as a prominent concern in 2021 when the vaccination campaign began.[80] Certain government officials confessed that there had been inadequate COVID-19 communication in LOTEs.[81] After reports in 2020 over the 'nonsensical' auto-translation of Victorian and federal COVID-19 fact sheets,[82] Melbourne Design Week 2021 even included an exhibition 'devised in response to translation errors and confusing information

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74 Dalzell, 'Government Warned' (n 73).

75 Ibid.

76 Ibid.

77 National COVID-19 Health and Research Advisory Committee, *Risks of Resurgence of COVID-19 in Australia* (Report, 21 May 2020) 4.

78 Ibid 4.

79 Patrick Durkin, 'Victoria's Failed English Test behind Spike in Virus Cases', *Financial Review* (online, 23 June 2020) <https://www.afr.com/politics/federal/victoria-s-failed-english-test-behind-spike-20200623-p5558g>.

80 Xiao et al (n 7); Rollason (n 20).

81 See, eg, Victorian Chief Health Officer, Brett Sutton: 'We know that there are some migrant communities, recent migrants or culturally and linguistically diverse communities, who are overrepresented now with some of our new cases … It's our obligation as government to reach those people. It's not their fault if we're not going in with appropriate engagement', quoted in E Kinsella, 'Victoria's Coronavirus Case Increase Saw a Horror Week of New Restrictions and a Testing Blitz', *ABC News* (online, 27 June 2020) <https://www.abc.net.au/news/2020-06-27/victorias-horror-coronavirus-week-testing-blitz-and-restrictions/12396324>.

82 See, eg, Dalzell, 'Government Coronavirus Messages' (n 5).

regarding COVID-19 … Artists from non-English speaking backgrounds were invited to create posters in languages other than English to make the COVID-19 safety messages clear'.[83] Together, the assembled sources indicated a communications problem that was not yet solved.

While my case study lends support to the claims reported in the Australian media that government communications in LOTEs often did not reach non-English-dominant individuals and communities in Australia, highlighting such problems is not to dismiss the efforts at multilingual communication made by the state and federal governments. There is evidence that Australian governments made concerted improvements to their COVID-19 communications in LOTEs over time. For example, on its third day of televised COVID-19 press conferences, 28 January 2020, the NSW government included an Auslan interpreter, and from April 2020 this was a regular feature;[84] however, in 2022 the lack of Auslan interpreting for COVID-19 bulletins was still concerning Deaf Queenslanders.[85] Nationally, in February 2020, a multilingual hotline was set up,[86] and particularly at the start of the pandemic, attempts were made to prioritise translation into languages associated with then-key source countries.[87] Later in 2020, the Victoria Government set up the Culturally and Linguistically Diverse Communities Taskforce 'as part of a $14.3 million initiative aimed at providing culturally specific support and communication'.[88] An executive director of the Multicultural Centre for Women's Health was reported as saying that 'migrant groups had been "excluded" in public engagement well before the COVID-19 pandemic began' but that since the Taskforce had been established 'communication had improved … and community groups and leaders had been better engaged to work with the State Government on their plans'.[89]

In 2021, at least one collaborative government–academic research project commenced, in NSW, to look into linguistically diverse people's

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83 Annette Gray, 'The Covid-19 Message', *Primary Learning* (Blog Post, 13 May 2021) <https://primarylearning.com.au/2021/04/19/the-covid-19-message>.

84 NSW COVID-19 press conferences and video updates from 26 January 2020 onwards are available at 'COVID-19 (Coronavirus): Press Conferences and Video Updates', *NSW Health* (Web Page) <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/press-conferences.aspx>.

85 Carli Willis, 'Deaf Community Fears They Don't Properly Understand COVID Pandemic Due to Lack of Auslan Interpreters', *ABC News* (online, 10 January 2022) <https://www.abc.net.au/news/2022-01-10/deaf-community-feels-left-out-of-news-loop-during-covid-pandemic/100721086>.

86 The Multilingual Older Persons COVID-19 Support Line operated until July 2021 under a federal Department of Health cooperative arrangement with the Centre for Cultural Diversity in Ageing (a non-government body) and All Graduates (an interpreting and translating company): Centre for Cultural Diversity in Ageing, 'Launch of Multilingual Older Persons COVID-19 Support Line' (online, 11 February 2021) <http://www.culturaldiversity.com.au/news-and-events/latest-news/680-launch-of-multilingual-older-persons-covid-19-support-line>.

87 Stayner (n 7).

88 Renaldi and Fang (n 4).

89 Ibid.

COVID-19 communication needs.[90] The Victorian government hired '50 women … to travel to communities across the state to give seminars, hold Zoom sessions, doorknock public housing and answer questions about the vaccine, the virus and other health issues in their own [non-English] language'.[91] At the federal level, a working group of medical experts and language and communications experts produced a resource set called *The Science of Immunisation* for the federal Department of Health to support the vaccination program;[92] 'questions of linguistic inclusion and communicative accessibility played an important role in the development of the resources'.[93] In addition,

> on top of the government's $31 million COVID-19 vaccination public information campaign, $1.3 million had been allocated to multicultural organisations to help reach CALD [culturally and linguistically diverse] communities.
>
> 'The National Vaccine Campaign includes advertising translated in 32 languages for multicultural audiences across radio, print and social media — this includes WeChat and Weibo …'
>
> The Department is also exploring other social media channels to reach multicultural communities.[94]

Further, the Culturally and Linguistically Diverse Communities COVID-19 Health Advisory Group was set up in 2021 by the federal Department of Health.[95]

Australia entered the pandemic with some state and territory governments having more experience in multilingual health communications than others. The NSW government already had its MHCS. The Service's approach to COVID-19 communications was to produce videos and written materials in the most frequently spoken languages as well as written materials in languages of new and emerging communities and in refugee communities' languages.[96] According to MHCS Director, Lisa Woodland,

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90 UNSW Sydney and the NSW MHCS commenced a new research project in 2021 'to identify strategies to improve communication and engagement with people from culturally and linguistically diverse backgrounds during pandemics': Email Calling for Participants, 9 February 2021, on file with author. See also Holly Seale, 'Enhancing and Supporting the COVID-19 Vaccination Program: Focusing on Culturally and Linguistically Diverse Communities' (UNSW, online) <https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/medicine/population-health/2022-09-Enhancing-supporting-COVID-19-vaccination-program.pdf>.

91 Rollason (n 20).

92 Australian Academy of Science, *The Science of Immunisation* (Web Page, 2021) <https://www.science.org.au/education/immunisation-climate-change-genetic-modification/science-immunisation>.

93 Ingrid Piller, 'There's Linguistics in the Science of Immunisation', *Language on the Move* (Blog Post, 21 May 2021) <https://www.languageonthemove.com/theres-linguistics-in-the-science-of-immunisation/>.

94 Xiao et al (n 7), quoting a Department of Health spokesperson.

95 Saudie (n 6).

96 MHCS, 'Multicultural Health Week 2020 Launch' (YouTube, 9 September 2020) 00:49:30–00:50:08 <https://youtu.be/LcWx7JErwbU>.

NSW's health communications are generally 'a little bit different' to those of other state and territory governments because the focus is on working with communities through 'co-designed processes' and responding to community needs; this includes producing audio-visual LOTE materials featuring 'trusted sources' such as community leaders, and disseminating written resources through multicultural networks.[97] By September 2020, the Director reported, NSW had published over 900 communications resources about COVID-19 in over 50 languages.[98] NSW Health also had its *NSW Plan for Healthy Culturally and Linguistically Diverse Communities: 2019–2023*, although, upon inspection, this Plan deals with interpreting communications with individual non-English speaking clients of health services rather than with making public communications accessible in multiple languages.[99]

These comments on NSW's unusually inclusive health communications are reassuring, but the implication for other jurisdictions is not positive, and even NSW Health's and NSW MHCS's COVID-19 communications had some significant shortcomings in accessibility, as my investigation found. Queensland,[100] Western Australia[101] and the Australian Capital Territory[102] have something akin to NSW's MHCS, but within their health departments, and South Australia's Department of Health has a 'Multicultural Communities COVID-19 Advice' website with LOTE resources.[103] Tasmania's Department of Health previously described an internal 'multicultural health' section on its website but no longer does; it is unclear if that service continues.[104] Victoria does not have such an agency or sub-department,[105] and its *Delivering for Diversity: Cultural Diversity Plan 2016–2019* had lapsed by the time of the pandemic. Thus, all other Australian jurisdictions appeared to have less of a multilingual health communications policy framework than NSW, which itself had only a patchy framework.[106]

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97 Ibid 00:59:30–01:00:42.

98 Ibid 00:59:15–00:59:25.

99 NSW Health, *NSW Plan for Healthy Culturally and Linguistically Diverse Communities: 2019–2023* (Policy Directive No PD2019_018, 2019). See discussion in Grey and Severin, 'Audit of NSW Legislation and Policy' (n 25).

100 'Multicultural Health', *Queensland Health* (Web Page) <https://www.health.qld.gov.au/multicultural>.

101 'Multicultural Health', *Department of Health* (Web Page) <https://ww2.health.wa.gov.au/Health-for/Health-professionals/Multicultural-health>.

102 'Multicultural Health in the ACT', *Health* (Web Page) <https://www.health.act.gov.au/about-our-health-system/multicultural-health-act>.

103 'Multicultural Communities COVID-19 Advice', *SA Health* (Web Page, 24 March 2023) <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/infectious+diseases/covid-19/business+and+community/multicultural+communities+covid-19+advice>.

104 *Department of Health* (Web Page, 6 April 2023) <https://www.health.tas.gov.au>.

105 See 'Our Services', *Health and Human Services* (Web Page, 6 April 2023) <https://www.dhhs.vic.gov.au/our-services>.

106 Grey and Severin, 'Audit of NSW Legislation and Policy' (n 25).

IV Australia's Framework through the Prism of International Guidance

The case study reported in Part III gives empirical support to fears of unequal access to public information about COVID-19 from government sources, illustrating how communicative injustice has high health stakes and exacerbates marginalisation. This part of the article discusses the implementation of linguistic non-discrimination in fulfilling international right-to-health obligations to prevent continued communicative injustice in Australia. It uses the facts and findings of the Australian case study, and emerging expectations from the international commentary which I identify, to show how even a state party making efforts at multilingual COVID-19 communications (such as Australia) may need to progress.

My analytic review of the international organisations' commentary does not suggest that a legal standard has crystallised; as noted in Part II above, the absence of new case law hinders this, but even short of that, more consensus-building is needed. However, I have distilled the recent international commentary into emerging expectations about multilingual public health communications' *effectiveness*, *community input* and *strategic planning*. I propose these as emergent standards around which dialogue should continue. This discussion also argues that emerging expectations as to a proportionate state response are demanding, at least in a pandemic: given the high stakes, states should include most or even all of the languages used by segments of their public. To begin, the key commentary texts are recapitulated to show mounting expectations that states provide multilingual public health communications within a rights-based approach.

A *A Rights-Based Approach to Multilingual Pandemic Communication*

Early in the COVID-19 pandemic, the CESCR released its *Statement on the Coronavirus Disease* which warned plainly of the dangers of governments not communicating up-to-date, reliable information in multiple languages:

> Accurate and accessible information about the pandemic is essential both to reduce the risk of transmission of the virus, and to protect the population against dangerous disinformation. Such information is also crucial in reducing the risk of stigmatizing, harmful conduct against vulnerable groups, including those infected by COVID-19. Such information should be provided on a regular basis, in an accessible format and in all local and indigenous languages.[107]

[107] CESCR, *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights*, UN Doc E/C.12/2020/1 (17 April 2020) [18].

Similarly, the WHO explained:

> The problems of misinformation, disinformation, a lack of information, and information presented in a way that is not accessible to some communities have increasingly been identified as a significant exacerbating factor during other recent health emergencies, but COVID-19 has given the issue a global dimension.[108]

The outgoing Special Rapporteur on Health specifically raised problems of language barriers and discrimination in access to information and services in relation to the realisation of the right to health during the COVID-19 pandemic in his final report to the General Assembly in 2020,[109] and reinforced that the ability to realise the right to health, whether during a crisis or not, requires ESC rights to be 'embraced'.[110] These international organisations and office-bearers were not alone in sounding warnings. From early in the pandemic, the Council of Europe's Committee of Experts publicly urged governments to go further than before with their multilingual public health communications.[111]

Furthermore, international awareness was building in the decade prior to this pandemic about the need for further efforts from both states and international organisations to realise the rights of linguistic minorities. Thus, in 2013, the UN Independent Expert on Minority Issues reported to the UN Human Rights Council that 'challenges to the enjoyment of the rights of linguistic minorities exist in all regions'[112] and specifically identified 'the provision of information and services in minority languages' as one of nine areas of concern.[113] This led to the publication in 2017 of *Language Rights of Linguistic Minorities: A Practical Guide for Implementation* ('*2017 Guide*').[114] The pandemic provided the *2017 Guide* with newfound currency.

While the pandemic-prompted commentary provides the momentum to develop shared expectations, the *2017 Guide* provides details. It offers a threshold to meet, and from which to progress, in the realisation of linguistic non-discrimination in health and healthcare, maintaining that 'linguistic rights issues … should be considered in any activity that involves state

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108 *WHO's Response to COVID-19* (n 2) 28.

109 Dainius Pūras, Special Rapporteur, *Final Report on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN Doc A/75/163 (16 July 2020) [6], [13], [63], [64]. For example: 'Pandemics quickly expose weak health systems, in which inadequate measures are in place to provide information to everyone in the languages and formats required so as to enable meaningful participation in decision-making, or to provide equitable access to testing and treatment': at [13].

110 Ibid [104].

111 'COVID-19 Crisis' (n 11).

112 *Report of the Independent Expert on Minority Issues, Rita Izsák*, UN Doc A/HRC/22/49 (31 December 2012) 1.

113 Ibid 18.

114 UN Special Rapporteur on Minority Issues, *Language Rights of Linguistic Minorities: A Practical Guide for Implementation* (March 2017) 2.

authorities and language preferences'.[115] This means most or all activities because even Australia's choice to communicate in English is, itself, a language preference. The *2017 Guide* sets out a 'recognize–implement–improve' method for ensuring that state authorities effectively comply with their obligations':[116] that is, a progressive realisation approach. The *2017 Guide*'s approach includes the following steps, and is guided overall by the principles[117] of dignity, liberty, equality and non-discrimination, and identity:

> 1. respect the integral place of language rights as human rights;
> 2. recognize and promote tolerance, cultural and linguistic diversity, and mutual respect, understanding and cooperation among all segments of society;
> 3. put in place legislation and policies that address linguistic rights and prescribe a clear framework for their implementation;
> 4. implement their human rights obligations by generally following the proportionality principle in the use of or support for different languages by state authorities, and the principle of linguistic freedom for private parties;
> 5. integrate the concept of active offer as an integral part of public services to acknowledge a state's obligation to respect and provide for language rights, so that those using minority languages do not have to specifically request such services but can easily access them when the need arises; [and]
> 6. put in place effective complaint mechanisms before judicial, administrative and executive bodies to address and redress linguistic rights issues.[118]

These six steps and four principles guide 'what should be done' — namely, 'where practicable, clear and easy access should be provided to public health care, social and all other administrative or public services in minority languages'.[119] The Guide then explains why, on what legal basis, and gives examples of 'good practices'.[120]

Readers will note that step 4 explicitly integrates proportionality. Crucially, the *2017 Guide* provides more detailed guidance than is found elsewhere in the international commentary on *proportionality*:

> [P]rovision [of public health information in minority languages] depends largely, although not exclusively, on the number and concentration of speakers. This will determine the extent to which and areas where the use

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115 Ibid 6.
116 Ibid 11.
117 Ibid 11–14.
118 Ibid 5–6 (numbering added).
119 Ibid 23.
120 Ibid 23–26. An Australian example is listed among these good practices: 'In Australia, the use of computer-animated films depicting three-dimensional Aboriginal characters using indigenous languages has been described as "revolutionizing" the delivery of important health care information to patients': at 26.

> of minority languages will be seen by the relevant authorities as reasonable and practicable … [However] [*t*]*he more serious the potential consequences are of not using minority languages … the more responsive policymakers should be* to addressing effective service delivery and communication with this segment of the public …[121]

That is, it *is* sometimes reasonable and justifiable for Australia to choose to communicate about health in only some languages, based on numbers of users; however, Australia should strive to use even small group languages when the stakes of not reaching those users are very high, as they have been during this pandemic. I note that small language groups often comprise new migrants who are not well connected to public communications channels or public services; the stakes of not reaching such a group may therefore be particularly high.

In short, Australia should be considering the *2017 Guide*'s steps and principles every time it makes a public health communication. When an Australian government chooses to use only English or only a few languages, it should be satisfied that not using additional languages is reasonable and practicable. One possible justification for excluding languages may be that Australia has inadequate funding for wide-ranging multilingual pandemic communications, but this justification is questionable in the COVID-19 context because there has been ample international acknowledgment that the cost of '[n]ational pandemic preparedness … is a fraction of the cost of responses and losses incurred when an epidemic occurs'.[122] That is, in Australia's proportionate realisation of the right to health without discrimination on the basis of language, excluding some minority languages from public pandemic communications is hard to justify. And indeed, it is not clear that Australia faced this zero-sum financial limit anyway; perhaps it could have spent more on an expanded range of COVID-19 communications, or spent the same amount but on communications that hewed closer to the emerging expectations, explored in the sections below, as to effectiveness, community input and strategic planning.

Thus, there is a strong argument that Australian governments' public health communications during this pandemic should have been in most or all of the languages used across the country, as a proportionate improvement in Australia's realisation of the right to health. It is the serious consequences of linguistic exclusion that shift the proportionality calculus. However, as the case study illustrated, the inclusion of minority languages was highly variable. My pre-pandemic NSW research showed the same,[123] suggesting a

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[121] Ibid 25 (emphasis added). A similar comment about the WHO's own practices appears in *Multilingualism: Report by the Director-General*, WHO Doc EB144/38 (23 November 2018) 1.

[122] *Make It the Last Pandemic* (n 18) 17. See also WHO, *COVID-19 Strategic Preparedness and Response Plan* (2021) ('*SPRP 2021*') 8.

[123] Grey and Severin, 'NSW Case Study' (n 9).

longstanding problem. More awareness of the rights-based, principled approach to which Australia has committed should prompt inclusive communications by underscoring that access to public information, and to autonomous decision-making and healthcare because of that information, are matters of justice and government responsibility.

Moreover, it is important to note that any advances made in Australia's multilingual health communications in response to COVID-19, including in the aspects discussed in the sections below, should be sustained after the pandemic unless there are justifications for unwinding them. The CESCR holds that

> any deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[124]

Let us now turn to key emerging aspects of compliant communications: effectiveness, community input, strategic planning, and accountability against domestic laws. Each is a form of respecting the integral place of language rights as human rights and promoting tolerance, cultural and linguistic diversity, which were part of the *2017 Guide*'s first two steps, as noted earlier.

B *Effectiveness*

My review identified increasing expectations that the realisation of art 12 of the *ICESCR* entails 'effective' public health communications. In 2021, WHO published the *COVID-19 Strategic Preparedness and Response Plan* ('*SPRP 2021*') with its accompanying *Operational Planning Guideline* containing the 'National Action Plan Key Activities' checklist,[125] as well as *WHO's Response to COVID-19*.[126] The *SPRP 2021* reminds us that '[p]roviding individuals and communities with actionable, timely and credible health information online and offline remains a key priority for successful implementation of activities across all pillars of the response',[127] proposing lessons, strategic objectives and pillars for national-level preparedness and response which emphasise the importance of overcoming communication problems. One of the nine key lessons and challenges for 2021 it lists is: 'Public health and social measures to control COVID-19 … must be risk-based, regularly reviewed on the basis of robust and timely public health intelligence [and] *effectively communicated*'.[128] Another is:

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124 *CESCR General Comment No 3* (n 32) [9].
125 WHO, *COVID-19 Strategic Preparedness and Response Plan: Operational Planning Guideline* (2021) 7, 45.
126 *WHO's Response to COVID-19* (n 2).
127 *SPRP 2021* (n 122) 13. There is similar wording in a listed strategic objective: at 10.
128 Ibid 8 (emphasis added).

> The infodemic of misinformation and disinformation, and a lack of access to credible information continue to shape perceptions and undermine the application of an evidence-based response and individual risk-reducing behaviours. However, empowered, engaged, and enabled communities have played a key role in the control of COVID-19.[129]

The *SPRP 2021* further advises states to provide 'high-quality health guidance … that is accessible and appropriate to every community'.[130] This is somewhat reflected in the WHO's own practices: for example, a separate WHO document explains the Information Network for Epidemics whose work includes tailoring WHO guidelines for 'different communities of users, and translat[ing them] into many different languages'.[131] WHO information about the pandemic was produced in Arabic, Chinese, English, French, Russian, Spanish, German, Hindi and Portuguese,[132] which is more than its six official operating language; however, 'in practice English predominate[d], as it is the language of [WHO] press conferences and the immediate "language of record" in a fast-changing information environment'.[133]

'Effective' public communication was likewise named in the list of urgent 'non-pharmaceutical measures'[134] in the Independent Panel's 2021 report. That report is blunt about the threat of repeated pandemics unless preparedness and responses improve immediately, warning plainly: 'Vaccination alone will not end this pandemic. It must be combined with testing, contact-tracing, isolation, quarantine, masking, physical distancing, hand hygiene, and *effective communication* with the public'.[135] The report is specific in offering recommendations along with timelines for their implementation and demands that national governments immediately apply these measures systematically and rigorously.[136]

The communications in my case study were *not* found to be monolingual, or completely ineffective; Australian governments made mistakes but also made efforts to reach a multilingual public. However, using international commentary as a guide, we can see how *more effective* communications *could* have been achieved. Moreover, they *should* have been achieved. The rights-based approach, specifically Australia's progressive realisation obligation, requires that Australia regularly inquire into its own and other nations' multilingual public health communications, and, if reasonable, improve its communications practices in response.

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129 Ibid.
130 Ibid 10.
131 *WHO's Response to COVID-19* (n 2) 28.
132 Piller, Zhang and Li (n 11) 505.
133 Ibid.
134 *Make It the Last Pandemic* (n 18) 12.
135 Ibid (emphasis added).
136 Ibid 63.

Adopting the 'Four As' or '4-A Framework' of effective communication is a practice Australia could have followed. This heuristic is well known to CESCR, having been proposed by the Special Rapporteur on Education two decades ago and since studied and advocated by crisis communications scholars.[137] The 'Four As' require that communications need to be *available*, *accessible*, *acceptable* and *adaptable* to various language groups, which can be assessed through these four questions:

> 1. Availability: Is multilingual crisis information made available and is it recognized as an essential service?
> 2. Accessibility: Is multilingual crisis information freely accessible, delivered on multiple platforms, in multiple modes (spoken, written, signed, digital, etc.) and in all relevant languages?
> 3. Acceptability: Are provisions in place to ensure the accuracy and appropriateness of multilingual crisis information?
> 4. Adaptability: Are provisions in place to ensure that multilingual crisis communications can be adapted to shifting requirements, technological demands, diverse hazards, and the needs of mobile populations?[138]

From this perspective, the case study suggests that many public pandemic communications were not effective. They were *available* in as much as some translated, written documents, and a smaller number of LOTE graphics and videos, were on free-to-access websites (government websites, SBS and YouTube). However, shortfalls in *accessibility* were found: multilingual information was delivered on a small number of platforms (largely via PDFs on websites and not, for example, via official Twitter accounts) in a small number of modes (mainly, digital written texts). The LOTEs were relatively numerous but the extent of information in each language was uneven,[139] and never as comprehensive or up to date as the information available in English. Moreover, the study illuminated basic accessibility problems in navigating English-language government websites to locate LOTE content and a lack of government messaging directing the public to LOTE website content. I noted that other studies have shown the English on such websites is likely inaccessible to many because of its poor readability.[140]

The collected media reporting shows no indication of quality assurance processes being in place to ensure the accuracy and appropriateness of multilingual COVID-19 information in Australia — that is, to ensure that it is *acceptable*. Rather, errors were picked up by communities following publication and then given media attention.

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137 A leading example is Sharon O'Brien, Federico M Federici, Patrick Cadwell, Jay Marlowe and Brian Gerber, 'Language Translation during Disaster: A Comparative Analysis of Five National Approaches' (2018) 31 (October) *International Journal of Disaster Risk Reduction* 627.

138 Piller, Zhang and Li (n 11) 509.

139 Grey and Severin, 'NSW Case Study' (n 9).

140 See, eg, McCaffery, Muscat and Donovan (n 16); Piller (n 70).

Moreover, there was evidence of a lack of such provisions before COVID-19.[141] There were also indications of their absence in my early exploratory interviews; quality assurance processes may have developed within Australian governments as the pandemic progressed. Auto-translation errors in pandemic communications garnered particular community ire (Part III recapping some of the responses). Auto-translation may seem cheap, but the inevitable auto-translated mishaps will not be fixed before publication unless quality assurance processes are put in place. It is with this emphasis on effectiveness, coupled with the rights-based emphasis on community input discussed in the section below, that a rights-based approach helps to overcome complacency and promote quality in multilingual communications.

Similarly, there was evidence in the media reporting of provisions not being in place to ensure that multilingual crisis communications were adapted to shifting requirements or tailored to reach audiences through the most appropriate mediums. That is, they were not *adaptable*. During my own exploratory interviews, one community informant noted that governments continued to place public health announcements in LOTE community newspapers in Sydney although these were no longer being distributed to the usual extent because of the public health restrictions. The low numbers of Twitter followers and YouTube viewers cited in the case study likewise suggest that governments' social media communications had not been adapted to their target audiences, remaining reliant on mainstream channels. The case study's finding of very low display rates in the physical environment for the free posters in LOTEs which could have been downloaded from state and federal government websites, and the use instead in some cases of posters from local councils and local businesses, also indicates a lack of adaptation by state and federal governments. It potentially also reflects that state and federal materials were not *acceptable* to LOTE communities.

Australia's state and federal governments made *some* COVID-19 information available in a relatively broad range of languages, and made *some* responsive improvements to these materials' *accessibility* over the course of the pandemic (particularly in 2021); but they were also slow to improve, and regularly dismissed concerns by citing the quantity of materials produced, regardless of quality or effect.[142] Although Australian governments produced multilingual public pandemic communications, they

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[141] See, eg, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs (Qld) (n 9); Grey and Severin, 'Audit of NSW Legislation and Policy' (n 25).

[142] See, eg, Nick Baker, 'Missing Posters and "Fake" Tweets: Pandemic Communications Strategy for Multicultural Australia Slammed', *SBS News* (online, 16 June 2020) <https://www.sbs.com.au/news/article/missing-posters-and-fake-tweets-pandemic-communications-strategy-for-multicultural-australia-slammed/8flzdurgq>.

did not necessarily aspire to or achieve *effective* communications, despite international guidance emphasising effectiveness, and despite tools such as the 'Four As' being known to international organisations (and scholars).

Moreover, I found that *trustworthiness* is slowly gaining acknowledgement in the international commentary as part of effective communication. The role of governments' language choices in building or breaking trust is not emphasised in the commentary although most international organisations operate on a closely related premise that their (formal) multilingualism signals wide inclusion to a linguistically diverse international community. In *SPRP 2021,* the WHO reminds us that 'trust building' is part of pandemic risk communication and management, and remained critical during the vaccination-focused phase.[143] The Independent Panel likewise notes the importance of building trust between governments and marginalised communities.[144] These international bodies single out trust building because it is a key part of converting public communications into behavioural change — that is, into effect. Using a community's language is known to researchers as an important gesture for developing trust; language choice is a meaningful signal.[145] The media reports examined in the case study show communities feeling disrespected by linguistic errors and exclusion. Yet without a decision-making framework to highlight links between language and trust, I argue that the trust-building role of government communications is easily overlooked in practice. I identified some trust-breaching tactics in NSW Health's multilingual tweeting in my initial publication of the case study data,[146] which ceased shortly thereafter. While that constituted community input, the international commentary encourages such input at the design stage, and from linguistic minorities.

C *Community Input in Design and Reform*

Community input is raised in the WHO's *SPRP 2021* quoted in Part IV(B) above. The Independent Panel's report also contains recommendations regarding community engagement in pandemic communications. Recommendation 7 includes:

> IV. Strengthen the engagement of local communities as key actors in pandemic preparedness and response and as active promoters of pandemic literacy, through the ability of people to identify, understand, analyse, interpret, and communicate about pandemics.

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143 *SPRP 2021* (n 122) 13.

144 See, eg, *Make It the Last Pandemic* (n 18) 59 (Recommendation 7-VI).

145 See further Piller, Zhang and Li (n 11) 510–11; O'Brien and Federici (n 23) 131 ('Poor or culturally inappropriate communication undermines trust in responders and institutions. Failure to address effective communication for CALD communities generates further social disruption, one of the cascading effects').

146 Grey, Submission No 156 to Senate Select Committee on COVID-19 (n 27).

> …
>
> VI. Invest in and coordinate risk communication policies and strategies that ensure timeliness, transparency, and accountability, and work with marginalized communities, including those who are digitally excluded, in the co-creation of plans that promote health and well-being at all times, and build enduring trust.[147]

Significantly, both are assigned to national governments for action, not only national health sector bodies:[148] 7-IV for 'medium-term' action and 7-VI for 'short-term' action.[149] Recommendation 7-IV is especially clear in its relevance: given Australia's linguistically diverse public, engaging local, multilingual communities will be part of making local communities 'key actors' and building up people's abilities to be 'pandemic literate' and to understand, analyse and communicate information. Recommendation 7-VI's explicit mention of marginalised communities is an invitation to deliberately include linguistic minorities in designing and executing pandemic communications policies.

Notably, these two recommendations are about preparing for community engagement and community-based communications *before* a pandemic, in line with the WHO's more general call for developing communications strategies and networks in advance. Preparation is discussed in Part IV(D) below on strategic planning. These particular recommendations for proactivity in community engagement draw on the Independent Panel's findings that countries that 'engaged with community health workers and community leaders, [and] involved vulnerable and marginalised populations'[150] had more success in their COVID-19 pandemic responses, including some countries which had developed robust community engagement and coordination during other health crises.[151]

In Australia, the media reporting assembled in Part III above quotes community leaders' praise for governments increasingly gathering and responding to community feedback (along with ongoing calls for greater involvement). This appears to be an area where Australia is already improving although proactive community involvement and co-design is not yet embedded. The possibility of embedding such activity brings us to the need for strategic planning.

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147 *Make It the Last Pandemic* (n 18) 59.
148 Ibid 20.
149 Ibid 70.
150 Ibid 58.
151 Ibid 31.

D *Strategic Planning*

The COVID-19 commentary by the WHO emphasises strategic planning, to better achieve effective communications and community input, among other advantages. For example, the strategic value of planning for communications that engage various communities is underscored in the *SPRP 2021*'s explanation of 'Pillar 2: Risk communication, community engagement (RCCE) and infodemic management'[152] which includes a warning about the need to adapt a state's COVID-19 response (including, but not only, its communications) informed by communities' experiences. This RCCE pillar also urges governments to address the 'removal and mitigation of demand-side barriers to health service access' and I argue that language barriers must be understood as one of those barriers.

States' strategic planning may also include some of the specific procedures for identifying language needs and checking the quality of multilingual communications which the WHO's 2018 *Multilingualism* report noted.[153] Additional commentary in support of the advanced planning of communications policies, and further content for them, is provided throughout the Independent Panel's report. A lack of strategic planning and a clear communications policy framework have also been problems that scholars worldwide have noted in public communications — particularly but not exclusively public crisis and pandemic communications[154] — and so changing state practices is this regard during the pandemic has drawn attention. For example, China's rapid shift from monolingual to multilingual COVID-19 communications has become the object of multiple studies,[155] and O'Brien and Federici have argued that language barriers can be considered 'part of disaster prevention and management' rather than only part of a response.[156]

Yet strategic planning seemed lacking across Australia even before the pandemic, as identified in my previous research and in government reports. For example, the Queensland government's 2014 *Language Services Policy Review* noted that ad hoc rather than planned LOTE communications were common, as was a lack of data about the quality or efficacy of LOTE communications.[157] My own 2019–20 research and this COVID-19 case

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[152] *SPRP 2021* (n 122) 13.

[153] *Multilingualism: Report by the Director-General* (n 121), building on *Multilingualism: Plan of Action — Report by the Secretariat*, WHO Doc EB121/6 (19 April 2007).

[154] See, eg, Grey and Severin, 'NSW Case Study' (n 9); Uekusa (n 24); Piller, 'Covid-19 Forces Us To Take Linguistic Diversity Seriously' (n 19).

[155] See, eg, Piller, Zhang and Li (n 11).

[156] O'Brien and Federici (n 23) 130.

[157] Department of Aboriginal and Torres Strait Islander and Multicultural Affairs (Qld) (n 9). See also Department of Health (WA) (n 9).

study are only a partial response; more data is needed and may already be held by governments.

Asking other countries for language service assistance could be part of strategic planning and would align with another theme of the international pandemic commentary: international solidarity.[158] For example, qualified translators of the languages of new and small migrant groups are often in short supply in Australia but may be abundant in another country where that language is neither new nor small. I have not found any such suggestion in the literature; these dots of international solidarity and planning for linguistic inclusion are yet to be connected.

E *Accountability under Domestic Laws and Policies*

Finally, my review of the international commentary found an emerging expectation that states not only plan multilingual health communications strategically but secure that planning in law so that linguistic minorities themselves can hold governments to account and prompt improvements. This has not been repeated as often as the emerging expectations identified above in this Part; however, the *2017 Guide* declared that '[l]egislation needs to codify how and where these [language] rights can be exercised, and ensure that effective mechanisms are in place to address and redress situations of non-compliance',[159] and its Steps 3 and 6 call for the establishment of legislative and judicial mechanisms. These are calls for *domestic* legislation as part of the progressive realisation of linguistically non-discriminatory ESC rights. Such calls remind us that difficulties in using legislation to prompt greater linguistic inclusion from Australian governments, or to hold them accountable for exclusion, are likewise faced overseas.[160]

I found little uptake of this call for domestic legal accountability in the commentary about states' responses to COVID-19, and therefore do not suggest it as a standard around which dialogue is coalescing. However, this is indisputably an area for improvement in Australia in order to progress in the realisation of ESC obligations, and ultimately to improve communicative justice in health.

V Conclusions and Implications

This research was driven by concerns over communicative justice — specifically, that shortfalls in the multilingual provision of government information about the COVID-19 pandemic contributed to health

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158 See, eg, Pūras (n 109) [9].

159 UN Special Rapporteur on Minority Issues (n 108) 25.

160 See, eg, Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge, 2020).

inequalities and exacerbated certain groups' marginality, violating international rights to health and linguistic non-discrimination. The pandemic raised the stakes of my and my co-author's earlier research finding that there is only a patchy framework of laws and policies to guide decision-making for Australian governments' multilingual public communications or to redress any injustices that those communications — or their absence — might produce. My response has been to investigate the guiding role of international law, specifically *ICESCR* rights and international organisations' recent commentary about them, alongside an empirical study of Australian governments' actual COVID-19 communications.

During this pandemic, I found that Australian governments *sometimes* communicated in dozens of languages, but at other times used few LOTEs, used them poorly, or buried their use within English-language websites, making authoritative information hard to access for many. I thus examined the possibility of improving the effectiveness, community input and strategic planning of our governments' public LOTE communications, overall asking whether public communications could better realise people's interacting international rights to health and linguistic non-discrimination. My case study analysed portions of more than two years of pandemic communications; while the contextual government statements and media reports indicate that the problems persist, further empirical studies of Australian public health communications would bolster the arguments and suggestions for improvement.

My point is not that COVID communications were bungled by Australian governments; certainly, some mistakes were made, but even well-intended multilingual efforts fell short. The analysis presented here suggests that Australia has failed to keep progressing the realisation of *ICESCR* health rights. Australia's *ICESCR* obligations are owed without language discrimination against even small language minorities. We have seen that the negative impacts of the pandemic cascade along lines of linguistic vulnerability; excluding languages from public communications has serious consequences. In pandemic-like crises where not communicating has serious consequences, I have identified an emerging line of reasoning that most or all languages of the public should be used by the government to uphold communicative justice.

New expectations are emerging that governments' multilingual health communications be not merely partially available, as they have been here, but rather produced without (unreasonable) linguistic discrimination, and with minority communities' involvement at preparatory stages, strategic planning and an eye to effectiveness. In explaining what more effective communication could entail, this article advocates assessing communications' *availability*, *accessibility*, *acceptability* and *adaptability*

— that is, the 'Four As' recognised by CESCR and crisis communications scholars. I also note the embryonic commentary on securing language rights in domestic law, pointing out that this could bolster the strategic planning, community input and effectiveness of public health communications. Laws could thereby scaffold a communicative justice orientation.

This elucidation of the rights-based approach in recent international commentary should remind us that multilingual public pandemic communications *are* a state responsibility; equalising access to health information between linguistically diverse minorities is an obligation Australia is bound to continually strive to realise. Linguistic inclusion honours people's dignity, affords people the liberty of informed autonomous decision-making, and supports sociolinguistic identities. It's also practically advantageous as a trust-building, risk-management measure.

Yet Australia is arguably not compliant in its proportionate and progressive realisation of the *ICESCR* right to health nor in its immediate realisation of the *ICESCR* right to linguistic non-discrimination. Mention of this article should be included in Australia's next report to CESCR (in 2024) because my findings show a possible non-fulfilment of *ICESCR* arts 2 and 12, which Australia is duty-bound to report. But Australia is not alone; as noted in Part I, problems with multilingual pandemic communications exist worldwide. Arguing that Australia is failing to meet certain *ICESCR* obligations is intended as a prompt to improve our public health communications following the international guidance arising from this pandemic, and also as an illustration of what other governments could do.

To turn guidance from the international commentary into concrete improvements, there is a clear need for government-partnered research accessing the internal policies and metrics about public health communications which I could not access. These would likely confirm this article's findings about shortfalls in government communications in LOTEs, and would also build up the record of state practice for international audiences. Governments and researchers need to be careful, however, not to exclude the very people whose possible exclusion they seek to investigate, through a reliance on English as the sole medium of research.

This article demonstrates the relevance of usually separate fields of scholarship to tackle problems of communicative injustice which, in reality, do not stay within disciplinary bounds. The term 'communicative justice' will, I hope, help future researchers label and find useful research beyond their own fields. One such relevant but siloed body of knowledge is scholarship about equitable 'public health literacy', an idea which already has acceptance in Australia's healthcare sector. A health information or healthcare organisation which is responsive to a population's public health literacy

> provides 'information and services in ways that promote equitable access and engagement, that meet the diverse health literacy needs and preferences of individuals, families and communities, and that support people to participate in decisions regarding their health and social wellbeing'.[161]

Public health literacy scholarship could benefit from further engagement with social and language sciences to better understand LOTE users as audiences facing discrete barriers to equitable healthcare; knowledge from those fields suggests we should not assume that improving someone's health literacy in a second language will be equivalent to improving first language health literacy.

Further, many official COVID-19 communications in Australia explained rules, rather than health risks, the breach of which came with penalties. The potential, therefore, for linguistic exclusion from public pandemic communications to have resulted in over-penalisation of *linguistic* minorities in Australia is another facet of communicative justice in health which warrants study.

Finally, many scholars have noted that while crises increase the stakes of communications problems — including language problems — research about crisis communications can usefully reveal pre-existing problems with government communications that will endure in their relevance and, if not addressed, in their social impact, beyond the crisis. In more general terms, the WHO emphasises the opportunity and need to learn from the COVID-19 pandemic and apply those lessons in the future.[162] There is no doubt that improving the effectiveness of public health communications in Australia and overseas will help the WHO realise its pre-existing goal of '1 billion more people enjoying better health and well-being'.[163] Thus, we might learn from this examination of Australian governments' COVID-19 communications about reducing linguistic discrimination and increasing social inclusion beyond the eventual end of this pandemic.

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[161] McCaffery, Muscat and Donovan (n 16) quoting Anita Trezona, Sarity Dodson and Richard H Osborne, 'Development of the Organisational Health Literacy Responsiveness (Org–HLR) Framework in Collaboration with Health and Social Services Professionals' (2017) 17 *BMC Health Services Research* 513 <https://doi.org/10.1186/s12913-017-2465-z>. See also NSW Health (n 99) 3.

[162] *SPRP 2021* (n 122) 29–30.

[163] WHO, *Thirteenth General Program of Work: 2019–2023*, WHO Doc WHO/PRP/18.1 (25 May 2018), quoted in *WHO's Response to COVID-19* (n 2) 6.

Safeguarding Australian Consumers from "Debt Vultures"

Vivien Chen* **and Michelle Welsh†**

Abstract

High levels of personal debt and the rising cost of living have increased the likelihood of Australian consumers engaging with businesses that promise to resolve their debt problems. Such businesses have been highlighted for the risks they pose to consumers, charging fees for services that are available at no cost and at times giving poor advice that exacerbates their financial difficulties. Drawing on a consumer survey, a focus group interview with professionals who assist vulnerable debtors, and experience in other countries, the article proposes reforms to strengthen safeguards against predatory conduct and harmful business practices. The proposals build on the recently introduced licensing regime for debt management firms to channel Australians towards suitable and affordable solutions that aid, rather than impede, their recovery from debilitating debt.

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I Introduction

Businesses that offer to resolve debt problems for a fee have been highlighted as a risk to individuals in financial stress. These risks are heightened in a climate of increased debt faced by many individuals following the COVID-19 outbreak. In a 2021 report, Good Shepherd estimated that 'over 40% of working Australians' have experienced 'negative employment impacts resulting from COVID-19' which affected their household finances, family relationships, housing security and mental health.[1] In light of the rising interest rates and high cost of living,[2] and against the backdrop of rising household indebtedness over the past 30 years,[3] the need for measures to safeguard consumers from predatory businesses that profit from debtors' problems, colloquially referred to as 'debt vultures',[4] is all the more urgent. Overseas experience suggests that appropriate regulatory intervention can play a significant role in curtailing predatory conduct and harmful business practices.[5] This article proposes reforms aimed at curbing harm to consumers in financial stress and fostering the provision of suitable and affordable debt solutions by businesses that offer debt help, channelling Australian debtors towards the road to recovery in the rising tide of debt.

In a joint communiqué issued in February 2016, consumer advocates, financial counsellors, industry associations, researchers and external dispute resolution ('EDR') providers underscored concerns about debt management[6] firms charging consumers in financial hardship 'high up-front fees for services of little value, [or providing] poor or inappropriate services that can leave consumers worse off'.[7] The communiqué underscored the need for law reform to curb the harm from unsuitable debt advice, misleading conduct and predatory behaviour that exacerbates consumers' financial hardship.[8] A Senate inquiry into credit and hardship in 2017 likewise emphasised the detrimental effects of for-profit debt advice on many consumers in its 2019 report.[9]

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1 Good Shepherd Australia New Zealand, *New Vulnerable Research* (Report, April 2021) 4.

2 Peter Hannam, 'Laden with "World-Beating" Debt, Australian Households Are at Increased Risk as Rates Rise, Expert Says', *The Guardian* (online, 5 May 2022) <https://www.theguardian.com/australia-news/2022/may/05/laden-with-world-beating-debt-australian-households-are-at-increased-risk-as-rates-rise-expert-says>.

3 Jonathan Kearns, Mike Major and David Norman, 'How Risky Is Australian Household Debt?' (Research Discussion Paper No 2020-05, Reserve Bank of Australia, August 2020) 1.

4 Consumer Action Law Centre ('Consumer Action'), *Caveat Removals: How Reforms to Caveats Can Help Stop Debt Vultures* (September 2020) ('*Caveat Removals*').

5 Vivien Chen and Candice Lemaitre, 'Regulating a Quick Fix for Debt Problems' (2021) 49(3) *Australian Business Law Review* 154, 167–8.

6 See below nn 66–67 and accompanying text for an explanation of activities that fall within the definition of 'debt management'.

7 Experts Roundtable, *Debt Management Firms: Regulatory Reform* (Communiqué, February 2016) <https://consumeraction.org.au/debt-management-firms-comm/>.

8 Australian Securities and Investments Commission ('ASIC'), *Paying to Get Out of Debt or Clear Your Record: The Promise of Debt Management Firms* (Report No 465, January 2016) ('*Paying to Get Out of Debt*').

9 Senate Economics References Committee, Parliament of Australia, *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (Report, 22 February 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report>.

Prior to July 2021, debt management firms ('DMFs') were not required to comply with the *National Consumer Credit Protection Act 2009* (Cth). The financial impact of the COVID-19 outbreak is reflected in the Australian Bureau of Statistics' finding that 21% of Australian family households with children were facing deteriorating household finances by September 2020.[10] In early 2021, licensing requirements were introduced to protect 'consumers from the often predatory practices of debt management firms'.[11] Since 1 July 2021, firms that provide debt help services for a fee[12] have been required to hold an Australian credit licence to carry out activities such as debt negotiation, credit repair[13] and other debt-related advice or assistance specified in the regulations (collectively referred to as 'debt management').[14] Debt management firms must ensure that their activities are carried out 'efficiently, honestly and fairly'[15] and comply with the conditions set out in the Act. As the regulator responsible for the consumer credit licensing regime,[16] the Australian Securities and Investments Commission ('ASIC') has often issued regulatory guidance on what businesses should and should not do to minimise their risk of breaching the law.[17] As such, there is potential for ASIC to issue regulatory guidance to explain how principles of honesty and fairness should be interpreted in the context of debt management activities, and to provide practical examples of how DMFs can fulfil their legal obligations.

This article argues that such regulatory guidance is a necessary step towards realising the underlying purpose of the licensing requirements. The article seeks to contribute to the development of regulatory guidance for the debt management industry in two ways: by identifying the business practices that have led to harmful consequences for consumers who engage DMFs; and by formulating regulatory responses aimed at mitigating risks of harm to consumers.

The article builds on prior research in two ways. First, it provides a more nuanced and contextualised understanding of the risks Australian consumers face when interacting with DMFs by exploring two sets of empirical data collected by

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10 Australian Bureau of Statistics, *Household Impacts of COVID-19 Survey, September 2020* (13 October 2020) <https://www.abs.gov.au/statistics/people/people-and-communities/household-impacts-covid-19-survey/sep-2020#household-finances>.

11 'Licensing Debt Management Firms', *Treasury* (Cth) (Web Page) <https://treasury.gov.au/consultation/c2021-139564>.

12 *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021* (Cth) sch 1 extended the Australian consumer credit licensing regime to firms that provide debt management assistance for a 'fee, charge or other amount': *National Consumer Credit Protection Regulations 2010* (Cth) reg 4B(2).

13 *National Consumer Credit Protection Regulations 2010* (Cth) reg 4A. Credit repair is a service that some DMFs offer for a fee, purportedly to improve consumers' negative credit records or credit history. These services attract consumers whose credit records are marred by late payments or defaults and who, consequently, experience difficulties in obtaining loans, credit cards, rental accommodation or other forms of credit: Paul Ali, Lucinda O'Brien and Ian Ramsay, 'A Quick Fix? Credit Repair in Australia' (2015) 43(3) *Australian Business Law Review* 179.

14 *National Consumer Credit Protection Regulations 2010* (Cth) reg 4B. See Part III(A) below for details.

15 *National Consumer Credit Protection Act 2009* (Cth) s 47(1)(a).

16 Ibid s 37.

17 See, eg, ASIC, *Credit Licensing: General Conduct Obligations* (Regulatory Guide No 205, April 2020).

the authors: a focus group interview and a survey of 400 consumers.[18] The data generates new knowledge, contributing to the existing Australian scholarship by producing new insights from the perspective of consumers on their interactions with DMFs including the challenges, outcomes and levels of transparency they experienced. The focus group data sheds light on various ways in which consumers are harmed as a result of engaging DMFs which have not been previously documented.

The second way this article builds on prior research is by drawing on the empirical data and on the international experience of regulating DMFs to develop proposals for a more robust Australian regulatory framework. Various countries have sought to enhance the effectiveness of regulatory interventions through a deeper understanding of the interactions and processes that influence consumers' financial decisions, and the harmful impacts that may ensue.[19] Regulators such as the Financial Conduct Authority ('FCA') in the United Kingdom ('UK') have used such insights to formulate targeted strategies aimed at reducing risks of harm to debtors in financial stress who engage the services of DMFs.[20] The reform proposals put forward in this article are substantially more comprehensive and detailed than the preliminary suggestions contained in the 2019 Senate report on credit and hardship.[21]

Part II of this article contains a review of the prior studies and describes what was previously known about the harm that could result from poor business practices and predatory conduct by DMFs in Australia and overseas. The existing Australian legal framework is discussed in Part III. Part IV explains the methodology adopted in this article while Part V discusses insights from the focus group interview and consumer survey. Proposed reforms aimed at mitigating risks of harm to Australian consumers are considered in Part VI. Part VII concludes.

II Prior Studies on Consumer Harm

A *Australia*

The problems highlighted in the joint communiqué by concerned consumer and industry groups have been canvassed in ASIC and Senate reports. In 2016, ASIC released a report on its investigation of firms that offer consumers who are in financial hardship services such as budgeting, debt negotiation, advice on debt agreements and credit repair.[22] The report, titled *Paying to Get Out of Debt or Clear Your Record: The Promise of Debt Management Firms* ('ASIC report'), observed

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[18] Ethics approval was obtained from the Monash University Human Research Ethics Committee for both empirical studies: Project ID 25394 on 30 June 2020 and Project ID 28211 on 13 April 2021.

[19] Anne-Francoise Lefevre and Michael Chapman, 'Behavioural Economics and Financial Consumer Protection' (OECD Working Paper on Finance, Insurance and Private Pensions No 42, Organisation for Economic Cooperation and Development, 15 March 2017) 3; Pete Lunn, *Regulatory Policy and Behavioural Economics* (OECD Publishing, 2014) 9.

[20] Kristine Erta, Stefan Hunt, Zanna Iscenko and Will Brambley, 'Applying Behavioural Economics at the Financial Conduct Authority' (Occasional Paper No 1, Financial Conduct Authority, April 2013) 4 <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf>.

[21] Senate Economics References Committee (n 9) 63–4 [4.39]–[4.42].

[22] *Paying to Get Out of Debt* (n 8).

that these firms commonly operated as 'one-stop shops' offering a range of services including referrals to others for further credit.[23] The ASIC report also highlighted systemic problems in the industry such as DMFs engaging in high-pressure sales tactics and misleading advertising, failing to provide information about important risks, and giving poor advice which at times caused significant harm to vulnerable consumers. The Senate inquiry into credit and hardship, culminating in *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* in 2019 ('Senate report') likewise emphasised the detrimental effects of for-profit debt advice on many consumers.[24]

Both the ASIC and Senate reports expressed concern about a range of conduct including the ways in which DMFs target consumers in financial difficulty to promote their debt help services.[25] Debt management firms are thought to obtain information about individuals' debt problems from court lists[26] or third parties such as payday lenders.[27] The reports also highlight the problem of DMFs engaging in misleading conduct[28] and, in particular, making unrealistic promises or obscuring fees that consumers are required to pay.[29] At times, consumers are not aware that they are dealing with a for-profit business.[30] Debt management firms have been found to refer consumers to 'inappropriate remedies which may be expensive and cause lasting damage'.[31] Unaffordable payment plans leave consumers with inadequate funds for daily necessities, with detrimental consequences.[32] Examples include debtors having insufficient money for childcare, compelling the parent to stop work and compounding their financial problems.[33]

For many consumers in financial hardship, paying substantial fees for services which are available free of charge ostensibly aggravates their financial difficulties. These fees are of greater concern when they are opaque, expensive and heavily front-loaded. Accounts have emerged of consumers not receiving any services, or receiving less than the DMF had promised, following payment of fees.[34] Although various forms of debt help may be obtained from financial counsellors free of charge, typically DMFs do not advise consumers of these options.[35]

Complaints have also emerged in relation to credit repair. Consumers can lodge disputes with EDR providers at no cost to rectify errors in default listings. Nonetheless, ASIC's report observed that DMFs were increasingly representing

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23 Ibid 4 [3], 19 [72–3], 36 [114–15].
24 Senate Economics References Committee (n 9).
25 Ibid 61–2 [4.30]; *Paying to Get Out of Debt* (n 8) 20 [77]–[81].
26 *Paying to Get Out of Debt* (n 8) 21 [85].
27 Senate Economics References Committee (n 9) 62 [4.31].
28 *Paying to Get Out of Debt* (n 8) 5 [7].
29 Senate Economics References Committee (n 9) 59–60 [4.21].
30 Ibid 56 [4.10], citing Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 24 January 2019, 2 (David Locke, Chief Ombudsman and Chief Executive Officer, AFCA).
31 Senate Economics References Committee (n 9) 56 [4.11]. See also *Paying to Get Out of Debt* (n 8) 35–8.
32 Senate Economics References Committee (n 9) [4.15].
33 Ibid 58 [4.16].
34 Ibid 61 [4.27].
35 Ibid 67 [4.12]; *Paying to Get Out of Debt* (n 8) 22, 27 [119].

consumers seeking the removal of default credit listings, often charging consumers high fees.[36] Further, the default listing cannot be removed if the records are accurate.[37] The Australian Financial Complaints Authority ('AFCA'), a major EDR provider, suggests that DMFs 'prey on consumers' ignorance', charge 'high up-front fees for services that provide little or no value' and offer 'poor, inappropriate services' that 'can leave consumers worse off in terms of actually negotiating a settlement'.[38]

A survey commissioned by Consumer Action in 2020 found that 27% of Australians have paid for such services at least once in their lifetime, and 8% had paid for debt management or credit repair services in the previous year.[39] Consumer Action estimated that approximately 55% of Australians saw or heard DMFs' advertisements in 2020.[40] The survey did not investigate consumers' experiences with DMFs and problems of harm highlighted in the joint communiqué and the ASIC and Senate reports.

This article builds on these reports and extends the knowledge of systemic weaknesses that underpin consumer harm by more closely investigating the interactions between consumers and DMFs, and the outcomes that ensued.[41] The empirical research conducted by the authors to bridge the gap in knowledge is discussed in Part V. The analysis then draws on the empirical data and the experience of regulating DMFs in the UK, Canada and the United States ('US') to inform the proposals examined in Part VI. These countries provide valuable lessons for Australia as they have experienced similar problems of consumer harm and have implemented reforms in attempting to deal with them.[42]

B *International Experience*

Reports from the UK, Canada and the US indicate that the risks posed by DMFs to consumers in these countries are in many respects very similar to the challenges faced in Australia.[43] In its 2015 review of DMFs, the FCA stated that 'debt management is one of the highest risk activities' in the UK's consumer credit

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36 *Paying to Get Out of Debt* (n 8) 29–33.

37 Senate Economics References Committee (n 9) 61 [4.28].

38 Ibid 60 [4.23], 61 [4.26], quoting Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 24 January 2019, 9 (David Locke, Chief Ombudsman and Chief Executive Officer, AFCA).

39 Consumer Action, *Debt Management Firm Research* (Report, December 2020) 12 <https://consumeraction.org.au/wp-content/uploads/2020/12/CALC_Debt-Management-Firms-Research_Report_7Dec20.pdf> ('*Debt Management Firm Research*').

40 Ibid 14–15.

41 See Part IV below for a description of the methodology.

42 Chen and Lemaitre (n 5).

43 Union des consommateurs, *Debt Settlement and Financial Recovery Companies: Too Risky an Option?* (Final Report, June 2017) <https://uniondesconsommateurs.ca/wp-content/uploads/2020/12/R06-redresseurs-financiers-V2-Eng.pdf>; United States Senate, *The Debt Settlement Industry: The Consumer's Experience*, Hearing before the S Comm on Commerce, Science, and Transportation, 111th Cong, 2 April 2010; *Paying to Get Out of Debt* (n 8); All Party Parliamentary Group, APPG on Debt and Personal Finance, *Summary Report on Fee Charging Debt Management and High Cost Credit Services* (February 2012).

industry.[44] Problems of poor advice, misleading advertising and misrepresentation of services as 'free when they were not' have been highlighted by UK regulators.[45] Consumers being channelled towards unsuitable debt 'solutions' that exacerbate their financial difficulties, high up-front fees and a lack of transparency have all been decried.[46] Similar problems have been underscored in Canada where Union des consommateurs,[47] a non-profit organisation that advocates for consumer rights, observes frequent complaints of 'negative experiences with debt settlement and financial recovery companies' across Canada.[48] In the US, problems have persisted despite regulatory intervention to curb predatory conduct by businesses offering various forms of debt help since the 1950s. A US Senate report observed that 'debt settlement companies are kicking people when they are down', that 'these companies keep the fees, but don't keep their promises' and that, in reality, 'these companies usually make [the position of] struggling consumers financially worse'.[49]

One of the key challenges in the US and Canada is the avoidance of regulation by predatory businesses. Although legislation in various US states prohibits or regulates debt adjusting or debt pooling,[50] and federal laws regulate credit repair, mortgage relief and telemarketing sales of debt relief,[51] firms have been adept at changing their business models to circumvent the laws.[52] Brock likens attempts to regulate the industry in the US to a 'game of whack-a-mole: as soon as a statute is enacted to strike down one business model, another business model pops up'.[53] Likewise, Canadian consumer groups observed that firms 'mutate regularly',[54] and 'redefine themselves to continue their practices with the same lack of transparency and high fees' in response to regulatory reforms or negative media reports.[55] Businesses avoid regulation by moving their operations to provinces where the industry is unregulated or laws are less stringent, taking advantage of exemptions by collaborating with professionals who are excluded from the regulations, and circumventing technical definitions relating to fees.[56] While the Canadian and US experience reflects the ongoing challenges in attempting to curb predatory behaviour, reports from the UK

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44 FCA, *Quality of Debt Management Advice* (Thematic Review No TR15/8, 2015) 5 [1.7].

45 Office of Fair Trading, *Debt Management Guidance Compliance Review* (Report No OFT1274, September 2010) 7 [1.14].

46 Ibid 5–6; All Party Parliamentary Group (n 43).

47 Union des consommateurs is comprised of several ACEFs (Associations coopératives d'économie familiale), the Association des consommateurs pour la qualité dans la construction (ACQC), and individual members.

48 Union des consommateurs (n 43) 6.

49 United States Senate (n 43) 2.

50 Ibid 56.

51 *Credit Repair Organizations Act*, 15 USC §§ 1679–1679j (2012); *Mortgage Assistance Relief Services (Regulation O)*, 12 USC § 1015; *Telemarketing Sales Rule*, 16 CFR § 310 (2018).

52 Matthew Brock, 'As Cats Are Drawn to Cream: Expanding Debt Settlement Regulation to Traditionally Exempt Entities' (2014) 47(3) *Columbia Journal of Law and Social Problems* 385, 389.

53 Ibid 416.

54 Union des consommateurs (n 43) 19.

55 Ibid 54, 100.

56 Ibid 100; Leslie Parrish, 'A Roll of the Dice: Debt Settlement Still a Risky Strategy for Debt-Burdened Households' (2016) 18(2) *Cityscape* 55, 58; Justin P Nelson, 'Federal Oversight of the Debt Relief Industry: A More Effective Means of Deterring Illegal Debt Settlement Schemes' (2014) 75 *Ohio State Law Journal* 41, 44.

are more optimistic. Following substantial regulatory intervention, the FCA found significant improvements in the quality of debt advice.[57]

Experience in the UK, the US and Canada indicates that regulations that target specific risks of harm are required if consumers are to be effectively protected from predatory business conduct.[58] The FCA underscores the importance of enforcing the rules, attributing improvements in the standard of debt advice to robust supervision and enforcement.[59] British consumers have access to free EDR to seek redress against DMFs that breach the rules.[60] The reforms enacted in Australia in 2021 allow consumers to seek redress from DMFs for breaches of the rules, examined in Part III, through AFCA. As discussed in Part VI below, were ASIC to introduce the proposed regulatory guidance, tangible and significant improvements in consumer outcomes through applications to AFCA, such as has been seen in the UK, could be achieved, particularly if accompanied by robust regulatory enforcement and supervision. The next Part examines Australia's existing regulatory framework.

III The Australian Regulatory Framework

Currently, Australian DMFs are subject to three sources of regulation: the consumer credit licencing regime which was extended to cover DMFs in 2021; the *Australian Consumer Law* ('*ACL*') which is sch 2 of the *Competition and Consumer Act 2010* (Cth); and pt IX of the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*') which regulates debt agreements.

A *Licensing Regime*

Firms that provide debt management or credit repair services to consumers are required to have an Australian credit licence.[61] These firms must satisfy the 'fit and proper person' test, undertake their activities 'efficiently, honestly and fairly', and ensure that their representatives are adequately trained and competent.[62] They must also be members of AFCA.[63] This membership enables aggrieved consumers to access EDR services to seek compensation against debt management and credit repair firms for breaches of regulations. The firms must also have internal dispute resolution procedures that meet approved standards, adequate resources, risk management systems, and arrangements to ensure that clients are not disadvantaged by any conflict of interest.[64] Individuals who carry on unlicensed credit activity are subject to civil penalties of up to $1.11 million; for companies, civil penalties may

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57 FCA, *Debt Management Sector Thematic Review* (Report No TR19/1, 15 March 2019).
58 Chen and Lemaitre (n 5) 167–70.
59 FCA, *Debt Management Sector Thematic Review* (n 57) 3.
60 *FCA Handbook*, 'Dispute Resolution: Complaints' ('DISP') [2.3] <https://www.handbook.fca.org.uk>.
61 *National Consumer Credit Protection Regulations 2010* (Cth) reg 4A.
62 *National Consumer Credit Protection Act 2009* (Cth) ss 37A, 47(1)(a).
63 Ibid s 47(1)(i).
64 Ibid ss 47(1)(b), (h), (k), (l).

be up to $11.1 million, three times the benefit obtained or detriment avoided, or 10% of annual turnover up to $555 million, whichever is greater.[65]

The definition of 'debt management service' covers a range of activities relating to debt negotiation and credit repair. 'Debt management services' include a recommendation by a DMF to a consumer that they apply for a change to a credit contract, apply for a deferral or waiver of amounts owed under a credit contract, or apply for a postponement relating to a credit contract.[66] Suggestions that consumers make a complaint to credit providers or regulators, give a hardship notice, institute proceedings or take any other action relating to a credit contract likewise fall within the definition of 'debt management services', and providers of these services must be licensed. The licensing requirements extend to credit reporting assistance, capturing a range of activities relating to credit repair.[67]

Experience in other countries suggests that for-profit businesses that offer debt help services commonly engage in avoidance strategies to circumvent regulation.[68] Consequently, framing laws to capture a broader range of debt-related activities leaves less room for avoidance. The Australian definitions are framed to include situations where credit reporting assistance or debt management assistance is provided on behalf of someone else, or fees and charges are paid to a third party.[69] These appear to provide some protection against the use of third-party arrangements to avoid regulations, as seen in the US and Canada. Nonetheless, consumer advocates argue that the potential for avoidance remains, as non-credit products and services such as energy, telecommunications, council rates, school fees and buy now pay later do not come within the licensing regime.[70]

B *Australian Consumer Law*

Debt management firms are required to comply with prohibitions in the *ACL* against conduct that is misleading or deceptive or likely to mislead or deceive.[71] The *ACL* also prohibits unconscionable conduct[72] and provides consumer guarantees such as

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65 Ibid ss 29, 166, 167, 167B; 'Fines and penalties', *ASIC* (Web Page) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties/>.

66 *National Consumer Credit Protection Regulations 2010* (Cth) reg 4B.

67 Ibid reg 4A(2)(b). These include suggestions that consumers apply for a change to information collected or held by a credit reporting body in relation to a credit contract; assistance in applying for a change to such information; and suggestions that consumers make complaints or claims to credit providers or regulators regarding such information. They also include suggesting that consumers institute proceedings or take action regarding such information, and assisting consumers in these matters: ibid reg 4C.

68 Union des consommateurs (n 43); United States Senate (n 43).

69 *National Consumer Credit Protection Regulations 2010* (Cth) regs 4B, 4C.

70 Consumer Action, Consumer Credit Legal Service (WA), Financial Counselling Australia, Financial Counselling Victoria, Financial Rights Legal Centre, Uniting Communities Consumer Credit Law Centre SA and WEstjustice, Joint Submission to Treasury: Licensing Debt Management Firms: Exposure Draft Regulations (15 February 2021) <https://www.financialcounsellingaustralia.org.au/fca-content/uploads/2021/02/DMFLicensing_JointSubmission.pdf>.

71 *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') ('*ACL*') s 18; *Australian Securities and Investments Commission v Malouf Group Enterprises Pty Ltd* [2018] FCA 808.

72 *ACL* (n 71) ss 20, 21.

the requirement that services should be fit for their purpose.[73] However, these provisions have been of limited use in protecting debtors in financial difficulties. This is because, in practice, these debtors face several challenges in relying on the *ACL* to seek compensation against DMFs for loss. These challenges include the prohibitive cost of litigation, the time and effort involved, and difficulties of proving misleading or deceptive conduct, or unconscionable conduct.[74]

C *Debt Agreement Administration*

Among the debt solutions offered by DMFs, debt agreements are subject to the most stringent regulation aimed at protecting vulnerable consumers. For example, DMFs that administer debt agreements must comply with pt IX of the *Bankruptcy Act*. Debt agreement administrators must be registered, comply with restrictions on advertising, and disclose risks and other important information to debtors before they enter into a debt agreement proposal.[75] Reforms were introduced in 2018 to address problems of unsuitable debt agreements that exacerbated debtors' financial difficulties.[76] These reforms included limiting debt agreements to three years unless the debtor owns or has an equitable interest in their principal place of residence,[77] and requiring a more rigorous affordability test to compare the debtor's payments with their income.[78]

The licensing requirements introduced in 2021 are a step towards better regulation of the industry. However, international experience and the empirical research discussed in Part V of this article indicate that more is needed. In particular, targeted measures aimed at mitigating specific risks of harm are critical to safeguarding consumers from the detrimental consequences described in Parts I and II. This article proposes targeted reforms in Part VI which may be implemented by way of regulatory guidance. The proposals are informed by empirical research conducted using the methods described below.

IV Methodology

This study adopts a dual-method approach to facilitate a deeper understanding of the business practices that lead to harmful outcomes for consumers who engage DMFs.

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73 Ibid s 55.

74 See, eg, *Wade v J Daniels & Associates Pty Ltd* [2020] FCA 1708.

75 *Bankruptcy (Registration and Cancellation of Registration of a Debt Agreement Administrator) Guidelines 2020* (Cth) [3.1]; *Advertising and Promotional Activities of Personal Insolvency Practitioners* (Inspector-General Practice Direction No 4) [3.1]–[3.20] <https://www.afsa.gov.au/resource-hub/practices/practice-guidance/advertising-and-promotional-activities-personal-insolvency-practitioners>; *Debt Agreement Administrators' Guidelines to Certification Requirements* (Inspector-General Practice Direction No 13) [3.1]–[3.5] <https://www.afsa.gov.au/resource-hub/practices/practice-guidance/debt-agreement-administrators-guidelines-certification-requirements>.

76 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018* (March 2018); Vivien Chen, Lucinda O'Brien and Ian Ramsay, 'An Evaluation of Debt Agreements in Australia' (2018) 44(1) *Monash University Law Review* 151, 188.

77 *Bankruptcy Legislation (Debt Agreement Reform) Act 2018* (Cth) sch 2.

78 Ibid sch 1.

These methods are an online survey of 400 consumers who have engaged DMFs, and a focus group interview with professionals who assist consumers.

The online survey was conducted with the assistance of Pureprofile, a company that specialises in internet-based consumer research. The invitation to participate in the survey was circulated to Pureprofile's database of consumers throughout Australia, and 400 participants who had engaged the services of DMFs were recruited from May to June 2021. To undertake the survey, consumers had to confirm at the start of the survey that they had, at some time in the past, engaged paid services to reduce or manage their debts, negotiate with creditors, stop the repossession of their home, fix their credit report, or assist with budgeting, a debt agreement or bankruptcy.[79] Respondents were recruited from across Australia,[80] with the cohort having close to equal proportions of males and females[81] and a range of age groups.[82]

Pureprofile required survey respondents to agree to its terms and conditions prior to undertaking the survey. These emphasised the importance of providing 'thoughtful and correct' answers as the research would be used by organisations to make important decisions. Respondents were provided with a statement explaining the survey and research, and were informed that the information gathered from the survey would be used by researchers from a university to consider how legal protections for consumers may be improved.

The 10 professionals who participated in the focus group were staff from not-for-profit organisations, including financial counsellors, community lawyers and EDR providers. The participants had experience assisting consumers who had engaged DMFs. Some of the participants specialised in consumer policy and had practical knowledge of how the law operates as well as avoidance strategies commonly employed by predatory businesses.

The focus group discussion took place using online conferencing software Zoom in September 2020. The interview was guided by open-ended qualitative questions. The authors interviewed the professionals to gain further details of the problems encountered by consumers who had engaged DMFs, and to investigate additional challenges not canvassed in the Senate and ASIC reports.[83] The focus group format was chosen by the authors because it allows participants to interact

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79 Survey respondents reported that they had paid for assistance with debt negotiation (45%), advice on how to reduce or manage their debts (41%), budgeting advice (36%), credit repair (32%), to arrange a debt agreement or bankruptcy (21%), and to stop the repossession of their home (7%).

80 The respondents were from New South Wales (33%), Victoria (27%), Queensland (20.5%), South Australia (8.2%), Western Australia (8%), Tasmania (2.2%) and the Australian Capital Territory (1.2%).

81 Of the respondents, 50.6% identified as female, 49.2% as male, and 0.2% as non-binary.

82 The age ranges, and proportion of respondents in each range, were 18–24 years (12.8%), 25–34 years (19.3%), 35–44 years (19%), 45–54 years (17.8%), 55–64 years (15.4%) and 65+ years (15.7%).

83 The focus group method allows a 'less-well-understood problem, situation, or context' to be clarified: Jane Sutton and Zubin Austin, 'Qualitative Research: Data Collection, Analysis, and Management' (2015) 68(3) *Canadian Journal of Hospital Pharmacy* 226, 226.

with, and react to the views of, other participants.[84] One of the objectives of the focus group was to explore potential reforms aimed at alleviating the risks of harm to consumers, and to test those ideas with all participants. In seeking to develop a robust regulatory framework, the discussion considered the practical challenges of implementing the proposed reforms and strategies to curb avoidance behaviour by predatory businesses.

The focus group Zoom session was recorded and later transcribed. The comments of individual participants were tagged with descriptors so that comments could be attributed to de-identified individuals. The authors manually coded the transcripts, revealing themes and identifying similarities and differences in the participants' views.[85] The coded transcript was synthesised, and the conclusions drawn by the authors in this article are supported by direct quotations from the focus group participants.[86]

Parts V(A) and (B) below examine the two empirical datasets. The discussion in Part V(C) then introduces the reform proposals which will be explored in Part VI. The proposed reforms, which are informed by the empirical data, extend the protection afforded by the licensing regime and mitigate risks consumers face in an Australian context.

V Empirical Research

A *Consumer Survey*

Prior to this study, the first-hand perspectives of consumers who have engaged DMFs' services were largely absent from existing reports. Much of the information on harm caused by DMFs was derived from reports by consumer advocates, industry stakeholders, government agencies and EDR services.[87] The survey conducted by the authors bridges this knowledge gap and facilitates a more nuanced understanding of the risks of harm that arise in these contexts. It does this by shedding light on consumers' interactions with DMFs and the outcomes that ensued. The survey also enabled perspectives to be gained from a broader range of consumers, including consumers who did not seek assistance from consumer advocates and who may not

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84 This is an advantage of the focus group method identified by Acocella who argues that 'value of [the focus group] technique lies in the kind of interaction that emerges during the debate': Ivana Acocella, 'The Focus Groups in Social Research: Advantages and Disadvantages' (2011) 46(4) *Quality & Quantity* 1125, 1125.

85 Terry Hutchinson, *Research and Writing in Law* (Thomson Reuters, 4th ed, 2018) 143–4; Herbert M Kritzer, *Advanced Introduction to Empirical Legal Research* (Edward Elgar, 2021) [5.2]; Sutton and Austin (n 83) 228–9.

86 Sutton and Austin (n 83) 229.

87 *Paying to Get Out of Debt* (n 8) 5–6 [11]–[17]; Senate Economics References Committee (n 9) 55–64 [4.1]–[4.45]. See also Consumer Action's survey in 2020 which considered matters such as the proportion of Australians who use DMFs' services and whether consumers support having 'UK-style consumer protection', a duty to act in the client's best interest, and a ban on up-front fees: *Debt Management Firm Research* (n 39). Notably, the survey did not investigate details of interactions between consumers and DMFs, such as the level of transparency and the outcomes of the interaction.

fall within the disadvantaged communities often assisted by the consumer groups cited in the Senate report.[88]

The survey of 400 consumers who had engaged DMFs[89] was funded by the authors' institution. It sought to gain a deeper understanding of consumers' interactions with DMFs, the extent to which they received the promised outcomes and any challenges they encountered. It also sought consumers' views regarding transparency of fees and risks. The survey asked respondents approximately 40 questions which were formulated by the authors based on the reports examined in Part II(A) and, to a lesser extent, the focus group discussion considered in Part V(B). These questions included how respondents initially came into contact with the DMF, the affordability of payment plans, and the effectiveness of the services in resolving their debt problems.

1 *Initial Contact*

The survey results suggest that many respondents were approached by DMFs who knew that they were experiencing debt problems. Slightly over a quarter (25.5%) of respondents indicated that the DMF initiated contact with them. When asked how the DMF obtained their contact details, 43% stated that the DMF found out about them because they were applying for credit, and 30% indicated that the DMF found out about them because they had been to court about their debts. Of the respondents who were contacted by DMFs, 80% said that the DMF knew they were in debt. In close to a third (31%) of those cases, the DMF knew the details of their debts such as to whom they owed money or how much they owed. These findings are consistent with claims that DMFs are accessing sources of information about debtors' financial difficulties such as court lists, or that third parties may be passing information on to DMFs.[90]

Nonetheless, in the majority of cases (59.5%) respondents took the initiative to contact the DMF.[91] Most commonly, respondents reported that they found out about the DMF through online searches (36%), although this may to some extent reflect behavioural biases of respondents who participated in an online survey.[92] Other respondents said that the DMF was recommended by friends or acquaintances (31%), that they had come across advertisements on television or radio (11%), that an accountant had recommended the DMF (8%), or that advertisements had popped up while they were online (7%). One respondent mentioned that they found out about the DMF through advertising material they received while attending court.

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88 See, eg, 'Eligibility for Assistance', *Consumer Action* (Web Page) <https://consumeraction.org.au/eligibility-for-assistance/>.

89 The consumers had engaged paid services to reduce or manage their debts, negotiate with creditors, stop the repossession of their home, fix their credit report, or assist with budgeting, a debt agreement or bankruptcy.

90 *Paying to Get Out of Debt* (n 8) 21 [85]; Senate Economics References Committee (n 9) 62 [4.31].

91 Fifteen per cent of respondents could not recall who made the first contact.

92 Notably, respondents to Consumer Action's survey listed advertisements on television as the most common source of advertising: *Debt Management Firm Research* (n 39) 14.

2 *Many Did Not Know of Free Debt Help*

The survey findings also indicate that the majority of respondents (61%) were not aware when they engaged the services of a DMF that they could get free debt help or credit repair. Close to two-thirds (65%) of these respondents said that they would not have paid for debt help if they had known they could get such services for free. The survey results support the proposition that there is some demand for paid debt assistance among consumers (39%) who are prepared to pay fees for someone else to deal with the problem. Common reasons expressed for this demand were that the DMFs 'saved the hassle' (21%), that 'they were helpful and friendly' (18%), that 'I had no time' (10%), that 'they were recommended by my regular credit provider (10%), and that the DMF 'told me the financial counsellors who offer free help are no good' (5%). Respondents also commented that they had been willing to pay for DMFs' services because they were desperate, confused and needed help; they were 'not confident with financial transactions'; and they thought they would receive 'better service quality'.

3 *Fees*

The survey findings indicate a lack of transparency around fees, with a significant percentage of respondents (48.5%) saying that they were not told before they signed up the total amount of fees they would have to pay for the DMF's services. These respondents comprised 34.2% who were aware that there were fees but didn't know the amount; 8% who knew there were some fees, but were later told by the DMF that they had to pay more; and 6.3% who had no idea before they signed up of how much they would have to pay.

Accounts of front-loaded fees also emerged from the survey, with 19% of respondents saying that they had to pay all the fees before the DMF would perform any services, and a further 16.4% noting that they had to pay 'a lot' of the fees before work commenced and regular fees after that. Nonetheless, another 28% said that they had to pay 'some' of the fees up-front and some later; 14.5% paid all the fees after the work was completed; while 13.7% paid regular fees but did not have to pay anything up-front. Notably, 6% said they were told to pay the DMF money, but did not know how much was taken as fees and how much was used to pay off their debts. Two per cent of respondents did not choose any of the above responses.

Responses to the survey reflect concerns (which were also expressed by the focus group participants, and discussed below) about DMFs using caveats and taking security for fees. Sixteen respondents (4%) stated that when they stopped paying the DMF's fees, the firm prevented them from selling their house. Forty-five respondents (11%) said the DMF took some of their property when they didn't pay its fees.

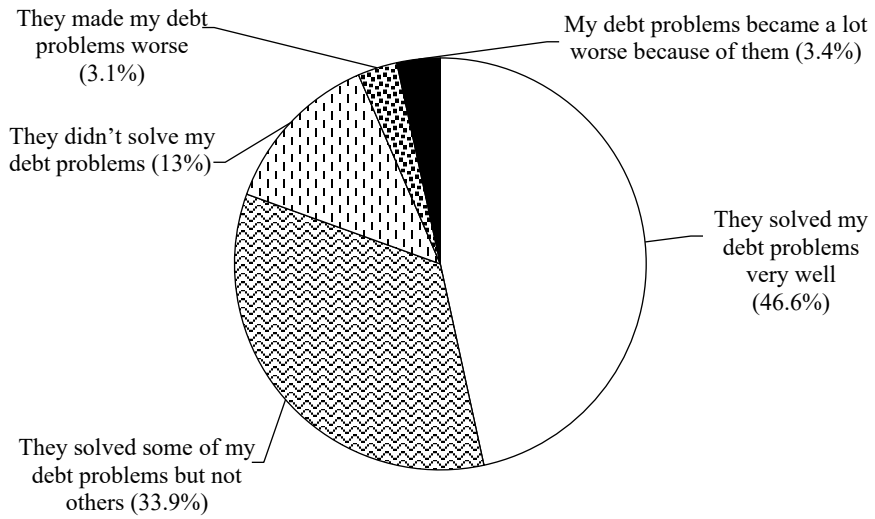
As for the amount of fees paid, respondents commonly paid in the range $500 or less (28.2%), $501–1,000 (21.2%), $1,001–5,000 (16.4%), $5,001–10,000 (8.4%) and $10,001–20,000 (5.5%). Only 1.7% paid more than $20,000. More than 12% (12.3%) of respondents did not know the amount they paid, while some (6.3%) elected not to answer the question.

4 *Outcomes*

Of the survey respondents who entered into payment plans recommended by DMFs, 43.9% said that the payments were unaffordable; they did not have enough money after paying the DMF and, consequently, struggled to pay their bills. The survey results also reflect problems of poor advice, with 26.3% of respondents indicating that their DMF told them to stop paying their creditors and to send the money to the DMF instead.

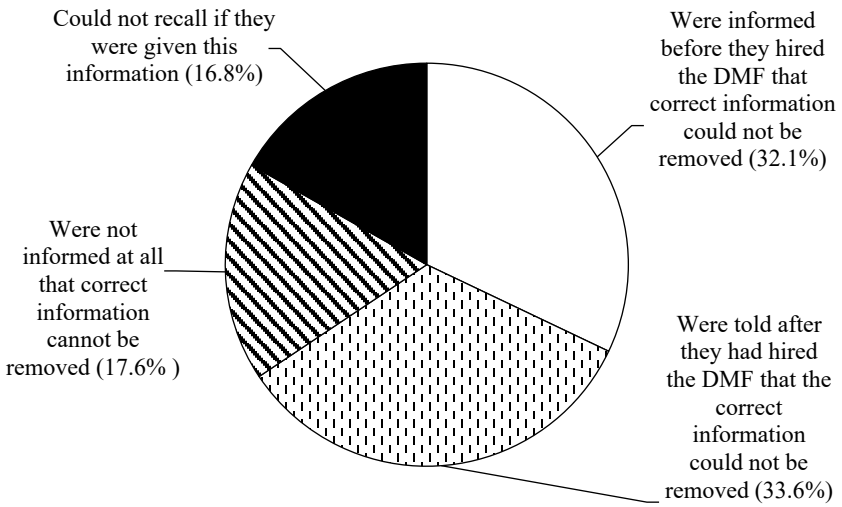
Overall, the survey responses indicate a mix of experiences, as shown in Figure 1. While 46.6% of respondents indicated that the DMFs solved their debt problems very well, 33.9% said they solved some debt problems but not others, and 13% said the DMFs didn't solve their debt problems. Some respondents (6.5%) reported that their debt problems became worse (with slightly more than half of those (3.4%) stating that their debt problems 'became a lot worse because of them').

Figure 1: Consumers' perspectives: The impact of DMF's services



The majority (51.2%) of respondents who paid for credit repair services reported a lack of transparency about the limitations of the outcomes that could be achieved, as shown in Figure 2. Less than one-third (32.1%) of respondents were informed before they hired the DMF that the DMF could not remove correct information from their credit record; slightly over one-third (33.6%) were told of the limitation after they had hired the DMF; and 17.6% said they were not informed of this limitation at all. The remaining respondents (16.8%) could not recall if they were given this information.

Figure 2: Credit repair services: Disclosure of limitations



The extended comments reflected the mix of experiences. Respondents observed: 'I was lucky to find an honest person'; '[I]t was a bit expensive but it took all the worry'; '[There's a] need [for] better promotion of free debt help'; 'I would never had [sic] paid if I had known there was free advice that wouldn't impact my credit rating. When your [sic] desperate you listen to anyone'; and 'The credit repair agency I used promised me all these things and never delivered on them leaving me in a worse financial position'.

B *Focus Group*

Focus group participants elaborated on problems that had been briefly canvassed in the Senate report such as targeted advertising, consumer harm and fees. They highlighted the ways in which risks arise across various stages of engagement with a DMF, from initial contact, through unsuitable recommendations that leave debtors worse off, to opaque fees and caveats that further impede debtors' recovery.

1 *Targeting Individuals with Debt Problems*

Several participants underscored concerns over unsolicited advertising that targets debtors in financial difficulty. In particular, significant concerns were raised about predatory advertising by DMFs who appear to have obtained details of debtors' legal problems from court lists:

> Three or four letters coming in a row, different entities all identifying that 'we think you're in financial difficulty' and 'we know that you are in court'. A lot of people get this before they even know that they are in court, before they even receive the paperwork themselves.

> Sometimes the wording suggests that they're lawyers, so they might use 'and associates' in the descriptor and a lot of consumers take that to mean that they may be lawyers or legally trained. And the consumer will instruct them to appear in proceedings before courts.

One participant reported that when they were in a support scheme for people in the repossession list, there were 'routinely people who also sat in the registry of the Supreme Court, handing out business cards and flyers on buying your house and renting it back to you or representing you in the Supreme Court'.

Participants observed that DMFs advertise on television, radio, the internet and social media. One strategy employed by some DMFs is to offer a 'free credit report', encouraging consumers to 'ring to get a sense of what's on their credit report':

> Sometimes [consumers] think they're ringing Equifax or one of the actual credit reporting agencies, but it's, in fact, not a credit reporting bureau. It's a sort of similarly named organization. And it's not free because they face high-pressure sales tactics to get them to purchase some sort of product or service to repair [their credit record].

Participants raised issues of advertising on the internet and the use of algorithms that cause unsolicited offers of debt help to 'pop up' on social media and other websites. They noted that consumers are targeted when they are vulnerable and searching for information on managing debt problems, highlighting the issue of overpromising and underdelivering:

> A couple of my colleagues have told me that they're getting people [clients] who are finding out about debt agreements and credit repair through social media … and then not returning [to financial counselling]. And the reason is because they found something on social media … [W]e know that algorithms are a really good way to find clients.
>
> The common problem across all the advertising is that it's often misleading. It sells this false hope about what they [DMFs] can do. The promise is really appealing. They sound friendly, approachable, and they're going to help you to turn your life around, take away the stress. What our casework routinely shows is that problems come later when the person realizes that the services provided don't really live up to that promise.

2 *Consumer Harm*

The focus group highlighted negative outcomes such as 'matters not being dealt with properly' and 'significant costs being incurred' and harmful consequences that leave debtors worse off. They described examples such as an arrangement set up by a DMF that was not affordable or sustainable, prolonging the consumer's financial stress, with the result that the consumer was ultimately declared bankrupt:

> One of the worst harms is when [consumers] get bad advice at the beginning … [T]hey start off down one path and it turns out to be the wrong one … Some of the consequences of these debt options … can't be undone under our current laws, for example, some of the insolvency options under Pt IX Bankruptcy.

Likewise, EDR providers highlighted the detrimental consequences for consumers who are represented by DMFs. A common problem is that consumers are excluded from dispute resolution processes as a result of engaging DMFs. A representative from an EDR provider commented that DMFs

> don't add any value at all. They can't do anything for the customer that we can't do ourselves and very often, we can actually do it a lot more effectively than they can. We find more often than not they are an obstruction to us in attempting to get a good result.
>
> Our understanding is that … no conversations around managing expectations are being had … By the time [consumers] get an outcome, when they're expecting it to go in their favour, for example, to be able to retain their home, the impact to them is even worse, than [for those consumers for whom we've] been able to manage expectations along the way.

Consumers who engage DMFs are often not present at conciliations where sometimes reasonable offers are made that are more advantageous for the consumer. Although the EDR provider makes efforts to contact consumers, many consumers don't want to speak to EDR providers, because they have hired a DMF to deal with the issue on their behalf.

In addition, the lack of engagement by consumers means that EDR personnel dealing with the matter have no confidence that they have a full understanding of the consumer's true position. This makes it particularly difficult for the EDR provider to determine an appropriate outcome that is both tenable and sustainable. The representative went on to say:

> We're hearing what their agent is telling us but that may be very different from what their actual position is.
>
> What you worry about … is, have we really got to the right outcome that's going to actually bring finality to this complaint, to this consumer, because do we have the proper story in the first place?

These concerns were echoed by a participant from a different EDR scheme who said, '[I]t's a frustration for us because we know we could do the work on behalf of that customer if they just got in touch with us directly, and we can do it for free'.

3 *Unaffordable Fees for Services which are Available at No Cost*

Participants observed there is a tendency for DMFs to recommend to clients 'solutions' that the DMF can earn fees from, instead of identifying the best long-term solution for clients. They noted that, in their experience, there are often many more effective ways of resolving underlying debt that can be arranged at no cost. For instance:

> [The DMFs] don't look to things like let's challenge whether the loan was a breach of responsible lending requirements. If they're judgment proof in

> Victoria, in many cases, a good advocate can negotiate and [the client can] walk away [from the debt].[93]

A number of the participants raised issues of opaque and unaffordable fees that are often required to be paid up-front. One financial counsellor observed that some fee structures are not easily understood, and the dollar cost of fees may be obscured through the use of formulas. For instance, debtors may not realise initially that fees expressed as a percentage of the debt may amount to a few thousand dollars. Another participant said that the DMFs' fees they came across ranged from $4,601 to $22,206.

Concern was expressed about DMFs' use of caveats and other forms of security for their fees which lead to harmful consequences for consumers. Some DMFs

> lodge caveats against people's homes as a tool to ensure their fees are paid, even when the promised services are not provided. In Victoria, it is extremely difficult for a homeowner to have a caveat removed without paying the debt vulture's fees … This puts the homeowner in an impossible position — pay the debt vulture's fees, or see the sale fall through.[94]

Participants observed that there is likely to be a spectrum of business models, with some being more predatory than others. While some middle-class consumers who can afford to pay fees may wish to outsource the labour, reforms that promote transparency and strengthen safeguards against predatory conduct are needed. One participant commented that reforms to the debt agreement regime in 2018 appear to have resulted in a significant reduction of complaints relating to unsuitable debt agreements, but noted that 'it's still a little bit too soon to know the full effect' of the reforms.

The second part of the focus group interview considered a range of proposed reforms put forward by the authors. The proposals were based on an analysis of regulations in the UK, Canada and the US for DMFs.[95] The authors also drew on previous research and reforms relating to the regulation of debt agreements,[96] and suggestions briefly canvassed by the Senate inquiry into credit and hardship.[97] Part VI examines the proposed reforms for Australian DMFs in detail and, where relevant, discusses the focus group participants' views about the proposals.

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93 The term 'judgment proof' refers to the principle that individuals cannot be compelled to repay debts out of their social security income by means of a court order: *Social Security (Administration) Act 1999* (Cth) s 60. See also *Judgment Debt Recovery Act 1984* (Vic) s 12(1).

94 *Caveat Removals* (n 4) 1. This document was sent to the authors by a participant following the focus group discussion. Consumer Action suggests that the problem may be alleviated by reforming Victoria's caveat system to allow caveats to lapse after a period, as permitted in Queensland, South Australia and New South Wales. It proposes that s 89A of the *Transfer of Land Act 1958* (Vic) should be amended to 'enable a homeowner to serve notice on the caveator that the caveat will lapse within 21 days unless they obtain a court order substantiating the interest claimed': at 2.

95 Chen and Lemaitre (n 5).

96 See Part III(C) above; Chen, O'Brien and Ramsay (n 76); Senate Legal and Constitutional Affairs Legislation Committee (n 76); *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* (Cth).

97 Senate Economics References Committee (n 9) 63–4 [4.37]–[4.42].

C *Summary of Empirical Findings*

The findings of the consumer survey and focus group discussion reflect the concerns raised in the ASIC and Senate reports[98] including concerns about opaque and heavily front-loaded fees,[99] unsuitable advice and, at times, poor outcomes.[100] The survey findings foster a more nuanced understanding of the nature and extent of these problems as experienced by the respondents. Notably, 48.5% of survey respondents were not informed of the total amount of fees before they signed up. Over a quarter were advised to stop paying their creditors and to pay the DMF instead. Of those survey respondents who entered into payment plans, 43.9% reported that the DMFs' recommended plans were unaffordable, resulting in them subsequently struggling to pay their bills.

In addition, the empirical study adds to the existing knowledge by shedding light on several ways in which consumers have been harmed. These include the dispute resolution providers' observations of poor outcomes that ensue when consumers are excluded from dispute resolution processes as a result of engaging DMFs. Focus group participants highlighted the challenges in gaining a full understanding of consumers' circumstances, and in managing their expectations. Consumers are often not present at conciliations which results in them missing out on offers that may be more advantageous. The focus group discussion also highlighted the problem of caveats being used as security for fees, and the hardship that follows when DMFs do not perform the services as promised.

The survey findings provide insights into the extent to which respondents encountered a lack of transparency around the limitations on what credit repair services could achieve. The majority of respondents who engaged credit repair services were not told before they hired the DMF that correct information could not be removed.

Further, the survey responses provide perspectives from a broader range of consumers than previous studies have, facilitating a deeper understanding of the positive and negative aspects of experiences with DMFs' services. The positive outcomes include 47% of respondents who engaged debt help services reporting that the DMF resolved their debt problems. The survey found some demand for paid debt help reflected in the responses of 39% who were willing to pay for DMFs' services for reasons such as their being helpful and friendly, and saving the respondents 'hassle' and time.

Several limitations of the empirical findings should be noted. The 400 survey respondents drawn from Pureprofile's panel of consumers located across Australia cannot be said to be representative of Australian consumers more generally. An online survey is less likely to be representative of demographic groups that experience higher rates of digital exclusion such as the elderly and Indigenous

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98 *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 56–62 [4.10]–[4.31].

99 *Paying to Get Out of Debt* (n 8) 22 [89]–[90]; Senate Economics References Committee (n 9) 57 [4.12].

100 *Paying to Get Out of Debt* (n 8) 35–8; Senate Economics References Committee (n 9) 57–8 [4.14]–[4.16].

Australians.[101] Nonetheless, the empirical findings discussed in Parts V(A) and (B) are largely consistent with the observations made in the ASIC and Senate reports.[102] The focus group largely comprised consumer advocates and financial counsellors who assist low-income individuals who have experienced problems with DMFs, and their views would tend to reflect the experiences of the demographic they represent. At the same time, the inclusion of EDR providers as part of the focus group together with the survey of 400 consumers provides a broader range of perspectives that inform the empirical findings of this study. As the focus of the study was the perspectives of consumers and their advocates, representatives from the debt management industry were not included in the focus group.

By fostering a more nuanced understanding of the concerns raised in the ASIC and Senate reports,[103] the empirical findings underscore the need for regulation of the industry as briefly canvassed in the Senate report on credit and hardship.[104] The second part of the focus group interview discussed potential reforms to alleviate these problems. These included prescriptive standards to curb targeted advertising, transparency to facilitate informed consumer decisions, fairer fee structures and measures to ensure that debtors are channelled towards suitable debt solutions. To an extent, the proposed reforms resonate with measures adopted in the UK and, to a lesser degree, Canada. In the UK, the FCA's rules draw on insights from consumers' interactions with DMFs and the risks that arise to enhance the effectiveness of regulatory safeguards.[105] Similar approaches have been used by policymakers in other parts of the world.[106]

Experience in the UK, the US and Canada suggests that licensing regimes are more effective when coupled with prescriptive measures aimed at specific problems, robust supervision and enforcement, and affordable dispute resolution for consumers.[107] To maintain their authorisation, UK firms must comply with a raft of rules set out in the *FCA Handbook* including ensuring that advice is suitable and customers are informed of the risks, cost and potential disadvantages;[108] treating customers fairly;[109] referring customers to not-for-profit debt advice if they cannot afford the fees;[110] and not engaging in misleading advertising.[111] Enforcing the rules and enabling consumers to seek a remedy for breaches of the rules through EDR have collectively led to improvements in the level of consumer protection from

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101 Daniel Nunan and MariaLaura Di Domenico, 'Older Consumers, Digital Marketing, and Public Policy: A Review and Research Agenda' (2019) 38(4) *Journal of Public Policy and Marketing* 469, 477; Dawn Burton, 'Digital Debt Collection and Ecologies of Consumers Overindebtedness' (2020) 96(3) *Economic Geography* 244, 260.

102 *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 56–62 [4.10]–[4.32].

103 *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 56–62 [4.10]–[4.32].

104 Senate Economics References Committee (n 9) 63–4.

105 Erta et al (n 20).

106 Organisation for Economic Co-operation and Development, *Improving Online Disclosures with Behavioural Insights* (OECD Digital Economy Papers No. 269, April 2018) 11–12; Lunn (n 19).

107 FCA, *Debt Management Sector Thematic Review* (n 57).

108 *FCA Handbook* (n 60) 'Consumer Credit Sourcebook' ('CONC') [8.3].

109 Ibid 'Principles for Businesses' ('PRIN') [2.1.1].

110 Ibid CONC [8.3.7(3)].

111 Ibid CONC [3.3], [3.9].

predatory conduct and generally increased the standard of debt advice provided to consumers in the UK.[112]

Australia's consumer credit licensing regime requires licensees to be fit and proper persons and to act honestly and fairly.[113] As noted in Part I, there is potential for regulatory guidance to prescribe how DMFs should conduct their businesses to fulfil these conditions.[114] Such regulatory guidance could be used to address systemic problems in the debt management sector and to strengthen safeguards for consumers.[115] As licensees must be members of AFCA,[116] Australian consumers have the advantage of access to free EDR to seek a remedy against DMFs that fail to comply with the required standards. Against this backdrop, the introduction of regulatory guidance for DMFs could promote higher standards of debt advice to assist debtors in times of financial difficulty.

Early indications of improved consumer outcomes following reforms to the debt agreements framework in 2018 lend strength to the argument that regulatory safeguards addressing transparency, affordability and restrictions against harmful advertising are likely to benefit Australian consumers.[117] Statistics from the Australian Financial Security Authority indicating that the number of new debt agreements has decreased since the reforms came into effect[118] are also consistent with the observation by a focus group participant that the problem of large numbers of unsuitable debt agreements, prior to the reforms, appears to have abated. The improvements generated by these reforms suggests the value of implementing the proposals discussed in Part VI for the broader debt management industry. Part VI discusses a range of safeguards to reduce the risks to consumers, drawing on the focus group discussion of potential reforms, the survey data and the experience of regulating DMFs in other countries.

VI Reform Proposals

The risks to consumers that arise in their interactions with DMFs as revealed by the empirical data,[119] and more briefly canvassed in the ASIC and Senate reports,[120] underscore the need for reforms in Australia. In light of the rising cost of living,[121]

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112 Chen and Lemaitre (n 5) 167–70.

113 *National Consumer Credit Protection Act 2009* (Cth) ss 37A, 47.

114 See nn 15–17 and accompanying text.

115 *National Consumer Credit Protection Act 2009* (Cth) ss 37A, 47. The specific rules in the UK's *FCA Handbook* are premised on broader principles such as acting fairly and meeting fit and proper standards which resonate with requirements for Australian consumer credit licensees.

116 Ibid s 47(1)(i).

117 The debt agreements framework is discussed in Part III(C) above.

118 'Debt Agreement Law Reform Statistics', *Australian Financial Security Authority* (Web Page) <https://www.afsa.gov.au/about-us/statistics/debt-agreement-law-reform-statistics>.

119 Discussed in Part V above.

120 *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 55–64.

121 Australian Bureau of Statistics, *Selected Living Cost Indexes, Australia, September 2022* (2 November 2022) <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/selected-living-cost-indexes-australia/latest-release>.

high levels of personal debt among Australian households[122] and warnings of an impending 'avalanche in debt collection',[123] the need to strengthen safeguards for consumers is all the more urgent.

The claim that debtors are more vulnerable to DMFs' misleading promises in pressing circumstances is supported by research in consumer psychology. When in a state of heightened anxiety, consumers are less likely to evaluate the accuracy of promises to resolve their problems, especially when confronted with prospects of financial ruin and decisions involving complex financial knowledge.[124] In such situations, they are more likely to take risks in the hope of becoming 'debt free'.[125] Their vulnerability to misleading promises is ostensibly greater when debt help is offered along with a friendly, helpful demeanour. Both the survey respondents and the focus group participants noted the appeal of 'friendly, approachable' help offered by DMFs.[126] Scholars warn that businesses that portray their services as 'a friend in need' may pose a risk, as consumer vigilance is often reduced by the trust such businesses engender and consumers may be lulled into a false sense of security.[127] The recent introduction of licensing requirements for DMFs is a step towards better regulation of the industry, but more is needed.

Targeted measures are needed to address problems such as the lack of transparency, misleading conduct, and harm from unsuitable and unaffordable recommendations.[128] Both the survey respondents and focus group participants highlighted the opacity of fees and limitations on what credit repair services can achieve.[129] The adverse consequences are reflected in the levels of dissatisfaction among the consumers surveyed.[130] Part VI(A) examines the need to curtail unsolicited targeted advertising, while Part VI(B) considers signposting free advice. Part VI(C) canvasses the importance of transparency, while suitable, affordable debt solutions are discussed in (D). Restrictions on fees and cooling-off periods are investigated in Parts VI(E) and (F) respectively.

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122 Marina Trajkovich, 'One in Four Aussies Struggling with Rising Cost of Living', *Nine News*, 12 May 2022 <https://www.9news.com.au/national/one-in-four-aussies-struggling-due-to-rising-cost-of-living/72629c56-7394-4554-b9fe-024261914226>; Kearns, Major and Norman (n 3).

123 Lucinda O'Brien, Vivien Chen, Ian Ramsay and Paul Ali, 'An Impending "Avalanche": Debt Collection and Consumer Harm after COVID-19' (2021) 49(2) *Australian Business Law Review* 84. See also Australian Taxation Office, 'ATO Prioritising Support and Assistance for Debt Collection Efforts' (Media Release, 13 May 2022) <https://www.ato.gov.au/Media-centre/Media-releases/ATO-prioritising-support-and-assistance-for-debt-collection-efforts/>.

124 Stevie Watson, Cassandra D Wells and Elania Jemison Hudson, 'The Effects of Idealized Advertising Imagery on Social Comparisons, Psychological and Emotional Outcomes, and Consumer Vulnerability: A Conceptual Model' (2011) 17(4) *Journal of Promotion Management* 407, 413–14; Cass R Sunstein, 'Empirically Informed Regulation' (2011) 78(4) *University of Chicago Law Review* 1349, 1359.

125 Lefevre and Chapman (n 19) 9.

126 Part V(A)(4) (consumer survey) and Part V(B)(1) (focus group) above.

127 Shmuel I Becher and Sarah Dadush, 'Relationship as Product: Transacting in the Age of Loneliness' (2021) 5 *University of Illinois Law Review* 1547, 1579.

128 *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 55–64.

129 Part V above.

130 Part V(A)(4) above.

A *Unsolicited Targeted Advertising*

Targeted advertising using court lists to obtain details of debtors' financial difficulties was highlighted by the focus group as among the most egregious forms of predatory conduct.[131] As noted above, studies suggest that consumers who are highly stressed over the prospect of losing their home, entering bankruptcy or experiencing other severe financial loss are more susceptible to unrealistic promises by DMFs.[132] Evidence of court lists being used to market DMFs' services[133] and findings of systemic issues of poor advice with detrimental outcomes for consumers[134] underscore the need for regulatory intervention.

The common practice in Australia of DMFs targeting individuals facing legal proceedings using information obtained from court lists ostensibly goes against the obligations of credit licensees to act efficiently, honestly and fairly. The element of 'fairness' has been described as 'precluding "a degree of calculated sharpness", conduct that was "sufficiently egregious", "systemic sharp practice", and behaviour that "undermined informed decision-making" by consumers'.[135] Some focus group participants noted that, as court lists are essentially public information, it would not be possible to prohibit DMFs from accessing the information. They recommended introducing a prohibition on the use of information obtained from a court register to make unsolicited contact with consumers. While the focus group participants acknowledged that it would not always be possible to determine which party made the first contact, they supported the introduction of a general prohibition on DMFs making unsolicited contact with consumers.

Prohibitions of unsolicited contact are already used to safeguard Australian consumers from risks of harm associated with specific financial products. Examples include prohibitions against unsolicited hawking of particular financial products[136] and unsolicited credit cards.[137] When the prohibition of unsolicited hawking was introduced, its rationale was described in Parliament as 'ensuring that Australian consumers receive the information they need to make informed financial decisions' and that restrictions on unsolicited contact would protect consumers from 'unsavoury' behaviour.[138] The authors recommend the introduction of a prohibition against unsolicited contact that precludes DMFs and their agents from communicating with consumers in any manner unless the consumer has first requested information on DMFs' services. The prohibition should encompass all means of communication whether post, email, other forms of electronic messaging

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131 Similar concerns were briefly raised in ASIC's report, *Paying to Get Out of Debt* (n 8) 21.

132 Watson, Wells and Hudson (n 124) 413.

133 *Paying to Get Out of Debt* (n 8) 21 [85]; Parts V(A)(1), (B)(1) above.

134 *Paying to Get Out of Debt* (n 8) 35–8; Senate Economics References Committee (n 9) 56–62 [4.10]–[4.31]; Parts V(A)(3), (B)(2) above.

135 JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1, 11 quoting the Full Federal Court decision in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [174], [289], [290], [398].

136 *Corporations Act 2001* (Cth) s 992A.

137 *Australian Securities and Investments Commission Act 2001* (Cth) s 12DL; ASIC, *Unsolicited Credit Cards and Debit Cards* (Regulatory Guide No 201, July 2010) 4.

138 Commonwealth, *Parliamentary Debates*, Senate, 22 August 2001, 26309 (Stephen Conroy).

including text messages and social media, telephone calls, door knocking or handing out flyers. The prohibition should be aimed at preventing DMFs from misusing information on debtors' financial problems to sell them high-cost services at a time when debtors are vulnerable, in need of debt solutions, and susceptible to false promises.[139]

The Senate report highlighted concerns that payday lenders may be forwarding to DMFs information on debtors whose loan applications may have been rejected, and that information gained from screen-scraping technology on consumers' indebtedness could potentially be misused to target debtors with advertising.[140] In light of such concerns, framing the prohibition against unsolicited contact broadly could potentially help minimise advertising being directed at individuals whose debt problems have been discovered by DMFs through covert methods. There are, however, limitations to the effectiveness of such a prohibition. As noted above, consumer advocates in the focus group observed that it may at times be challenging to prove that contact was unsolicited, particularly as referrals among related businesses appear to be common in the industry and consumers may at times respond to offers of free credit reports or other incentives.[141] In addition, the use of artificial intelligence to target internet and social media users with advertising based on their internet browsing habits would seem to be more challenging to rein in. Consequently, it is important that advertising by DMFs should not be misleading. In particular, reforms should be introduced to require advertising to clearly state the cost of services and inform consumers of the availability of free debt advice. These proposals are further considered in Parts VI(B) and (C) below.

The increasing use of digital platforms has heightened concerns over targeted advertising, particularly as artificial intelligence enables DMFs' offers of debt help to emerge when debtors are potentially vulnerable.[142] Social media advertising is thought to be relatively intrusive and may reach viewers at times when they are less on guard against predatory advertising. Regular posts from DMFs that consumers 'follow' are interspersed between posts from trusted family and friends.[143] Presenting advertising material in a 'high trust' environment such as social media and blogs may cause consumer confusion,[144] particularly where DMFs' Facebook pages share 'life hacks' on managing finances, blurring the distinction between advertising and helpful advice. Viewing posts by family and friends of successes,

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[139] Restrictions on advertising by DMFs are found in the UK: *Consumer Credit Act 1974* (UK) s 154. In November 2019, Google announced restrictions on advertising by DMFs along with other high-risk financial products and services on the grounds of potential harm to consumers. Credit repair services are no longer permitted to advertise, while other debt management services must comply with local laws and industry standards: Google, 'Update to Financial Products and Services Policy (November 2019)', *Google* (Web Page, October 2019) <https://support.google.com/adspolicy/answer/9508775?hl=en-AU>.

[140] Senate Economics References Committee (n 9) 62 [4.31].

[141] Part V(B)(1) above.

[142] Senate Economics References Committee (n 9) 62 [4.31]; Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 12 December 2018, 39 (Corinne Proske).

[143] See further Vivien Chen, 'Online Payday Lenders: Trusted Friends or Debt Traps?' (2020) 43(2) *University of New South Wales Law Journal* 674, 699–700.

[144] ASIC, *Advertising Financial Products and Services (Including Credit): Good Practice Guide* (Regulatory Guide No 234, November 2012) 38 [RG 234.136].

holidays and happy moments has been found to foster a sense of inadequacy and perceptions that others have better and happier lives, giving rise to emotional vulnerability.[145] Studies demonstrate that 'likes' on social media have significant influence over consumer choices, further underscoring the need for regulatory guidance to ensure that social media advertising is not a source of consumer harm.[146]

The approach adopted by the FCA in its social media guidance provides useful strategies for Australia where regulatory guidance for social media advertising is less developed. At the very least, reforms should be introduced to require DMFs to signpost the National Debt Helpline on their social media pages and ensure that customers are given fair and prominent indication of the cost of the DMF's services. This is especially important where offers of 'free consultations' from DMFs potentially give rise to misleading impressions that the business may be a not-for-profit organisation offering free debt help. Specific guidance given by the FCA on how warnings of risks should be prominently displayed on social media to safeguard consumers against misleading impressions is also helpful in this context.[147]

B *Signposting of Free Advice*

The ASIC and Senate reports discussed in Part II raised concerns over the substantial fees imposed on consumers in financial difficulty for services which they could have obtained free of charge.[148] Unaffordable fees exacerbate debtors' financial stress and, as observed in Part V(A), 61% of survey respondents were not aware that free debt help or credit repair was available when they signed up with a DMF. Close to two-thirds (65%) of these respondents said that they would not have paid for debt help if they had known that free services existed.[149] To alleviate the problem, DMFs should be required to inform customers of the availability of free debt advice and prominently display a link to the National Debt Helpline on their websites and social media sites. In the UK, DMFs must inform customers where they can obtain free debt advice, debt negotiation and credit repair services.[150] Likewise, payday lenders are required by Australian law to provide information on their websites about alternative low-cost measures for dealing with debt such as financial counselling, and payment plans with utilities providers.[151]

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145 Edson C Tandoc Jr, Patrick Ferrucci and Margaret Duffy, 'Facebook Use, Envy, and Depression among College Students: Is Facebooking Depressing?' (2015) 43 *Computers in Human Behavior* 139, 142–3.

146 David C Edelman, 'Branding in the Digital Age: You're Spending Your Money in All the Wrong Places' (December 2010) *Harvard Business Review* <https://hbr.org/2010/12/branding-in-the-digital-age-youre-spending-your-money-in-all-the-wrong-places>; M Nick Hajli, 'A Study of the Impact of Social Media on Consumers' (2014) 56(3) *International Journal of Market Research* 387; Simon Hudson and Karen Thal, 'The Impact of Social Media on the Consumer Decision Process: Implications for Tourism Marketing' (2013) 30(1–2) *Journal of Travel & Tourism Marketing* 156.

147 FCA, *Social Media and Customer Communications: The FCA's Supervisory Approach to Financial Promotions in Social Media* (Finalised Guidance No FG15/4, March 2015).

148 *Paying to Get Out of Debt* (n 8) 22; Senate Economics References Committee (n 9) 57 [4.12].

149 Part V(A)(2) above.

150 *FCA Handbook* (n 60) CONC [8.2.4].

151 *National Consumer Credit Protection Regulations 2010* (Cth) regs 28XXB(a), (b); *National Consumer Credit Protection Regulations 2010* (Cth) sch 9.

At a time when many are facing financial difficulties, there are grounds for requiring information on the availability of free debt advice and a link to the National Debt Helpline to be prominently displayed on all advertisements by DMFs of their services. The vulnerability of consumers to promises of debt help, as they are exposed to advertising on television, radio, internet or other media, arguably warrants stronger intervention to alert them to free sources of debt advice. Australian laws restrict the advertising of gambling, alcohol and smoking, and require warnings of health risks to be displayed on cigarette packages.[152] These suggest that signposts directing debtors to free debt advice, particularly when they may not be able to afford to pay for debt solutions, would be consistent with standards of responsible advertising required of other businesses that pose a risk to consumers.

At the same time, steps should be taken to ensure that the prominence of signposting of free alternatives is not diminished through layout, such as by placing the link to free advice at the end of webpages with miscellaneous information while placing eye-catching promotional material much more prominently.[153] Rules in the UK require prominent signposting of free debt help, and are supplemented by guidance aimed at countering avoidance strategies. Signposts of free debt advice must be proportionate in size to the promotional material, be 'clearly stated within the main body of the advertisement and ahead of the "small print"', 'remain fixed on the screen even when the customer scrolls up and down respective web pages', and be 'contained within their own distinct border, thus drawing the reader's attention to them'.[154]

C *Disclosure: Costs, Risks and Limitations*

The need for greater transparency is highlighted by the empirical data and in the ASIC and Senate reports.[155] Issues of opaque fees and unrealistic promises may potentially be mitigated through a requirement that DMFs clearly disclose their fees and the risks or limitations of their services in their initial communication with customers. Information on fees and limitations should also be clearly and prominently presented on DMFs' websites. Mandatory risk warnings have been introduced to alleviate risks of harm to vulnerable consumers from payday loans, another sector of the consumer credit industry known for the risks it poses to consumers in financial difficulty.[156] Payday lenders must clearly display warnings about some of the limitations of high-cost credit on their websites.[157]

To promote better transparency, DMFs could be required to provide a 'key facts sheet' during their initial communication with customers, disclosing the costs

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[152] *Broadcasting Services (Online Content Service Provider Rules) 2018* (Cth); *Broadcasting Services Act 1992* (Cth) s 123; *Tobacco Advertising Prohibition Act 1992* (Cth) s 15; *Competition and Consumer (Tobacco) Information Standard 2011* (Cth).

[153] Chen (n 143) 674.

[154] FSA, *Financial Promotions: Guidance Prominence* (Finalised Guidance, September 2011) 2 <https://www.fca.org.uk/publication/finalised-guidance/fg-fin-proms-prominence.pdf>.

[155] *Paying to Get Out of Debt* (n 8) 7 [21]; Senate Economics References Committee (n 9) 59–60 [4.21]; Parts V(A)(3), (4).

[156] Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 54.

[157] *National Consumer Credit Protection Regulations 2010* (Cth) regs 28LCB(a), (b), sch 8.

and limitations of DMFs' services, the availability of free debt advice, and self-help measures such as negotiating a financial hardship variation with credit or utilities providers. The key facts sheet should use plain, everyday language to explain limitations or risks of the services offered by the DMF in a readable format.[158] For example, in relation to credit repair, the key facts sheet could say:

> If you wish to dispute inaccurate information on your credit record, you may seek help from the Australian Financial Complaints Authority free of charge. You do not need to hire a credit repairer, or anyone else, to exercise this right.
>
> Credit repair services cannot remove negative information that is accurate from your credit record. To find out more, call 1800 931 678 (free call).

An example of a statement that could apply more generally to debt management services is:

> Using this service will not necessarily improve your credit rating, deter the efforts of a creditor to collect a debt, or prevent legal action to repossess your house or other assets. For more information on debt solutions, please contact the National Debt Helpline at https://ndh.org.au/debt-solutions/ or call 1800 007 007 for free advice.

The key facts sheet should clearly explain the fees charged by DMFs in dollar terms. It should avoid costs being obscured through formulas which may be challenging for some consumers to work out. The key facts sheet should set out the total cost of services as well as when payments must be made. It should disclose any additional fees which may be incurred such as fees for late payments or bounced cheques. While disclosure documents may have limited efficacy for some vulnerable consumers who may struggle to make sense of the information,[159] the requirement to provide consumers with a key facts sheet is likely to help mitigate deliberate attempts at obscuring the facts to mislead consumers.

Warnings of limitations on what credit repair or debt negotiation services can achieve are used in Canada.[160] Debt management firms in the UK are required to clearly disclose the risks of the product they are advertising in sufficient detail to enable potential customers to make informed decisions.[161] The risks must be presented in a way that is easily understood and must not be diminished or obscured.[162] Firms must also clearly disclose the cost of the services in advertising material,[163] stating the total price to be paid by the customer including all additional fees and expenses.[164]

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158 Chen, O'Brien and Ramsay (n 76) 193; Therese Wilson, Nicola Howell and Genevieve Sheehan, 'Protecting the Most Vulnerable in Consumer Credit Transactions' (2009) 32(2) *Journal of Consumer Policy* 117.

159 Literacy levels and emotions such as the 'humiliation of admitting an inability to understand' are thought to play a role in risk-taking by vulnerable consumers in financial difficulty: Wilson, Howell and Sheehan (n 158) 123–4, 134.

160 O Reg 17/05, reg 46; RRO 1990, Reg 74, reg 27(1); 'Settling Debt: What You Need To Know', *Consumer Protection Ontario* (Web Form) <http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/11351E~1/$File/11351E.pdf>.

161 *FCA Handbook* (n 60) 'Conduct of Business Sourcebook' ('COBS') [14.3.2].

162 Ibid COBS [4.5.2R(3)], [4.5.2R(4)].

163 Ibid COBS [4.7.1R(1)].

164 Ibid COBS [6.1.9].

D *Suitability of Advice*

The evidence examined in Parts II and V underscores the problem of DMFs giving unsuitable advice which at times exacerbates debtors' financial difficulties.[165] This indicates the need for regulation requiring DMFs to give customers suitable advice and recommend affordable solutions. The obligation could be based on Australian credit licensees' existing responsibilities to carry out their activities 'efficiently, honestly and fairly' and to ensure that their representatives are adequately trained and competent.[166] The Senate report canvassed proposals that DMFs should be required to act in the client's best interests and to treat customers fairly.[167] Debt management firms in the UK must ensure that all advice given has regard to the best interests of the customer, is appropriate to their individual circumstances, and is based on a sufficiently full assessment of their financial circumstances.[168]

The regulations would ideally require DMFs to do the following: provide information about the available options identified as suitable for the customer's needs; explain the actual or potential disadvantages, costs and risks of each option; ensure that the debt solution and payments are affordable; and explain the reasons why the recommended option is suitable and others are unsuitable. The advice should be put in writing and given to the customer. This suitability statement should explain the reasons for the recommendation, clearly highlighting the risks. In seeking to ensure that payments are affordable, the DMF should set out in the suitability statement the calculation of affordability based on the customer's individual financial circumstances and needs. In the UK, the *FCA Handbook* states that recommending a debt solution which a firm 'knows, believes or ought to suspect is unaffordable for the customer' is likely to contravene principles of skill, care and diligence, and treating customers fairly.[169] The UK rules also require DMFs to warn customers of the consequences of failing to continue making repayments to creditors; ignoring correspondence from lenders, which could result in repossession of the customer's home; and failing to pay taxes, child support and fines.[170]

There was support from some focus group participants for the introduction of a requirement that DMFs provide consumers with a suitability statement that sets out how the initial contact with the consumer was made, the consumer's circumstances on which the DMF's proposal was based, and the details of the DMF's proposal. A representative from a community legal centre noted that the requirement would be helpful in enabling consumers to seek redress 'through EDR without a complicated chunk of analysis needed'. Another participant said that a suitability statement would be useful in situations where it provided evidence of misleading conduct, especially where there was evidence that the DMF misled the consumer about the likely outcome of entering into a recommended arrangement.

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165 *Paying to Get Out of Debt* (n 8) 35–8; Senate Economics References Committee (n 9) 56–9 [4.10]–[4.18]; Parts V(A)(4), (B)(2) above.
166 *National Consumer Credit Protection Act 2009* (Cth) s 47.
167 Senate Economics References Committee (n 9) 63 [4.39], 64 [4.42].
168 *FCA Handbook* (n 60) CONC [8.3.2].
169 Ibid CONC [8.2.2].
170 Ibid CONC [8.3.4].

The authors recommend the introduction of requirements that DMFs act in the client's best interest, make suitable and affordable recommendations based on a full assessment of the circumstances, and give consumers a suitability statement. Aggrieved consumers who wish to seek compensation against DMFs through AFCA would be able to use the statement as evidence to support their claim. Accountability in the form of a suitability statement may potentially militate against the more overt forms of unsuitable advice highlighted in the Senate report on credit and hardship, and in the consumer survey, such as telling customers to stop paying creditors.[171]

E *Restrictions on Fees*

The focus group and survey participants echoed ASIC's concerns over high, opaque and heavily front-loaded fees.[172] At the lower end of the scale, close to half (49.4%) the survey respondents paid fees of $1,000 or less. At the same time, some respondents reported paying more than $10,000 in fees, with 6% paying between $10,001 and $20,000, and 3% paying more than $20,000. Substantial fees are likely to exacerbate financial hardship, particularly for debtors experiencing entrenched disadvantage. Anecdotal evidence from a whistle blower was also cited during the focus group's discussion of a predatory business model which purported to offer credit repair but took fees without any intention of carrying out the services promised. To protect consumers against risks associated with high up-front fees, reforms should restrict the amount of fees and specify when they can be charged.

In Canada, for example, fees cannot be charged for credit repair until there is material improvement to the consumer's credit rating or record.[173] Fees must not be charged for debt negotiation until creditors have agreed to the arrangement and received the first payment.[174] There are also fee caps of 10–15% of total repayments for debt negotiation services.[175] Likewise, a schedule of fees for credit repair was suggested at the focus group discussion, and there was general agreement that there should be a requirement that the service must have been provided by the DMF before any fee could be charged. Restricting fees has been used in relation to payday loans in Australia to protect consumers from becoming further entrenched in disadvantage.[176] Similar restrictions on DMFs' fees are justified on similar grounds, and should be introduced.

Consumer advocates have raised issues relating to caveats lodged by DMFs on consumers' property which have caused significant hardship. If DMFs are concerned that a customer may not be able to afford their fees, there are grounds for requiring them to refer the customer to free financial counselling, as is required in the UK.[177] Recommending a debt 'solution' that requires payment of fees which

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171 Senate Economics References Committee (n 9) 59 [4.18]; Part V(A)(4) above.

172 *Paying to Get Out of Debt* (n 8) 7; Parts V(A)(3), (B)(3) above.

173 *Consumer Protection Act*, 2002, SO 2002, c 30, sch A, s 50(1)(b).

174 RRO 1990, Reg 74, reg 27(2)(ii); *Consumer Protection Regulation*, Man Reg 227/2006, reg 28(1).

175 In Canada, where payments are made to creditors in accordance with a schedule, fees are often capped at 15% of each payment. Where one-off payments are made, fees are capped at 10% of the total debt.

176 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 62–4.

177 *FCA Handbook* (n 60) CONC [8.3.7(3)].

customers cannot afford is arguably not in keeping with a credit licensee's obligation to act efficiently, honestly and fairly. Focus group participants took the view that DMFs should not be permitted to take security over debtors' assets for fees, given the hardship caused to debtors when DMFs fail to deliver the services promised. Further, if DMFs are prohibited from taking security over the assets of consumers for their fees, they may have fewer incentives to recommend unaffordable 'solutions', and be more likely to refer consumers who cannot afford to pay fees to free sources of debt help. Such a prohibition would also be consistent with the requirement that DMFs should act fairly.

F *Cooling-off Period*

Cooling-off periods have been introduced as a form of consumer protection in several areas of Australian law. They are available to consumers in relation to unsolicited contracts under the *ACL*,[178] financial products under the *Corporations Act 2001* (Cth)[179] and a range of products and services under state legislation.[180] The right to cancel a contract without penalty within the cooling-off period is thought to allow consumers time and opportunity to reconsider their decision. These rights are usually given in situations where consumers are vulnerable to making decisions based on emotions or a lack of information, or are subject to unsolicited contact or high-pressure sales strategies.[181] Against the background of DMFs engaging in targeted advertising and unrealistic promises,[182] providing consumers with cooling-off rights would seem to be an appropriate response.

Such a reform could give consumers the right to cancel a contract with a DMF without penalty, and without giving any reasons, within 14 days of receiving a copy of the contract or other specific period. Some focus group participants noted that the limitations of cooling-off periods include consumers at times not being aware of their right to cancel the contract or how to exercise it. They believed that providing longer cooling-off periods is one way of increasing their effectiveness giving consumers the opportunity to extricate themselves from a poor decision. Regulatory frameworks for DMFs in Canada give consumers cooling-off rights, and DMFs in the UK must give consumers who enter into contracts online or over the phone a cooling-off period. A less common, but more protective alternative is to use opt-in clauses which require consumers to contact the business within a period of time to confirm that they wish to continue with the contract.[183] Opt-in clauses are used in France where consumers cannot formally accept an offer of a debt consolidation contract within the first 10 days.[184]

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178 *ACL* (n 71) s 82.

179 *Corporations Act 2001* (Cth) s 1019B.

180 See, eg, *Motor Car Traders Act 1986* (Vic) s 43; *Sale of Land Act 1962* (Vic) s 31.

181 Consumer Affairs Victoria, 'Cooling-off Periods in Victoria: Their Use, Nature, Cost and Implications' (Research Paper No 15, January 2009) 1 <https://www.consumer.vic.gov.au/resources-and-tools/research-studies>.

182 Parts II(A), V above.

183 Paul Harrison, 'Cooling-off Periods for Consumers Don't Work: Study', *The Conversation* (online, 28 November 2016) <https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473>.

184 *Code de la consommation* [Consumer Code] (France) art L313-34. After 10 days have lapsed, consumers may accept the offer which is valid for 30 days.

VII Conclusion

The financial impact of the COVID-19 pandemic and rising costs of living have left an increasing number of Australians struggling with debt. The recent introduction of licensing for DMFs is a step towards better regulation of the industry. However, more is required to curb risks of harm to consumers in financial stress from predatory and unfair business practices. The licensing regime requires DMFs to undertake their activities 'efficiently, honestly and fairly',[185] and regulatory guidance on how these principles should be interpreted in the context of debt management has the potential to strengthen consumer protection significantly. This article investigates proposals for such regulatory guidance. The proposals are informed by empirical data collected by the authors through a survey of 400 consumers, and a focus group. The study is underpinned by two complementary goals: to gain a more nuanced understanding of the risks that arise in DMFs' interactions with Australian consumers with debt problems, and to develop the regulatory framework for DMFs to mitigate these risks.

Regulatory guidance should require DMFs to ensure that their recommendations are suitable and affordable, and that fees are transparent, reasonable, and payable only after substantial progress has been made towards the promised outcomes. Steps should also be taken to ensure that consumers are directed by signposts to free sources of debt help such as the National Debt Helpline on advertising material, websites and social media sites. Debt management firms should clearly disclose the limitations of what their services can achieve; they should be required to act in their client's best interest; and allow substantial cooling-off rights. Debt management firms should be prohibited from making unsolicited contact with consumers to prevent them from targeting debtors in difficulty through information obtained from court lists and third parties.

Experience from other countries that have developed regulatory frameworks for DMFs illustrates the benefits that such reforms engender, particularly when coupled with robust enforcement. As the Australian credit licensing regime allows consumers to seek redress against errant DMFs through EDR, such regulatory guidance could make significant strides in channelling financially stressed consumers towards debt solutions that help rather than harm them.

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[185] *National Consumer Credit Protection Act 2009* (Cth) s 47(1)(a).

Proportionality and Protracted Emergencies: Australia's COVID-19 Restrictions on Repatriation Rights Compared

Elizabeth Hicks*

Abstract

The COVID-19 pandemic plunged governments into a world of 'tragic choices'. With minimal forewarning and limited available infrastructure to enable freedoms in an alternative way, governments were required to restrict rights to meet the more urgent, 'existential' need to control threats to life. The nature of the emergency limited the role of courts in assessing challenges that raised rights and proportionality arguments against restrictions. In this article I argue that rights-based proportionality reasoning can nonetheless retain a meaningful role in emergency settings. To do so, I compare how courts in Israel, New Zealand and elsewhere applied proportionality reasoning in public law challenges to restrictions on repatriation rights during the pandemic. I argue that judicial scrutiny of a restriction's proportionality can intervene in 'executive path dependency' — the failure of executive emergency governance to invest in infrastructure over time to render restrictions less necessary. Such scrutiny can also provide for more principled systems of allocating scarce resources. I then demonstrate how various Australian mechanisms — constitutional, administrative and political — failed to supply the same protection in challenges to restrictions on repatriation rights. I trace this to the faith that the Australian system places in popular, majoritarian accountability mechanisms, whose operation is altered in emergency settings.

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I Introduction

The COVID-19 pandemic plunged governments into a world of 'tragic choices'. With minimal forewarning and limited available infrastructure to enable freedoms in an alternative way, governments were required to restrict rights to meet the more urgent, 'existential' need to control threats to life. These restrictions led to numerous court challenges as affected parties sought to test the proportionality of restrictions by reference to rights frameworks. How courts decided these challenges varied across legal systems and legal cultures and — as I argue in this article — over time as the pandemic evolved into a protracted problem.

Guido Calabresi and Philip Bobbitt described a societal 'tragic choice' as one involving the allocation of scarce resources. Their account considered how societies approach the allocation of scarce resources in a principled way.[1] Calabresi and Bobbitt distinguished between first-order choices — how a society determines the quantity of a resource to produce — and second-order choices, which relate to the allocation of scarce resources. Although used to a different end in their theory, the distinction is a useful way of conceptualising some of the problems that attend proportionality analysis in emergency settings. One justification for proportionality analysis in non-emergency settings is that it protects discrete groups against unnecessary restrictions of their rights where that group is too small to meaningfully influence electoral processes. Where a fundamental right is engaged, a court can intervene to inquire whether a restriction is truly necessary or whether alternative means — albeit ones that are less convenient or popular — could achieve the same ends. Yet crises and emergency settings can involve unstable factual circumstances and evidence, uncertain science and limited forewarning. It becomes more difficult for courts to assess whether a restriction is necessary and alternative means may not be available. Trade-offs — 'tragic choices' regarding the allocation of limited resources — are made by governments confronted with a lack of infrastructure or time to invest and plan. On one view, then, there is a limited role for courts to consider the proportionality of restrictions on rights during an emergency.

In this article I consider the example of restrictions on citizens returning to their country during the pandemic and assess the extent to which rights-based proportionality analyses retained a meaningful role in some of those cases. I then compare how proportionality analysis was applied in those cases with how Australian courts responded to challenges to restrictions on repatriation rights during the pandemic. The focus on repatriation rights is deliberately narrow. While the problem of 'tragic choices' affected other forms of governmental response during the pandemic, restrictions on repatriation rights draw attention to that problem in heightened detail. Restrictions on repatriation rights tended to affect a smaller group of people — citizens abroad or resident citizens with time-sensitive reasons to travel abroad — as part of measures enacted for the benefit of the collective. Jurisdictions that limited the rights of citizens to return often did so by limiting the numbers of those that could return to manage demand for quarantine and monitoring systems. Such restrictions engage questions of resource allocation and a related question of

[1] Guido Calabresi and Philip Bobbit, *Tragic Choices* (Norton, 1978) 18.

'state capacity'[2] — the ability of states to achieve policy goals such as the protection of repatriation rights — that go to the heart of the problems proportionality analysis faces in emergency settings. The rights of citizens to return to their country is also a lens through which to explore how a legal system conceives of the relationship between individual citizens and the state and the relationship between majorities and minorities.

In focusing on restrictions on repatriation rights, I engage with a deeper question regarding the effect of emergencies upon proportionality assessments generally. I argue that the nature of proportionality testing — particularly the 'necessity' sub-test which considers whether less burdensome alternative means may achieve the same ends — involves an inquiry into government choices over time. The construction of an emergency as a short-term problem, with limited existing infrastructure or state capacity available to manage that emergency, provides a greater justification for measures that restrict rights temporarily. However, over time, as that emergency morphs into a protracted societal and political problem, it begins to more closely resemble the circumstances with which proportionality assessments contend in non-emergency settings. In the case of restrictions on international movement, governments can choose to invest in systems that render restrictions on rights less necessary or facilitate movement via alternative means. At the same time, the conditions in which political will forms and politics is practised have not yet returned to a 'non-emergency' state. The emergency response can acquire a 'path dependency', where governments do not invest in systems that become feasible alternatives to the status quo with the passage of time. As I argue in this article, the COVID-19 pandemic demonstrated the complexity of the concept of emergency. The failure to facilitate repatriation rights over time resulted from what I describe as a 'protraction problem', giving rise to executive path dependency.

Proportionality arguments were raised throughout the pandemic in many jurisdictions to challenge an array of COVID-19 restrictions on rights and freedoms. Not all of these restrictions implicated the same questions of executive path dependency or government choice over time; nor did they necessarily engage the same issue of rapidly constituted minorities 'caught under the wheels' of collective-benefiting measures. I confine my analysis to challenges to restrictions that did involve this dynamic. Proportionality analysis may provide other benefits in emergency settings. The application of proportionality principles to questions of resource allocation over time is but one among several uses. These other uses remain, however, outside the scope of this article.[3]

The first part of the article considers how proportionality assessments in two jurisdictions — Israel and New Zealand — dealt with the problem of proportionality

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[2] I thank Scott Stephenson and Maxim Bönnemann for this insight. See Madhav Khosla and Mark Tushnet, 'Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry' (2022) 70(1) *American Journal of Comparative Law* 95.

[3] Proportionality arguments were also raised unsuccessfully in Australia to challenge restrictions implemented at the state level. This included challenges to a curfew during Melbourne's 'second wave' (*Loielo v Giles* (2020) 63 VR 1) and challenges to vaccine mandates in New South Wales (*Kassam v Hazzard* (2021) 106 NSWLR 520; *Larter v Hazzard [No 2]* [2021] NSWSC 1451; *Knowles v Commonwealth* [2022] FCA 741). These cases did not raise the problem of state capacity and resource allocation over time that I analyse in this article.

analysis in assessing restrictions on repatriation rights in an emergency. These jurisdictions are useful case studies for a comparative study of how proportionality reasoning can engage with restrictions on repatriation rights in an emergency setting. Restrictions on repatriation rights were successfully challenged in these jurisdictions, but for different reasons. Israel and New Zealand also reflect different cultures of proportionality reasoning, with that of New Zealand marked by a greater degree of deference. The comparison highlights how proportionality analysis can intervene in the problem of executive path dependency and resource allocation regardless of the culture of deference. I also make occasional reference to the approaches of courts in other jurisdictions — Germany, India and Canada — where this further illustrates how courts responded to questions of executive path dependency and resource allocation as the emergency became a protracted problem. The primary focus of my analysis remains, however, restrictions on repatriation rights.

In the second half of the article I assess how proportionality mechanisms fare in protracted emergency settings in the absence of rights catalogues to underwrite them. To this end I consider how 'tragic choices' were realised in Australia's pandemic restrictions on international movement. Australia is a laboratory to investigate more generalisable questions. Australia lacks an entrenched constitutional or federal legislative bill of rights. This absence, coupled with the legal culture to which it has given rise, backs 'ordinary politics' to ensure government actions are proportionate. I assess how proportionality considerations incorporated by legislation and constitutional structures, as well as political mechanisms, performed in a protracted emergency setting over time. I argue that emergency settings alter the conditions within which political pressure on executive government forms. They create an atmosphere of urgency and fear that focuses the public on collective goals and directs attention away from rapidly constituted minorities 'caught under the wheels' of measures directed toward those goals. Key questions that go to proportionality in protracted emergencies — whether government is investing in resources over time to limit restrictions on rights and whether scarce resources are allocated in a principled way — attract less public concern where they only affect small groups defined by discrete circumstances. The nature of the emergency may even encourage hostility toward discrete groups whose circumstances differ from those comprising the majority. I demonstrate how Australia's various legal mechanisms — constitutional and administrative — failed to incorporate the same proportionality considerations in these settings as mechanisms underwritten by rights frameworks elsewhere. I then consider how political mechanisms in which the Australian system places its faith — public pressure and federalism — failed in a similar way.

Before beginning, it is worth noting that the underlying factual matrices that gave rise to court challenges varied across jurisdictions. Until the Delta outbreak in Sydney in July 2021, Australian jurisdictions maintained elimination as a goal. In this goal, Australia — like New Zealand, Singapore and a handful of other 'COVID zero' jurisdictions — departed from the express aim of governments elsewhere to manage and suppress some community transmission. On one view, an elimination objective involves different proportionality considerations when compared with an objective that tolerates some community transmission: I explore this in my

discussion of the stages of proportionality testing — particularly 'necessity' and 'proportionality in the strict sense' — in Part II(A) below. Notwithstanding those factual differences, a comparison of how different legal systems have received challenges to pandemic restrictions yields insights into the different factors that those systems consider in a proportionality assessment. It reveals the standards against which a legal system assesses the proportionality of a restriction. Significantly for my argument, comparing court challenges across different legal cultures reveals how courts engage with evidence and practise deference in the face of uncertainty, urgency and unstable factual circumstances.

II Proportionality and Protracted Emergencies: The Post-1945 Paradigm

A *Proportionality and the Post-War Paradigm: The Limits of Majoritarianism*

Proportionality emerged as a favoured tool of courts negotiating rights catalogues that proliferated across the globe after 1945. The literature has dealt extensively with the nature of its commitments.[4] Those commitments can also serve to correct structural biases of the political process.[5] Proportionality testing — where applied within a constitutional system and associated legal culture that support a greater degree of judicial oversight of legislative and executive decision-making — can ensure that the restriction of rights isn't excessively driven by expediency or political convenience. Legislatures or executives may limit the rights of the few even where less restrictive alternatives are available, because that group is too small to meaningfully influence electoral processes.

Each stage of structured proportionality testing (see Figure 1) lends itself to an explanation of correcting problems in the political process' ability to safeguard the position of minorities. Considering the 'legitimacy' of an end can 'check' goals that are openly discriminatory or oppressive to a minority group with less representation in democratic structures. Determining whether the means of achieving that end are 'suitable' and 'necessary' addresses what I described in Part I above as the 'political expedience' problem of majoritarianism. The least restrictive means of achieving a particular goal will not always be the most practically or politically convenient. Achieving the least restrictive means may require an expansion of state capacity or the investment of resources. The least restrictive means may not be the most popular. The 'necessity' stage of proportionality testing requires the state to justify its choice of means on its own terms — with the support of evidence — with lesser weight given to questions of convenience or cost. In this way, the 'necessity' stage of proportionality testing is perhaps the most crucial to mitigating the risk that majorities will neglect to agitate for the interests of minorities.

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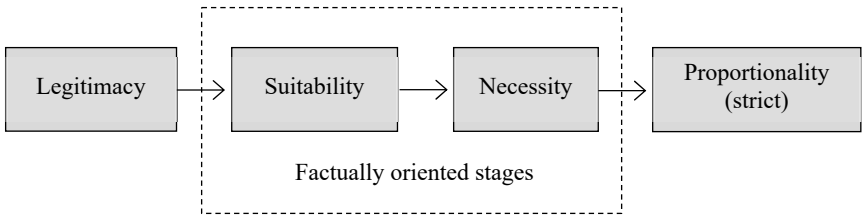
[4] See, eg, Robert Alexy, *Theorie der Grundrechte* [A Theory of Constitutional Rights] (Suhrkamp Verlag, 1986); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

[5] See, eg, Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press, 2017) 9.

The final, 'strict proportionality' stage of testing addresses the power imbalance between the majorities capable of commanding electoral processes and minorities whose rights may be disproportionately impacted relative to the benefit the end confers upon the majority. This stage requires analysis of the concrete benefits of a particular measure relative to its concrete impact upon rights. This avoids 'balancing' incommensurable values against each other in a way that would supplant the legislature's priorities for that of the court, while serving to correct excessive imbalances of power in realising electoral goals.

Figure 1: Four stages of structured proportionality testing



The use of proportionality testing by courts serves to create what is described as a 'culture of justification': that is, the state must justify the rationality of its choices restricting rights beyond their pure popularity with the electorate.[6] Arguably, the strength of proportionality testing lies in its secondary impact on state choices before they are challenged in courts. The knowledge that a restriction on a right may be tested forces the state to explain and consider its choices in a way that pure electoral mechanisms may not.[7]

How courts use and apply structured proportionality reasoning varies across constitutional systems and legal cultures.[8] It accommodates variations in cultures of deference and the institutional self-perception of courts. Specialised constitutional courts interpreting constitutionally entrenched bills of rights often find restrictions lack proportionality because they are not 'proportionate in the strict sense' — the final stage. This preference flows from the challenges specialised courts face in applying the 'factually' oriented stages of proportionality testing — 'necessity' and 'suitability'.[9] In Germany, the Federal Constitutional Court leans more heavily into the final stage as it understands this stage to be more aligned with its institutional competence, which is normative questions.[10] But preferring an analysis at this final

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6 See, eg, Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013).

7 See, eg, Anne Peters, 'A Plea for Proportionality: A Reply to Yun-Chien Chang and Xin Dai' (2021) 19(3) *International Journal of Constitutional Law* 1135.

8 Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meaning of Postwar Legal Discourse* (Cambridge University Press, 2013).

9 Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 383. See also Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart, 2022).

10 Oliver Lepsius, 'Die Maßstabsetzende Gewalt' [The Standard Setting Power] in *Das Entgrenzte Gericht. Eine kritische Bilanz nach Sechzig Jahren Bundesverfassungsgericht* [The Court without

stage has attracted controversy in other jurisdictions.[11] In Canada, for instance, the Supreme Court is more likely to invalidate restrictions on rights at the 'necessity' stage.[12] The application of proportionality analysis also allows for different understandings of deference.

Finally, proportionality analysis has been adopted by some courts in the Commonwealth world.[13] Courts in Commonwealth states — such as Canada and New Zealand — share legal traditions that colour how bills of rights, introduced later in their histories, operate and are applied by courts. They tend towards a greater level of deference. The NZ example of the Commonwealth model features an ordinary statutory bill of rights[14] that does not empower courts to invalidate legislation for inconsistency. Rights do, however, bind the executive. Legislation must also be assessed for compatibility with the bill of rights before being introduced into Parliament.[15] In this way, the NZ system's relationship to majoritarian political processes can be better described as facilitative rather than corrective: rights may still be restricted through political processes underwritten by majorities (parliaments), but in a way that requires open debate and dialogue. A test similar to the structured proportionality model I explored above is used to assess whether executive acts justifiably restrict rights. Restrictions must instead be prescribed by law, serve a purpose sufficiently important to justify curtailment of the right, be rationally connected with the purpose and be in due proportion to the importance of the objective.[16] The NZ courts apply this test with more deference than Israeli or German courts, as I explore further in Part II(B) below.

B *Proportionality Analysis during Crises and Emergencies*

1 *Executive Path Dependency in Protracted Emergencies*

Proportionality analysis faces particular challenges in crisis and emergency settings. Emergencies often require restrictions on rights to pursue legitimate goals — the management of a crisis. The nature of an emergency often involves urgency and a need to respond within a short time frame. The factual circumstances underpinning the emergency are often unstable and quickly changing. Information and data on the emergency may also be unsettled or lend itself to multiple interpretations, with no clear expert consensus emerging.

Limits: A Critical Reflection of Sixty Years of the Federal Constitutional Court] (Suhrkamp Verlag, 2011) 159, 206–7. For an alternative argument see Peters (n 7).

11 See, eg, the extensive literature critiquing the problem of balancing: Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10(3) *International Journal of Constitutional Law* 709.

12 Grimm (n 9).

13 For a fuller discussion see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013). See also Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016).

14 *New Zealand Bill of Rights Act 1990* (NZ).

15 See discussion in Gardbaum (n 13) 129–55.

16 *Hansen v The Queen* [2007] 3 NZLR 1, 40–1 ('*Hansen*'). See also Matthew Palmer and Dean Knight, *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, 2022) 189–207.

The experiences of courts exercising constitutional and administrative jurisdiction across the world during the COVID-19 pandemic illustrate some of these problems. In the initial stages of the pandemic, information about the transmissibility of the virus, as well as its mode of transmission, was still unsettled. The time frame of the pandemic — as a crisis that morphed into a protracted societal and political problem — also posed challenges for proportionality testing, particularly for courts assessing whether restrictions were 'necessary' or whether alternative, less burdensome means were available that achieved the same ends. In the short term, a lack of available infrastructure and forewarning may justify restrictions that would be less defensible in non-crisis settings. For this reason some courts tended to err in favour of allowing greater discretion to the executive during the earlier stages of the pandemic.[17] Anna-Bettina Kaiser notes that German courts tended to defer to the executive's justification for a measure's necessity and find restrictions proportionate, particularly during the first wave in Germany in March and April 2020.[18] Kaiser argues that proportionality testing will prove a weak standard of control during 'existential' crisis situations.[19] In Israel, courts similarly preferred to focus on procedural and parliamentary safeguards during the early stages of the pandemic. Courts avoided deciding on proportionality challenges to the restrictions themselves.[20]

Over many months, however, states acquired knowledge, experience and the opportunity to invest in systems that could have rendered restrictions upon rights less necessary.[21] Courts in Israel and Germany were notably more willing to find restrictions disproportionate as more time passed and the distribution of effective vaccination allowed for risks to be tailored to individual vaccination status. The beginning of 2021 in Israel witnessed a discernible shift in the Supreme Court's

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17 See, eg, Hans-Heinrich Trute, 'Ungewissheit in der Pandemie als Herausforderung' [Uncertainty in the Pandemic as Challenge] [2020] *Zeitschrift für das gesamte Sicherheitsrecht* [Journal of Comprehensive Security Law] 93; Katrin Kappler, 'Dealing with Uncertainties in the Pandemic: A German Perspective' [2021] 2 *eucrim* 127 <https://eucrim.eu/articles/dealing-with-uncertainties-in-the-pandemic>. Kappler notes that courts were 'faced with the same knowledge deficits that the legislator had to cope with. In the COVID-19 pandemic, this became a crucial issue before German courts. Case law shows that, in particular, the necessity of the protective measures has been subject to critical judicial examination. This is not surprising, as the authorities were extremely challenged during the first few months of the pandemic and, when in doubt, opted for more far-reaching and blanket measures rather than finely tuned and differentiated measures': at 131.

18 See, eg, Anna-Bettina Kaiser, 'The State of Exception under German Law and the Current Pandemic: Comparative Models and Constitutional Rights' (2020) 7(3) *Revista Electrónica de Direito Público* [Electronic Journal of Public Law] 55.

19 Anna-Bettina Kaiser, *Ausnahmeverfassungsrecht* [Constitutional Law of the Exception] (Mohr Siebeck, 2020) 234.

20 Einat Albin et al note that in Israel, during the first year of the pandemic, the Supreme Court 'generally placed less emphasis on activist substantive judicial oversight of the government's measures themselves, and more emphasis on protecting procedural safeguards and parliament's ability to control the government's measures': Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross and Tamar Hostovsky-Brandes, 'Israel: Legal Response to Covid-19' in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press, 2021) [52] (online, 9 November 2021) <https://oxcon.ouplaw.com/home/occ19>.

21 Liz Hicks and Sangeetha Pillai, 'Proportionality, Rights and Australia's COVID-19 Response: Insights from the India Travel Ban', *auspublaw* (Blog Post, 16 August 2021) <https://auspublaw.org/2021/08/proportionality-rights-and-australias-covid-19-response-insights-from-the-india-travel-ban>.

approach to proportionality testing, 'with the Court demonstrating greater willingness to strike down Covid-19 measures on substantive grounds'.[22]

Courts in Germany similarly demonstrated a greater readiness to intervene in restrictions and find them disproportionate as time passed and the acute phases of the emergency lessened.[23] Judicial deference in administrative courts corresponded inversely to the 'waves' of the pandemic: courts were reluctant to find restrictions were disproportionate during the initial wave (March and April 2020) and during the peak of the second wave (December 2020 until April 2021).[24] In Germany the Federal Constitutional Court recognised the legislator's discretion to assess unstable evidence in a challenge to the April 2021 'federal emergency brake'.[25] This federal legislation was introduced at the height of the third Alpha wave and provided for certain restrictions — including contact restrictions and a curfew — once certain case numbers were reached. The Court stated that, where the legislature only has a limited ability to accurately assess an emergency situation because of 'factual uncertainty', the Court can only consider the 'suitability' of a measure in terms of how tenable the legislator's justification for it is.[26] German administrative courts nonetheless began to question 'blanket' restrictions when vaccination initially emerged as a means of mitigating individual risk. A number of German administrative court decisions emerged in the latter half of 2021 invalidating restrictions to the extent that they applied to fully vaccinated or recovered patrons.[27] In these cases, courts relied upon evidence at the time that fully vaccinated or recovered individuals contributed to the case burden in only a minor way. Restrictions therefore lacked proportionality in the strict sense.

A successful challenge to 'caps' on the number of international arrivals in Israel in March 2021 provides an example of the Israeli courts' 'shift' in approach

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22 Albin et al (n 20) [53].

23 Anna-Bettina Kaiser and Roman Hensel, 'Federal Republic of Germany: Legal Response to Covid-19' in Jeff King and Octávio LM Ferraz (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press, 2021) [46] (online, 23 October 2021) <https://oxcon.ouplaw.com/home/occ19> ('[W]ith increasing knowledge on the pandemic, judicial review of state action became more robust, sometimes considerably restricting the margin of appreciation of the Länder's governments'). See also Kappler (n 17) 131 ('With increasing experience and growing knowledge of the mechanisms of the spread of the virus, some measures have proven to be too excessive and [been] corrected by the courts').

24 I thank Roman Hensel for this observation. For an empirical analysis of decisions on the proportionality of restrictions, see Anika Klafki, 'Kontingenz des Rechts in der Krise: Rechtsempirische Analyse gerichtlicher Argumentationsmuster in der Corona-Pandemie' [Contingency of Law in the Crisis: Legal-Empirical Analysis of Court Argumentation Frameworks during the COVID Pandemic] (2021) 69 *Jahrbuch des öffentlichen Rechts* [Yearbook of Public Law] 583, 592–9. Klafki's analysis must be read with the caveat that published decisions do not represent a complete dataset of all decisions in Germany connected with pandemic restrictions. German administrative courts are not required to publish all decisions, with judges deciding which decisions should be published based on perceived importance. Judges may have deemed decisions that upheld restrictions over time to be of less interest, therefore not warranting publication.

25 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 781/21, 19 November 2021 <https://www.bundesverfassungsgericht.de/e/rs20211119_1bvr078121.html>.

26 Ibid [185].

27 See, eg, Verwaltungsgericht Frankfurt/Main [VG] [Administrative Court of Frankfurt am Main], 5 L 2709/21.F, 29 September 2021 reported in openJur 2021, 31207 <https://openjur.de/u/2360691.html>; Verwaltungsgericht Berlin [Berlin Administrative Court], VG 14 L 467/121, 20 August 2021 reported in openJur 2021, 24607 <https://openjur.de/u/2349428.html>.

to assessing the proportionality of restrictions. From February 2020 until January 2021, Israel required international arrivals to complete 14 days of home quarantine. Only citizens and residents, or those with a relationship to an Israeli citizen, were permitted to enter Israel.[28] A mass vaccination program was launched in December 2020. Case numbers nonetheless rose in December with the emergence of the Alpha variant.[29] On 5 February 2021 Israel issued regulations restricting its citizens and permanent residents from leaving Israel unless they lived regularly outside Israel, or met set criteria for an exception, to be approved by a committee. Individuals similarly needed to apply to an exceptions committee for permission to enter Israel.[30] Those who left Israel on an exemption were permitted to re-enter automatically. Exceptions applied to those with compelling reasons.[31] On 12 February 2021 the Israeli government introduced a cap of 2,000 people per day for entry into Israel and departure from Israel. On 7 March 2021 the regulations were amended to allow fully vaccinated citizens and permanent residents to leave without an exemption and the cap was raised to 3,000 people per day.[32] In *Shemesh v Prime Minister* applicants brought a challenge against the initial regime that prohibited entry to and departure from Israel without an exemption. This petition was later amended to a challenge to the cap on daily arrivals.[33]

The High Court of Justice found that the daily cap burdened the right of citizens to enter and exit Israel freely in art 6 of the Basic Law of Human Dignity and Liberty[34] in a way that was not proportionate. An associated finding was that the caps also burdened the right to vote, as elections were soon to be held.[35] All three Justices who heard the challenge found that the cap lacked proportionality at the 'necessity' stage of proportionality testing, as a less restrictive alternative was available. The Israeli government had defended the restrictions due to non-compliance with self-isolation directives among those returning. Its submissions focused on the operational difficulties associated with enforcing compliance[36] as well as the need to adopt the precautionary principle due to the spread of the Alpha variant.[37] Supreme Court President Hayut noted that the government had failed to

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28 Albin et al (n 20) [81]–[90].

29 Ibid.

30 *Special Authorities Regulations to Combat the Novel Coronavirus (Temporary Provision) (Limitations of Exit and Entry from Israel) 2021* (5 February 2021) (Israel). See discussion in Albin et al (n 20) [88].

31 Albin et al (n 20) [89].

32 *Special Authorities Regulations to Combat the Novel Coronavirus (Temporary Provision) (Restrictions on Operation of Airports and Flights) (Amendment No 13) 2020* (18 February 2021) (Israel); *Special Authorities Regulations to Combat the Novel Coronavirus (Temporary Provision) (Limitations of Exit and Entry from Israel) (Amendment No 4) 2020* (6 March 2021) (Israel). See ibid.

33 *Shemesh v Prime Minister* (2021) HCJ 1107/21 High Court of Justice (Israel) (17 March 2021) ('*Shemesh*'). The Supreme Court sits as the High Court of Justice conducting judicial review of executive action and legislation: see Albin et al (n 20).

34 Basic Law of 1992, Human Dignity and Liberty (Israel) [tr Israel Ministry of Foreign Affairs] art 6 ('Leaving and entering Israel') provides: 'All persons are free to leave Israel. Every Israel national has the right of entry into Israel from abroad.'

35 *Shemesh* (n 33) [21] (Hayut P) <https://he.afiklaw.com/caselaw/12122>. It is worth noting that Israel does not allow for overseas voting outside very narrow circumstances.

36 Ibid [27].

37 Ibid [30].

adequately explain why enforcement of home isolation could not be strengthened or greater penalties imposed to encourage compliance.[38]

Hayut P also observed that the government's explanation justified the caps on the basis of convenience and simplicity, rather than necessity.[39] Amit J accepted the need to apply the precautionary principle with respect to the risk of new variants entering Israel against which a vaccine may not be effective.[40] However, Amit J's judgment similarly noted that alternative, less restrictive measures — including the introduction of electronic bracelets and monitoring — could respond to that risk.[41] Hayut P also noted that, given the government's lack of data regarding those who were affected by the arrival caps, the caps also lacked proportionality in the narrow sense. While the Court should have regard to the precautionary principle, the benefits conferred by the caps were outweighed by the harms they inflicted. This is because the benefit they conferred was abstract and uncertain.[42] In this way the Court was prepared to analyse risk and harm beyond that to health alone.

The Court in *Shemesh* expressly raised themes of resource allocation and proportionality over time. It began with a description of restrictions on international movement since the beginning of the pandemic, locating the challenged restrictions in that context.[43] When discussing the lack of governmental data on the number of citizens stranded abroad, Hayut P drew attention to the length of time available to the government to procure that data.[44] Hayut P also noted that the virus was 'not expected to disappear' in the foreseeable future notwithstanding vaccination. This called for a greater scrutiny of the balance between fundamental rights and control of the virus over time.[45] In assessing the 'necessity' of flight caps, Amit J's judgment questioned why alternative measures such as electronic bracelets had not been introduced earlier.[46] The Court's reasoning in *Shemesh* accordingly addressed the problem of executive path dependence. It took the time period over which the emergency had extended into account when scrutinising the proportionality of a restriction.

Increasing the intensity of proportionality review over time mirrors how courts approached scrutinising the executive during the pandemic elsewhere. In India, the Supreme Court was prepared to openly articulate how its role 'transformed' as time passed in the pandemic, during which it adopted a 'dialogic jurisdiction'.[47] Dialogic review requires that the executive justify the basis of its decisions about the management of the pandemic, allowing the Court the ability in

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38 Ibid [28].
39 Ibid [29].
40 Ibid [13].
41 Ibid [14]–[17].
42 Ibid [30] (Hayut P).
43 Ibid [1] (Hayut P).
44 Ibid [31].
45 Ibid [33].
46 Ibid [14].
47 *Re Distribution of Essential Supplies and Services during the Pandemic* (Supreme Court of India) Suo Moto Writ Petition (Civil) No 3 of 2021 determined 31 May 2021. I am grateful to Gautam Bhatia for this observation. See Gautam Bhatia, 'Coronavirus and the Constitution — XXXVII: Dialogic Review and the Supreme Court (2)', *Indian Constitutional Law and Philosophy* (Blog Post, 3 June 2021) <https://indconlawphil.wordpress.com/tag/dialogic-review>.

scrutinise them for constitutional compliance without invalidating them. Should the executive fail to modify the policy to ensure its compliance, the Court will then move to invalidate those aspects of a policy.[48] In taking *suo motu* cognisance of aspects of the federal executive's management of the pandemic during India's 'second wave', including the distribution of oxygen and vaccines, the Indian Supreme Court articulated a description of its role in a protracted emergency. It noted that judicial scrutiny is 'transformed' during public health emergencies, 'where the executive functions in rapid consultation with scientists and other experts'.[49] It referred approvingly, however, to Alito J's dissenting opinion in a United States Supreme Court decision that denied an emergency application to hold religious services during the pandemic. Alito J stated that a public health emergency does not provide the executive with

> *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.[50]

Some courts, then, were more willing to intervene in executive restrictions as the COVID-19 pandemic crystallised into a protracted societal and political problem. This demonstrates one strength of proportionality testing during a protracted crisis: it interrupts the risk of executive 'path dependency' establishing itself, where executives do not invest in systems or deploy resources to adapt to a 'new normal' because they continue to experience less, or different, public pressure than in non-emergency settings. This benefit of proportionality testing is particularly relevant where a public is not agitating for the interests of discrete groups of people affected by restrictions — such as those with compelling reasons to return to a country over the medium term during a pandemic. The successful challenge to arrival caps in Israel demonstrates how this can force the executive to invest in systems as a problem establishes itself as a new status quo, rather than continuing to choose 'short-term' measures because of their convenience or simplicity.

An increasing willingness of courts to intervene as the pandemic became a protracted problem reveals itself in how courts approached evidence to 'give the benefit of the doubt' to governments defending restrictions. The initial deference that courts were willing to give when the pandemic began was connected to uncertainty, urgency and instability — settings involving an immediate, 'existential' threat as I described above. And yet the Israeli High Court approached evidence and uncertainty in *Shemesh* in favour of those challenging the arrival restrictions. It found the harm to those affected by flight caps outweighed the abstract and uncertain benefits that the flight caps conferred, given community transmission was already established in Israel and alternative means of quarantine enforcement were available. In light of the certainty surrounding the harms the caps inflicted, the Court adopted

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48 Bhatia (n 47).

49 *Re Distribution of Essential Supplies and Services during the Pandemic* (Supreme Court of India) Suo Moto Writ Petition (Civil) No 3 of 2021 determined 31 May 2021. The Court further noted: 'Any over-zealous judicial intervention, though well-meaning, in the absence of expert advice or administrative experience may lead to unintended circumstances where the executive is left with little room to explore innovative solutions.'

50 *Calvary Chapel Dayton Valley v Sisolak* (US, No 19A1070, 24 July 2020) slip op 1, 3.

a more critical stance to the government's invocation of the precautionary principle. How courts apply proportionality testing in crisis settings may vary according to the urgency of that crisis. *Shemesh* demonstrates that in less urgent settings, some courts have been more willing to interrogate a paucity of evidence.

2 *Allocation of Scarce Resources*

As earlier explained in Part II(A), the NZ model of proportionality analysis is less sceptical of majoritarian political processes. It places its faith in Parliament rather than the executive. It is also associated with a legal culture that supports a greater degree of deference. This is reflected in the decision in *Grounded Kiwis Group Inc v Ministry of Health*.[51]

In pursuit of its elimination strategy, New Zealand required arrivals to isolate in government-run managed isolation and quarantine facilities ('MIQFs'). This policy remained in place from April 2020 until February 2022. For periods in late 2020 and much of 2021, demand for places in MIQFs exceeded supply. From November 2020, the NZ government began to issue vouchers to passengers for quarantine facilities on a 'first come, first served' basis via an online booking system. A separate allocation was retained for emergency cases. During this period the online system for applying for vouchers was not regulated. Media reports noted that 'tech-savvy New Zealanders' were using computer codes to acquire places, new vouchers were released in the middle of the night, there was no queue and others were paying for 'freelance computer programmers' to monitor the site for them to acquire vouchers. Vouchers were reportedly allocated within 'seconds'.[52] These events were compounded by a community outbreak of the Delta variant in Auckland in August 2021, which required that MIQF places be used to quarantine some community cases.

On 20 September 2021, the NZ government introduced a 'virtual lobby system' to allocate vouchers for MIQF places on a randomised basis. The virtual lobby system did not take into account how long citizens had been waiting outside New Zealand. From 12 October the Minister for the COVID-19 Response sought to further reduce demand by allowing low-risk close contacts and asymptomatic cases to quarantine at home. From 19 October, large numbers of people with COVID-19 were being allowed to quarantine at home. From 14 November, quarantine in MIQF was reduced to seven days. The criteria to qualify for an emergency place in MIQF was also expanded.

A network of NZ citizens — 'Grounded Kiwis' — sought to challenge aspects of the managed isolation and quarantine system in place during the period between 1 September 2021 and 17 December 2021 (the 'relevant period'). They argued that aspects breached the right to return. The status of the *New Zealand Bill of Rights Act 1990* (NZ) as ordinary legislation means that it binds the executive — in this case, decisions made by the Minister of Health about managed isolation and quarantine. Section 18(2) provides that '[e]very New Zealand citizen has the right

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51 *Grounded Kiwis Group Inc v Ministry of Health* [2022] 3 NZLR 19 ('*Grounded Kiwis*').
52 Ibid 44 [80].

to enter New Zealand'. This right is subject to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[53] As also explained above in Part II(A), this has been clarified to include a variety of structured proportionality testing.[54] Grounded Kiwis argued that, during the relevant period, those who had contracted the virus in the community as well as their close contacts were permitted to self-isolate. Even though the period of quarantine in MIQF was reduced to seven days during the relevant period, Grounded Kiwis argued that this was expedient because of increased demand by community cases, which therefore didn't increase capacity for international arrivals. It argued that a move to home quarantine or reduction of the period of quarantine in MIQF to seven days should have occurred earlier, including before the Delta variant established itself in the NZ community. In this way, Grounded Kiwis' argument addressed questions of timing that go to the problem of 'executive path dependency' I described in Part II(B)(1). It challenged the government's choices regarding infrastructure because the prolonged nature of the emergency made other choices available.

Grounded Kiwis also challenged the randomised way that the 'virtual lobby system' allocated places in MIQF. The group argued that the failure of this system to factor in how long citizens had been waiting to return breached the right to return, as did a failure to prioritise NZ citizens over other applicants for vouchers. Finally, Grounded Kiwis argued that the allocation of places for groups such as international sporting teams unjustifiably infringed the right of citizens to return because it reduced available places for them.

Mallon J rejected the argument that the government should have implemented self-isolation for low-risk arrivals prior to the Delta outbreak. Her Honour noted that there was a higher risk involved with self-isolation, including of low-risk arrivals from Australia, and concluded that the Minister and the NZ government were 'entitled to adopt a precautionary response'.[55] In this way Mallon J's approach to the precautionary principle contrasts with that of the Israeli High Court of Justice in *Shemesh*, where it questioned the government's argument regarding the precautionary principle. In *Shemesh* the Court accepted that alternative measures such as greater enforcement and penalties could mitigate that greater risk. In *Grounded Kiwis*, Mallon J deferred more to the government's evidence on the availability of those alternatives. With respect to alternatives that were potentially higher risk, her Honour stated that it was appropriate for the Court 'to give leeway to the Minister, and the expert advice he was receiving in this area, in decisions about this'.[56] Grounded Kiwis had also accepted that 'the Court is not equipped to determine disputed issues of scientific or technical opinion'.[57]

Mallon J also rejected the argument that the requirement to hold a voucher for managed isolation and quarantine during the relevant period was an unjustified infringement on the right of New Zealanders to enter their country *after* the Delta outbreak had established itself in the community, including for returning those

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53 *New Zealand Bill of Rights Act 1990* (NZ) s 5.
54 *Hansen* (n 16) 40–1.
55 *Grounded Kiwis* (n 51) 91 [302].
56 Ibid.
57 Ibid 94–5 [317].

citizens who had been vaccinated. Mallon J accepted that the number of community cases surpassed the number of positive cases among international arrivals within days of the outbreak. Nonetheless, her Honour accepted expert evidence that international arrivals could risk seeding new clusters in areas without cases, particularly outside Auckland. There was also the risk that a new variant could be introduced. Mallon J therefore concluded that the continued use of MIQFs for international arrivals was proportionate notwithstanding the differential treatment of community cases. Mallon J took the view that the Court 'should appropriately defer to the evidence of the experts' with respect to how to assess risk.[58] Her Honour noted that a 'more proportionate alternative' could have been to allow self-isolation on a case-by-case basis, but there was already scope for this after a previous court decision.[59] This approach to evidence and deference was similar to that taken by the Canadian Federal Court in an unsuccessful challenge to the requirement that arrivals by air, but not land, quarantine in hotels. In *Spencer v Canada*,[60] the Court referred to the precautionary principle and noted that it did not have access to the resources and specialised expertise necessary to 'second-guess' the Chief Medical Officer's decision. The reasoning in the NZ and Canadian courts once more contrasts with the approach taken in *Shemesh*, where the Court rejected the Israeli government's argument that restrictions were justified to prevent further outbreaks and contain the threat of further variants. This difference can arguably be explained by the approach to evidence and deference taken by the 'Commonwealth model' of constitutionalism that I explored in Part II(A) above. Contrasting these cases, then, suggests that courts adhering to the Commonwealth model maintained a reluctance to interrogate the executive's reliance on public health evidence or its approach to risk even as the pandemic became a protracted problem.

Mallon J did, however, find that the Minister and the NZ government had failed to properly allocate places in hotel quarantine in a way that was consistent with the right of NZ citizens to return to their country. Her Honour agreed with Grounded Kiwis' argument that a technical solution could have allowed for a priority system that allocated places to those who had already experienced unreasonable delay.[61] The 'virtual lobby' system did not provide for such prioritisation. Other aspects of the system — such as a failure to limit places to those with a legal right to enter — also meant places were not efficiently allocated.[62] Mallon J concluded that it was a 'flawed system for giving effect to the right of New Zealanders to enter their country' because some applicants had a greater call on that right than others. Her Honour concluded that 'alternatives should have been pursued'.[63] The failure to implement a prioritising system 'disproportionately gave weight to public health risks over an individual's right to return. The system needed to be able to cater for individuals that were experiencing undue delay.'[64] The mechanism for allocating emergency places did not do so because it lacked sufficient resources to applications

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58 *Grounded Kiwis* (n 51) 104 [361].
59 *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment* [2021] 3 NZLR 425.
60 *Spencer v Canada* [2021] FC 361.
61 *Grounded Kiwis* (n 51) 96–7 [328].
62 Ibid 99 [340]–[341].
63 Ibid 99–100 [343].
64 Ibid 105 [364].

made within the timeframes it set[65] and some of the categories for which it provided were too narrow.[66]

Grounded Kiwis, like *Spencer v Canada*, suggests that some courts in the Commonwealth world applied more deference to executive decisions during the pandemic than courts elsewhere, notwithstanding the passage of time. The Court in *Grounded Kiwis* was not receptive to arguments regarding what I have described as 'executive path dependency' — a failure to invest in, or organise, infrastructure over time in a way that rendered restrictions on rights less necessary. But *Grounded Kiwis* does demonstrate that, even in more deferential courts, proportionality analysis can retain a function in scrutinising how scarce resources are allocated. This provides other benefits in protracted emergency settings.

III Australia's Proportionality Protections in Protracted Emergencies

A *Australia's Constitutional Protections of Proportionality*

1 *Faith in Majoritarianism*

Australia is a case study to produce generalisable insights into how proportionality considerations function in protracted emergency settings where those considerations aren't underwritten by entrenched constitutional or statutory bills of rights. Australia lacks a constitutionally entrenched or federal statutory bill of rights. While it protects some individual interests, those interests are largely connected with the focus of the constitutional document: federalism and trade.[67] A patchwork of proportionality considerations nonetheless extends across the Australian public law landscape. The stance of those considerations toward majoritarian political processes is, however, distinct from that of other proportionality models I explored in Part II(A) above. This can be explained by the political context and concerns that animated the *Australian Constitution*. The new federation emerged from a society that inherited rather than rejected British intellectual tradition. This included the British tradition's faith in political institutions and responsible and representative government.[68] That context predated a distrust of majoritarianism. To the extent that federalism was intended to moderate majoritarianism, it would do so through institutions — majorities and minorities defined by state and Commonwealth populaces.

The convention debates reflect concerns that judicial review of rights could obstruct majority will. South Australian delegate John Gordon, for instance, stated that it would be 'monstrous' were 'any individual' allowed to impugn 'a law

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65 Ibid 108 [385].

66 Ibid 111 [404].

67 See, eg, Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018, Oxford University Press) 357, 367.

68 Ibid 368. See also Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 173.

expressing the will of the majority of the people'. Instead, the test of whether a law is 'righteous' is whether it is 'required in the interests of the whole'.[69] Similar sentiments emerged during debate as to whether the *Constitution* should include an equal protection clause. That debate had implications for the constitutionalising of citizenship, ultimately leading to a decision to leave such concerns to legislatures. The delegates were concerned that recognising citizenship could potentially extend to all British subjects — including those 'coloured aliens' who were members of colonies in the British Empire. Antecedent legislation of the White Australia policy[70] was already in place in the Western Australian colony.

The framers endorsed a framework of political mechanisms that would limit the power of governments by counterbalancing the will of differently constituted majorities against one another. This is not to say that the Australian model was designed in ignorance of the risks to which later models of proportionality advert — that legislatures or executives may pursue policies for their expediency or convenience at the expense of the rights of smaller groups. The convention debates make it clear the framers intended to allow legislatures and executives the flexibility to determine, or override, such rights. Proportionality was a framework that could only connect with structures and values for which the *Constitution* did provide, such as federalism and freedom of trade and commerce between the states. In other matters — such as the relationship between individual citizens and the state or majorities and minorities — proportionality was a political question addressed through electoral mechanisms.

Proportionality therefore features in Australian constitutional law as a means of regulating the operation of constitutional structures and institutions. It is not grounded in a sceptical stance toward majoritarianism. Federal legislative power, for instance, must fall within the scope of an enumerated head of power in the *Constitution*; proportionality has been used to test whether legislation falls within the scope of certain federal legislative powers.[71] Proportionality has also been used to determine the circumstances in which legislatures can burden a freedom of trade, commerce and intercourse — a limit on federal and state legislative power entrenched in s 92.[72] More recently, structured proportionality analysis has emerged as a means of assessing whether legislation can permissibly burden a freedom of political communication implied from the constitutionally entrenched system of the representative government.[73]

In two instances challenges were brought to COVID-19 restrictions that argued those restrictions infringed principles that were implied in the *Constitution*. Both were unsuccessful. *Gerner v Victoria*[74] considered the existence of a 'freedom of [intrastate] movement' that was claimed to be 'implied from the text and

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69 *Official Report of the National Australasian Convention Debates*, Melbourne, 1 March 1898, 1,681. See also Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25 *Federal Law Review* 295.

70 *Immigration Restriction Act 1901* (Cth).

71 See Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 100–30.

72 Ibid 131–49. See also *Palmer v Western Australia* (2021) 272 CLR 505 ('*Palmer*').

73 See, eg, *McCloy v New South Wales* (2015) 257 CLR 178.

74 *Gerner v Victoria* (2020) 270 CLR 412.

structure' of the *Constitution*.[75] The High Court rejected this argument due to a lack of authority. The Court noted that the constitutional framers were concerned with 'movement between the States' and not motivated to deny state legislatures authority over intrastate movement.[76] In *Athavle v New South Wales*[77] members of a religious community argued that state public health orders issued in New South Wales infringed a right of religious freedom implied by s 116 of the *Constitution*. The Federal Court dismissed this argument, finding that its relationship to the principles that gave rise to the implied freedom of political communication was tenuous.[78] Both *Gerner* and *Athavle* demonstrate the difficulty of relying on constitutional implication to establish constitutional standards against which the proportionality of a restriction can be measured.

2 Palmer v Western Australia

The proportionality considerations that arise from Australian constitutional structures and freedoms can indirectly protect individuals affected by majoritarian political processes. However, the indirect nature of that protection — coupled with the culture of legalism that Australia's system of political constitutionalism has supported — means that Australian courts tend to apply those proportionality considerations with a great degree of deference. An unsuccessful s 92 challenge to restrictions on entry into Western Australia early in the pandemic arguably demonstrates this tendency. *Palmer v Western Australia* concerned a challenge by an Australian businessman to restrictions on entry into the state of Western Australia unless individuals fell within a limited number of exempt categories.[79] The *Quarantine (Closing the Border) Directions* (WA) ('*Directions*'), which the WA government implemented on 16 March 2020, prevented Palmer from entering Western Australia to pursue his business interests. His application for an exemption had been refused. Palmer argued that the *Emergency Management Act 2005* (WA) which authorised the *Directions* and/or the *Directions* themselves breached the freedom of trade, commerce and intercourse among the states guaranteed in s 92 of the *Constitution*. Western Australia argued in its defence that the purpose of the legislation was to protect the WA populace against the pandemic and that there was no other, equally effective means available to achieve that purpose that imposed a lesser burden on the freedom of intercourse.

The Court unanimously upheld the *Directions* and the Act that empowered them, though the judges differed in their reasoning. Two caveats are required in comparing their reasoning to proportionality elsewhere. The most obvious of these is that the challenge did not concern restrictions on citizens returning to their country but instead restrictions on internal movement. It provides, however, a case study of the extent to which structures and freedoms in the *Australian Constitution* can indirectly protect a discrete group — those outside Western Australia with time-sensitive reasons to return — affected by measures that protect a larger majority.

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75 Ibid 419.
76 Ibid 425.
77 *Athavle v New South Wales* (2021) 290 FCR 406.
78 Ibid 426 [89].
79 *Palmer* (n 72).

State border closures aimed at limiting the incursion of the virus created periods of time where residents were 'stranded' outside their states. A second, arguably more fundamental caveat connects with the timing of the challenged restrictions in the lifespan of the pandemic. The restrictions that were challenged in *Palmer* were implemented in March 2020, when the longer term structure of the emergency had not yet crystallised. At the time the arguments were heard in late 2020, WA authorities had announced that a new system for exemptions would be implemented. The Federal Court, to which factual questions were remitted for findings of fact, noted the absence of a vaccine, uncertainty around testing, and lack of treatment as relevant to the proceedings. The date when *Palmer* was heard also precludes analysis of the approach of the Court over time. The absence of quarantine systems at the beginning of the pandemic similarly limits discussion of how resource allocation questions could have featured.

The Court's reasoning in *Palmer*, however, does reveal how it understood its role in relation to the legislature and executive in the emergency. The Court directed its analysis toward whether the *Emergency Management Act 2005* and the way it could be applied, rather than the *Directions* themselves, breached the freedom. With the exception of Edelman J, who nonetheless also found that the Act was valid, the Justices directed much of their attention toward methodological questions — especially the ongoing academic debate in Australian constitutional law as to whether the structured proportionality test that I explored in Part II(A) above should be incorporated within the existing approach to s 92 of the *Constitution*. There was limited discussion of how the structure or nature of an emergency could affect proportionality assessments or what the Court's role should be in such cases, despite this question being more crucial to the outcome than the incorporation of structured proportionality. All of the judgments assumed the question of how proportionality reasoning should interact with emergencies to be straightforward. Kiefel CJ and Keane J noted that the Act provided relevant safeguards — the emergency needed to be regularly renewed — and referred to the findings of fact in the Federal Court.[80] They addressed Palmer's arguments that a less burdensome alternative could have allowed persons from states with lesser risk to enter. Their Honours concluded that, were the Court to accept this argument, it would be to find that 'there is a level of risk which may be regarded as acceptable'. Because of the factual uncertainty that the Federal Court's findings had established, 'a precautionary approach should be adopted'.[81] While these factual findings were made at the beginning of the pandemic, the manner in which Kiefel CJ and Keane J treated the nature of risk assessments in emergencies — as a straightforward question warranting brief treatment — contrasts with the approach I have explored in the Israeli and NZ cases. Gageler J's judgment approached the question similarly, directing attention toward the structured proportionality question and dealing with the nature of the emergency briefly. Like Kiefel CJ and Keane J, Gageler J noted the constraints on the power to restrict movement built into the Act, including the requirement that the Minister for Emergency Services consider the advice of the State Emergency Coordinator.[82]

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80 *Palmer* (n 72) 533–4 [77]–[78].
81 Ibid 534 [79].
82 Ibid 557–8 [157].

Gordon J and Edelman J reasoned similarly in separate judgments:[83] Gordon J referred to the 'extraordinary' nature of the emergency[84] while Edelman J noted the 'extreme nature of the circumstances'.[85]

This tendency of the Court's approach — directing analysis to the empowering Act for executively determined restrictions rather than the restrictions themselves — meant that analysis of proportionality remained at a higher level of generality than the more granular analyses in *Shemesh* and *Grounded Kiwis*.[86] This affords a greater degree of discretion in specific cases to the executive, provided that legislatures have conferred that discretion in a way that is 'open-textured'[87] and where an emergency can be described as 'extreme'. Such an approach arguably forecloses the more nuanced approach to proportionality in protracted emergency settings that was evident in *Shemesh* and *Grounded Kiwis*, where the court could consider questions of state capacity and resource allocation. The Australian approach means that the court must address the nature of an emergency in binary terms: either an emergency is sufficiently serious to allow the executive a broad discretion to manage it, or it is not an emergency. *Palmer* suggests that the indirect protection afforded by s 92 — especially when combined with the legal culture that has grown around Australia's constitutional system — provides less space for judicial intervention into the proportionality questions that protracted emergencies can raise.

B *Administrative Law Protections*

1 *Limits of Legislative Proportionality Requirements*

Legislation can require that members of the executive take proportionality considerations into account when making decisions in an emergency setting. The nature of those requirements, however, allows less space for judicial scrutiny of a measure's proportionality. Challenges brought to determinations made under s 477 of the *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*') during the pandemic reveal that lack of space.

Section 477 permits the Minister for Health and Aged Care ('Health Minister') to make certain determinations when a biosecurity emergency has been declared. Before a determination may be issued under s 477, the Health Minister must be satisfied that the requirement they impose is appropriate and adapted to — and likely to play an effective part in achieving — its purpose;[88] that both the requirement and the manner in which it is pursued are no more restrictive or intrusive

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83 Ibid 561–4 [172]–[177] (Gordon J), 604–5 [283]–[286] (Edelman J).
84 Ibid 534 [78].
85 Ibid 505 [286].
86 See Tom Manousaridis, '*Palmer v Western Australia*: A Critique of the High Court of Australia's Approach to Constitutional Review of Executive Exercises of Power' (2022) 44(2) *Sydney Law Review* 295.
87 Edelman J employs this description in *Palmer* (n 72) 578 [219].
88 *Biosecurity Act 2015* (Cth) ss 477(4)(a), (b).

than required in the circumstances;[89] and that the requirement does not apply for longer than necessary.[90] These criteria broadly map onto the 'suitability' and 'necessity' elements of structured proportionality. They are, however, legislative standards incorporated by Parliament rather than constitutional standards against which legislative and executive acts may be measured. Legislative standards are comparatively weaker, particularly when framed in the terms employed by s 477 of the *Biosecurity Act*. Section 477 merely requires that the Minister be subjectively satisfied that a measure meets the proportionality considerations that it details. That the power is conferred upon the Health Minister personally structures it as one where personal 'experience, understanding, knowledge and resources' may colour the value judgment reached.[91]

In this way, a s 477 proportionality assessment asks *different questions* to those prompted by models underpinned by rights. What matters is not whether a right has been restricted in a way that is proportionate, but whether the legislative requirements that s 477 imposes — a process that the Health Minister must follow before they can be satisfied that a restriction is proportionate — have been met. This difference turns on matters of evidence and reasoning. The rights-based model of proportionality asks substantive questions. It purports to interrogate the objective reality that underpins the suitability, the necessity and the strict proportionality of a restriction. *Shemesh* demonstrates that this can involve robust questioning of the evidence and justification for a restriction. While deference still operates within this model — particularly in the emergency settings that I discussed in Part II(B) above — courts are more empowered and willing to critically appraise the quality of evidence underpinning the state's reasoning. In contrast, the terms in which s 477 is phrased confers power on the Health Minister personally to reach a subjective judgment. This confines the court to an evidential inquiry parsed along very different lines of merit and legality to the inquiry conducted by the rights-based proportionality model. What matters is whether the Health Minister was *capable* of being satisfied of a particular matter, not whether it was the most compelling conclusion on the facts. In Australian administrative law this latter question is considered the domain of the executive. Such questions do not go to the 'legality' of the decision — matters that can be judicially reviewed — because no rights catalogue supplies a standard against which to measure them and bring them into the legal domain.

The logic of these two notions of proportionality lends itself to comparison in terms of the political process. Rights-based proportionality models are grounded in scepticism of the extent to which a popularly elected branch of government will have regard to the rights of smaller groups unable to meaningfully influence political processes. Legislative proportionality considerations, in contrast, reflect greater institutional trust in those popularly elected branches than in courts. In settings that involve unstable factual circumstances with multiple risk factors and considerations in play, decisions cannot be easily programmed by a legally determinate standard. Conferring the power of that decision on a Minister — accountable to Cabinet, to

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89 Ibid ss 477(4)(c), (d).
90 Ibid s 477(4)(e).
91 *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409, 428.

Parliament and to the electorate — recognises the complex character of decision-making in a crisis response. In such circumstances, choices are 'tragic choices' where the optimal outcome is not clear. If 'tragic choices' must be made, they are better made as the prerogative of elected representatives than of courts.[92]

At the beginning of the pandemic the Health Minister relied upon s 477 to ban Australian citizens and residents from leaving Australia unless they fell into certain exempted categories or received an exemption for exceptional circumstances ('Outward Travel Ban').[93] In April 2021 the Health Minister also relied upon s 477 to ban any person who had been in India during the previous 14 days from entering Australia ('India Travel Ban').[94] Criminal penalties attach to a breach of a s 477 determination: a potential custodial sentence of up to five years, a fine of up to $66,000, or both.[95] This was intended to close the 'loophole' that would allow Australians who had been in India during the previous 14 days to return via third countries.[96]

2 *India Travel Ban*

The limitations of legislative proportionality requirements are reflected in *Newman v Minister for Health and Aged Care*,[97] an unsuccessful Federal Court challenge to the India Travel Ban. Newman argued grounds in both administrative law and constitutional law, though only the former were ultimately heard. Among other arguments, Newman claimed that the Minister had failed to consider whether there were less restrictive measures that could have managed the public health risk other than criminalising re-entry into Australia. He noted that the health advice from the Chief Medical Officer, upon which the Health Minister had relied, did not advise on alternative means or the appropriateness of imposing a criminal penalty.[98]

The Court rejected Newman's proportionality argument, finding that the Health Minister was capable of being satisfied of the 'proportionality considerations' delineated in s 477 of the *Biosecurity Act*. Thawley J noted that the requirements in s 477 do not require the Minister to consider 'every single fact which might be thought of as being potentially relevant' before being satisfied of the matters it lists.[99] His Honour accepted that the Health Minister had considered the Chief Medical Officer's advice and concluded that the Minister had considered whether less restrictive alternatives were available because the India Travel Ban carved out

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92 See, eg, discussion of decision-making in crises as 'polycentric' in HP Lee, Michael WR Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 235.

93 *Biosecurity Act (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth).

94 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021* (Cth).

95 *Biosecurity Act 2015* (Cth) s 479.

96 See, eg, Michelle Grattan, 'India Travel Ban Falls as Morrison Tries to Escape the Branding of His Government as a Moral Pariah', *The Conversation* (online, 6 May 2021) <https://www.abc.net.au/news/2021-05-07/coronavirus-india-light-ban-lifted/100120932>.

97 *Newman v Minister for Health and Aged Care* (2021) 173 ALD 88 ('*Newman*').

98 Ibid 100–1 [47].

99 Ibid 102 [52].

exceptions: it permitted arrivals on government-facilitated flights and emergency medical evacuation flights.

The Court's rejection of Newman's argument flowed from how the s 477 proportionality analysis interacts with evidence. As the Chief Medical Officer's advice supported the introduction of those restrictions, the quality of that evidence — the Chief Medical Officer's advice — was not tested. Thawley J noted that the Chief Medical Officer provided a clear opinion that 'further relief would come to the Australian quarantine system' by taking the further step of criminalising transit to Australia via third countries in addition to the existing suspension of flights from India.[100] That advice noted that the number of positive cases in hotel quarantine programs had sharply increased during the previous week to 1.8% of cases, and over half of those were arrivals from India. The advice then adverted to the risk that positive cases in hotel quarantine could 'leak' into the Australian community. It cited recent examples of 'leaks' in New South Wales and Western Australia.[101] The Chief Medical Officer elsewhere stated that the Australian Health Protection Principal Committee ('AHPPC') had provided advice that positive cases in hotel quarantine programs would reach a 'benchmark of concern' at 2%.[102] It was clear that the Health Minister had read the Chief Medical Officer's advice and had therefore turned his mind to the considerations set out in s 477. There was also evidence available on which the Minister *could* be satisfied of those considerations even if it were not the most compelling view.

Because it condenses the inquiry of proportionality and alternative means into narrower questions — whether it was open to the Minister to reach a particular conclusion — s 477 bypasses questions regarding the approach of governments over time. It was only open to the Court to ask whether the Minister had considered whether less restrictive means were available. It could not interrogate underlying assumptions and government choices that supported that state of satisfaction and assess their proportionality. For instance, the WA example of 'leakage' from a hotel quarantine program that the Chief Medical Officer noted in his advice was connected with a state government error. Despite warnings in March 2021 that the Mercure hotel in Perth was at 'high risk' of positive cases spreading into the community due to inadequate ventilation, the hotel continued to be used.[103] The 2% threshold that the AHPPC cited as a 'benchmark' before positive cases in hotel quarantine became unsafe similarly embeds certain assumptions about government behaviour and choices that the Court could not analyse. The benchmark assumes that a degree of leakage is inevitable and cannot be mitigated by alternative means. This contrasts starkly with the approach that could be taken in *Shemesh*, where the Israeli High Court rejected the state's arguments regarding non-compliance as arguments of

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100 Ibid 103–4 [61].

101 Letter from Paul Kelly to Greg Hunt, 30 April 2021, available in 'Affidavit of Michael David Bradley', Submission in *Newman v Minister for Health and Aged Care* (Federal Court of Australia, NSD388/2021, 10 May 2021) <https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/84496/NSD388of2021-Affidavit-20210505.pdf> 12–15.

102 Interview with Paul Kelly (Laura Jayes, Sky News, 3 May 2021).

103 Rhiannon Shine, 'WA Hotel Quarantine Report Warned of "High-Risk" COVID-19 Dangers a Month before Perth Lockdown', *ABC News* (online, 27 April 2021) <https://www.abc.net.au/news/2021-04-27/wa-hotel-quarantine-report-warned-of-dangers-a-month-ago/100098824>.

'convenience' rather than 'necessity'; alternative means were available to mitigate that risk, albeit ones that required government investment.

The Court similarly rejected Newman's principle of legality argument. Both parties accepted — and the Court affirmed — that Australian citizens have a fundamental common law right to re-enter Australia. Nonetheless, the Court found that Parliament had expressed a sufficiently clear intention that the India Travel Ban apply to Australian citizens. This displaced the common law right to re-enter Australia. Thawley J inferred this intention from the deliberate breadth of the terms in which s 477 is phrased and the references in that section to limits on people moving in and out of Australia. His Honour therefore concluded that the utility of s 477 would be undermined should it be interpreted to only apply to limiting the movement of non-citizens.[104] That s 477 also incorporates legislative proportionality considerations also indicated Parliament had contemplated that rights would be restricted.[105]

3 *Outward Travel Ban*

The case *LibertyWorks Inc v Commonwealth*[106] concerned a September 2021 challenge to the outbound restrictions on international movement made under s 477 of the *Biosecurity Act*. While the Outward Travel Ban did not directly involve repatriation rights, it reflected a similar logic to repatriation restrictions. Restrictions on leaving Australia were intended to limit the numbers of those who would need to return. In this way those restrictions also connected with limiting demand on quarantine systems and resource allocation over time. That restriction remained in place from 25 March 2020 until 1 November 2021, when a 'blanket' exemption was provided to fully vaccinated citizens and residents. To the extent that the Outward Travel Ban affected those with time-sensitive reasons to leave Australia who were not eligible for an exemption, it also involved the problem of a smaller group whose rights were affected for the benefit of a larger collective.

LibertyWorks, a libertarian think-tank, argued that the Outward Travel Ban was not authorised by s 477. Its argument relied upon principles of statutory construction that raised proportionality considerations indirectly. Section 477(6) prohibits the Minister from making a human biosecurity control order under s 477(1). A separate part of the Act regulates human biosecurity control orders over individuals and is subject to a different set of controls, including the requirement that the individual have symptoms or have been exposed to a listed human disease. LibertyWorks argued that, because a restriction on leaving Australia was similar to that provided for in a human biosecurity control order, the Outward Travel Ban was not authorised under s 477(1).[107] In doing so, it relied upon a similar principle of legality argument to that raised in *Newman*. It also raised Australia's international obligations regarding freedom of movement.[108]

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104 *Newman* (n 97) 111 [95].
105 Ibid 110–11 [94].
106 *LibertyWorks Inc v Commonwealth* (2021) 286 FCR 131.
107 Ibid 137.
108 Ibid 146–7.

Katzmann, Wigney and Thawley JJ rejected LibertyWorks' argument. Like the Court in *Newman*, the Court in *LibertyWorks* found that proportionality requirements incorporated in s 477(4) effectively displaced common law rights to re-enter Australia.[109] This satisfied the principle of legality. The brevity of the Court's analysis in this regard again reflects the limitations of legislative proportionality requirements. It noted that international obligations regarding freedom of movement are not absolute. It then noted that the proportionality considerations incorporated in s 477(4) had been examined in a Human Rights Compatibility Statement when the Bill was proposed.[110] For the reasons explained in Part III(B)(1) above, such an inquiry could not test the quality of evidence and justification informing the Minister's proportionality assessment.[111]

C *Political Accountability: Public Pressure, Quarantine Capacity and Quarantine Federalism*

1 *Public Pressure and Quarantine Capacity*

I have explained the Australian system's preference for political, rather than legal, mechanisms to 'check' the proportionality of the executive's response to a crisis. I have also explored how Australian constitutional structures embed a certain concept of political accountability. Australia's system trusts the voting public to hold the legislature and executive government to account when they fail to act in the interests of smaller groups. We can think of this as a form of 'electoral proportionality reasoning': how public will forms and exerts influence to ensure that legislative and executive action does not restrict rights unnecessarily and that the benefit conferred by any restriction of rights outweighs the burden it imposes.

Crisis settings and emergencies further alter the conditions in which public opinion and political pressure on executive government forms. Crises orient decision-making toward utilitarianism and the collective (majorities) — toward which Australia's system is already tilted. They create an atmosphere of urgency and fear that deflects concern away from rapidly constituted minorities 'caught under the wheels' of collective-benefitting measures.[112] This undermines dispassionate analysis of whether alternative, less restrictive measures could achieve the same ends. As I argued earlier in Part II(B), whether a restriction is necessary to resolve a protracted problem cannot be separated from the question of governmental choices over time. Alternative means become available through governmental choices to expand capacity. As the crisis crystallises into a new status quo, the proportionality of a restriction depends on whether the state is deploying the resources at its disposal

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109 Ibid.

110 Ibid.

111 For a critique of the Court's approach to the principle of legality in this case see Bruce Chen, 'No Way Out? Australia's Overseas Travel Ban and "Rights-Based" Interpretation' (2022) 10(1) *Griffith Journal of Law & Human Dignity* 53.

112 See, eg, Julie Anne Lee, Anat Bardi, Ella Daniel, Maya Benish-Weisman and Ronald Fischer, 'Our Research Shows COVID Has Made Australians More Conservative and Care Less about Others', *The Conversation* (online, 21 June 2021) <https://theconversation.com/our-research-shows-covid-has-made-australians-more-conservative-and-care-less-about-others-161500>.

to expand state capacity. Competitive electoral politics, especially as practised in those 'protracted crisis' settings, may fail to generate the conditions necessary for public deliberation of such nuanced, complex questions about state capacity and investment.

The failure of both Australian federal and state governments to expand quarantine capacity during the first 20 months of the pandemic reveals this effect. Restrictive border and repatriation policies were among the most popular restrictions during the first 20 months of the pandemic. In December 2020 market research company Ipsos reported that 83% of Australians supported sealing the international border completely, with no exceptions for entry or departure.[113] In May 2021 the Lowy Institute reported that 59% of Australians polled believed the federal government was sufficiently supporting the tens of thousands of Australian citizens stranded abroad.[114] This meant that there was limited pressure upon governments to expand quarantine capacity despite the passage of time. Absent this pressure, Australian governments routinely responded to 'leaks' from hotel quarantine programs — onward community transmission stemming from infection protocol failures in those programs — by reducing the places available in those programs as a measure of first resort. Victoria suspended its hotel quarantine program for the duration of its second wave.[115] It suspended it again for two months following a 'leak' from hotel quarantine in February 2021. Western Australia, Queensland and New South Wales also halved their intake of international arrivals at various points in 2021 in response to 'leaks' from hotel quarantine programs.[116] All hotel quarantine programs halved available places following an outbreak of the Delta variant in Sydney in July 2021.[117] Variability in arrival numbers therefore meant a booking system — as used in New Zealand's managed isolation and quarantine system — was not possible, further frustrating the ability of stranded citizens to plan their affairs. In August 2021 the federal government removed the automatic

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113 Ipsos, 'Majority (83%) of Australians Support Closing of Their International Borders as Few (21%) Believe COVID-19 Is Contained — Ipsos Poll' (Press Release, 4 December 2020) <https://www.ipsos.com/sites/default/files/ct/news/documents/2020-12/halifax_press_release.pdf>.

114 Daniel Hurst, 'One-Third of Australians Believe Coalition Must Do More to Help 36,000 Citizens Stranded Overseas: Poll', *The Guardian Australia* (online, 3 May 2021) <https://www.theguardian.com/world/2021/may/03/one-third-of-australians-believe-coalition-must-do-more-to-help-36000-citizens-stranded-overseas-poll>.

115 'Victoria Records No New Coronavirus Cases, Will Resume Hotel Quarantine Program in December', *ABC News* (online, 20 November 2020) <https://www.abc.net.au/news/2020-11-20/victoria-0-coronavirus-cases-international-flights-to-resume-dec/12903074>.

116 Bridget Judd, 'Cap on International Arrivals to Australia Has Been Slashed. So What Does It Mean for Those Still Overseas?', *ABC News* (online, 11 January 2021) <https://www.abc.net.au/news/2021-01-11/australia-international-arrival-caps-covid-19-flight-booked/13046728>.

117 Nick Evershed, 'Data Reveals Australia's New International Arrivals Cap Is Harshest Yet', *The Guardian Australia* (online, 7 July 2021) <https://www.theguardian.com/news/datablog/2021/jul/07/australias-travel-restrictions-how-the-cap-on-international-arrivals-has-changed>; Jane McAdam and Regina Jefferies, 'Why the Latest Travel Caps Look like an Arbitrary Restriction on Australians' Right to Come Home', *The Conversation* (online, 5 July 2021) <https://theconversation.com/why-the-latest-travel-caps-look-like-an-arbitrary-restriction-on-australians-right-to-come-home-161882>.

exemption of citizens ordinarily resident abroad from the Outward Travel Ban to further limit demand for quarantine places.[118]

On the one hand, the explanation for cap reductions was logistical. Some of these leaks resulted from failures in the design of hotel quarantine programs, while others flowed from failures in infection control protocols by personnel and during the transportation of international arrivals. Emerging science regarding the aerosol mechanism for disease transmission did not crystallise until after hotel quarantine programs had been established. This meant those programs were not optimised to control transmission in confined quarters. Reducing places in hotel quarantine programs provided less opportunity for failures in the design and administration of hotel quarantine programs to be realised. This response, however, was also informed by its convenience, simplicity and popularity — the risks that I identified earlier in Part III(A)(1) when the proportionality of a restriction on a discrete group is determined through purely electoral mechanisms. That restrictive approaches to quarantine capacity were so popular meant there was little pressure on governments or opposition parties to introduce complexity to debate about repatriation programs even when circumstances changed. The clearest example of this was the failure to increase arrival caps or pilot home quarantine programs after community transmission of the Delta variant became established in Sydney and Melbourne. Despite both jurisdictions accepting by the beginning of September 2021 that a return to zero transmission would not be possible,[119] arrival caps were maintained at the lowest level yet reached in the pandemic. Separate caps were not extended to vaccinated arrivals, despite statistical indications that positive cases among that cohort would be extremely low.[120] During the same period, thousands of Australian residents — vaccinated and unvaccinated — were permitted to self-isolate in homes as close contacts.[121] Citizens exposed to COVID-19 locally as 'close contacts' therefore received different treatment to those potentially exposed outside Australia's borders.

2 *Partisan Framing*

Public debate about the arrival caps' proportionality was similarly refracted through electoral politics and competition between political parties. In many respects this conformed to the premises of the Australian constitutional system explored in

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[118] Liz Hicks, Jane McAdam and Regina Jefferies, 'The Federal Government Just Made It Even Harder for Australians Overseas to Come Home. Is This Legal? Or Reasonable?', *The Conversation* (online, 9 August 2021) <https://theconversation.com/the-federal-government-just-made-it-even-harder-for-australians-overseas-to-come-home-is-this-legal-or-reasonable-165744>.

[119] Patrick Durkin and Tom Burton, 'Victoria Abandons COVID Zero but National Plan in Doubt', *Financial Review* (online, 31 August 2021) <https://www.afr.com/policy/health-and-education/victoria-abandons-covid-zero-but-national-plan-in-doubt-20210831-p58ngs>; Jennifer Hewett, 'NSW Charts a Radically Different COVID-19 Course', *Financial Review* (online, 11 August 2021) <https://www.afr.com/policy/health-and-education/nsw-charts-a-radically-different-covid-course-20210811-p58hwh>.

[120] Gregory Dore, 'Home Quarantine for Vaccinated Returned Travellers Is Extremely Low Risk, and Won't Damage Their Mental Health', *The Conversation* (online, 16 June 2021) <https://theconversation.com/home-quarantine-for-vaccinated-returned-travellers-is-extremely-low-risk-and-wont-damage-their-mental-health-162436>.

[121] Ibid.

Part III(A)(1) above. In trusting the voting public to hold the legislature and executive to account for restricting the rights of the few at the ballot, Australia's system presupposes that the government of the day and the opposition will present alternative policies and compete for support from the voting public. This meant, however, that complex, bipartisan strategies that could have repatriated more citizens featured in a limited way in public debate. The crisis settings that I explored earlier in Part II(B)(1) created political conditions where parties competed in terms of public safety rhetoric. A 2020 parliamentary inquiry into the Victorian hotel quarantine program and a 2020 national audit of Australia's hotel quarantine programs both noted the need to move away from a 'one size fits all' approach to quarantine[122] and consider alternatives such as monitored home-based quarantine for low-risk arrivals as used in Taiwan and Singapore[123] combined with dedicated quarantine facilities.[124] However, public safety framing and competitive political conditions invested a move away from 'a one size fits all' approach to quarantine with political risk.[125] Public discussion of alternatives also lacked nuance. Limited, if any, media and political attention addressed the capacity and outlay of infrastructure that would have been required to quarantine all international arrivals in dedicated facilities without the continued use of arrivals caps or an outward travel ban to limit demand.[126] Leakages also resulted that were not connected to the use of hotels as such or the return of Australian citizens, leaving an open question as to whether dedicated quarantine facilities would have reduced the rate of outbreaks without further improvement to infection control procedures.[127] The June 2021 Sydney outbreak that led to community transmission establishing itself on the eastern seaboard notably stemmed from the private transportation of freight crew.[128]

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122 Jennifer Coate AO, *COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations. Volume I* (Parliamentary Paper No 191, Victorian Parliament, 21 December 2020) 102; Jane Halton AO, *National Review of Hotel Quarantine* (Report, Department of Health and Aged Care, 23 October 2020) 30–1.

123 Halton (n 122) 36–7. See also Coate (n 122) 111. Coate concluded that '[g]iven the physical limitations of hotels as quarantine facilities … a major risk of the hotel model is the daily movement of personnel in and out of the facility and then into the communities in which they live … Minimising the number of people working in such environments, by only having those unable to quarantine safely at home, in the facility, reduces this risk of transmission to the broader community': at 111 [67]–[68].

124 Halton (n 122) 31.

125 See, eg, David Crowe, 'One-Third of Voters Back Cuts in Overseas Arrivals to Ease Quarantine Pressure', *The Sydney Morning Herald* (online, 19 June 2021) <https://www.smh.com.au/politics/federal/one-third-of-voters-back-cuts-in-overseas-arrivals-to-ease-quarantine-pressure-20210618-p5826w.html>.

126 See, eg, Australian Bureau of Statistics, 'Overseas Travel Statistics, June 2021', *Australian Bureau of Statistics* (14 July 2021) <https://www.abs.gov.au/statistics/industry/tourism-and-transport/overseas-travel-statistics-provisional/latest-release>. Dedicated facilities that were proposed notably provided for less capacity than hotel quarantine programs then operating. See, eg, 'Melbourne COVID-19 Quarantine Facility Approved as Commonwealth, Victoria Agree on Site', *ABC News* (online, 25 June 2021) <https://www.abc.net.au/news/2021-06-25/melbourne-mickleham-covid-quarantine-facility-to-be-built/100243456>.

127 Anthony Macali, 'COVID Live Quarantine Breaches', *COVID Live* (Web Page, 29 June 2022) <https://docs.google.com/spreadsheets/d/15kdyqFGfJdFi0KaTbZp-UDw8WwoKu6OPRs5V5ZzO1c0>.

128 Michael McGowan, 'Police Probe into Sydney Limousine Driver Expanded as Health Minister Seeks Tougher Mask Rules', *The Guardian Australia* (online, 24 June 2021) <https://www.theguardian.com/australia-news/2021/jun/24/police-probe-into-sydney-limousine-driver-expanded-as-health-minister-seeks-tougher-mask-rules>.

3 *Quarantine Federalism*

'Quarantine federalism' — the constitutional organisation of legislative power over quarantine — complicated rather than assisted public deliberation about the proportionality of repatriation restrictions. Quarantine is a concurrent legislative power, like other powers within s 51 of the Australian Constitution. The convention debates indicate that the drafters framed quarantine as a concurrent power so as not to interfere with the states' power over public health. It was perceived as desirable that the Commonwealth have the ability to legislate to prevent the spread of both animal and human disease from outside the Commonwealth's borders; an exclusive power over quarantine was nonetheless deliberately rejected. While the Commonwealth gradually took over most state quarantine stations during the first decades of the 20th century, this tendency reversed as immunisation became widespread, particularly after smallpox was eradicated. Commonwealth quarantine infrastructure was therefore progressively dismantled[129] and not operational at the time the COVID-19 pandemic began. National Cabinet — a forum of state and federal heads of government — agreed that hotels would be used to quarantine international arrivals. The 2020 Victorian parliamentary inquiry noted that '[h]otels were chosen because they were available, could be stood up quickly, would accommodate large numbers of returned travellers and would provide economic benefits.'[130] Further decisions reached in National Cabinet about the reduction of arrival caps remained confidential.[131] It was therefore difficult for voters to determine which level of government — and which government — proposed, or was responsible for, decisions about the use of hotels to quarantine international arrivals, decisions to reduce arrival 'caps', or failures to expand quarantine capacity or innovate alternative quarantine programs.

The opacity surrounding National Cabinet decisions was further aggravated by electoral competition between political parties in power at different levels of government. Tension between the states and the Commonwealth over responsibility for quarantine became a politically partisan issue. The federal Liberal–National Coalition government insisted that the primary responsibility for repatriating citizens and residents rested with the states, as they had assumed responsibility for hotel quarantine programs when supervised quarantine facilities were initially proposed at National Cabinet.[132] The states' reasoning for that decision, or accession to it, was not transparent because it was a decision of National Cabinet. The federal Labor opposition and some Labor state governments in turn argued that the Commonwealth was 'constitutionally responsible' for quarantine and had a

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[129] Australian Bureau of Statistics, 'Human Quarantine: The Australian Approach to a World Problem', *Year Book Australia, 1988* (Catalogue No 1301.0, 1 January 1988).

[130] Coate (n 122) 25.

[131] See, eg, Paul Karp, 'Human Rights Commission Says National Cabinet Should Not Be Covered by Secrecy Laws', *The Guardian Australia* (online, 17 September 2021) <https://www.theguardian.com/australia-news/2021/sep/17/human-rights-commission-says-national-cabinet-should-not-be-covered-by-secrecy-laws>.

[132] David Crowe and Anthony Galloway, '"We're Not Running It": PM Says He Won't Take over Hotel Quarantine', *The Sydney Morning Herald* (online, 12 February 2021) <https://www.smh.com.au/politics/federal/we-re-not-running-it-pm-says-he-won-t-take-over-hotel-quarantine-20210212-p5721w.html>.

'constitutional duty' to establish dedicated, national facilities.[133] In this way different levels of government were able to benefit from the 'cover' that opaque National Cabinet proceedings provided for decisions about restrictions on repatriation rights and a failure to expand and apply state capacity. They also benefited from gaps in voter literacy regarding the nature of concurrent legislative powers. For instance, when the Mercure Hotel in Perth 'leaked' and caused onward community transmission in April 2021, WA Premier Mark McGowan insisted that the responsibility for failings within that program lay with the Commonwealth, as it had declined to use and develop dedicated facilities. The WA government relied on this as a justification to lower Western Australia's 'cap' for international arrivals.[134]

Federalism provided a structure through which states could 'compete' in their pandemic response and realise principles of 'competitive federalism'. To a certain extent this benefit was felt in quarantine programs. The Victorian hotel quarantine program, for instance, experimented and pioneered the use of negatively pressured hotel rooms to reduce the risk of outbreaks,[135] providing a prototype that other state programs could have adopted. In this way the federal structure of power over quarantine created avenues for dialogue concerning how best to protect the rights of discrete groups.[136] In the particular context of repatriating 'stranded Aussies', a lack of bipartisanship and electoral competition nonetheless compromised lines of accountability. It was not clear to voters which level of government was responsible for expanding quarantine capacity. Electorates at the state and federal levels also remained defined by the 'majority' of those Australians who were not physically outside Australia. Governments at both state and federal levels were accordingly incentivised to 'compete' for support from that majority rather than the minority of those stranded abroad. This in turn attracted the problems of 'electoral proportionality reasoning', underwritten by majoritarianism, that I explored in Part III(A)(1) above.

IV Conclusion

Proportionality reasoning confronts certain challenges in emergency settings. The COVID-19 pandemic exposed those challenges. Facts were often uncertain and executives were required to make decisions quickly, with limited infrastructure and resources available to facilitate alternatives. For this reason, some courts were reluctant to intervene in executive decision-making in the way they may have in non-emergency settings. Proportionality — particularly the assessment of whether alternative, less burdensome means are available — involves assumptions about

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133 Rachel Withers, 'It's the Constitution: Labor Pushes Federal Responsibility', *The Monthly* (online, 5 February 2021) <https://www.themonthly.com.au/today/rachel-withers/2021/05/2021/1612496805/it-s-constitution>.

134 'Western Australia Reduces Its Hotel Quarantine Intake', *9 News* (online, 7 May 2021) <https://www.9news.com.au/national/western-australia-reduce-its-hotel-quarantine-intake/8ad62748-ecea-40d1-ae81-b0259c32f9d9>.

135 'VIDEO: How Negative Pressure Rooms Will Solve Victoria's Quarantine Woes', *ABC News* (online, 7 April 2021) <https://www.abc.net.au/news/2021-04-07/negative-pressure-rooms-victorias-covid-hotel-quarantine/13292290>.

136 See, eg, Scott Stephenson, 'The Relationship between Federalism and Rights during COVID-19' (2021) 32(3) *Public Law Review* 222.

state capacity that do not hold in acute emergency settings, where executive decision-making is analysed over discrete periods of time. Over time, however, the protracted nature of the COVID-19 pandemic introduced complexity to how some courts were prepared to approach proportionality reasoning when adjudicating rights complaints. This was evident in *Shemesh*, a successful Israeli High Court challenge to flight caps decided in March 2021. Commentary suggests a similar approach was adopted in German administrative courts. Similar to 'non-emergency times', applications of proportionality varied across constitutional systems and legal cultures during the pandemic. The Court in *Grounded Kiwis*, an NZ decision, applied a greater degree of deference to the executive than that shown by the Court in *Shemesh* notwithstanding that the challenge concerned a period later in the pandemic. Nonetheless, the NZ High Court was willing to criticise executive decisions about the allocation of scarce resources. This demonstrates a second advantage of rights-based proportionality reasoning in protracted emergencies that also holds in legal cultures with traditions of legislative supremacy.

Lacking either a constitutional or federal statutory bill of rights, the protection that Australia's proportionality frameworks provided during the pandemic produces more generalisable insights as to how such frameworks perform in emergency settings. The Australian experience suggests that constitutional, administrative and political mechanisms designed to guide proportionality reasoning did not encourage the same treatment of the emergency in its protracted stage as some proportionality mechanisms elsewhere that were underwritten by rights frameworks. Australian safeguards tend to place greater faith in electoral mechanisms to hold the executive to account, including in emergency settings. In emergency settings, however, the ordinary operation of politics is unsettled. Even as time passes, public anxiety and hostility toward discrete groups constituted by circumstances — such as those perceived to be introducing risks to the collective from outside it — may complicate public debate and deliberation about the need for certain restrictions and investment in infrastructure that benefits only a smaller group.

Before the High Court

Long-Arm Jurisdiction over Foreign Tech Companies "Carrying on Business" Online: *Facebook Inc v Australian Information Commissioner*

Michael Douglas*

Abstract

In *Facebook Inc v Australian Information Commissioner*, the High Court of Australia will consider whether the American parent company behind the social media platform is amenable to the Federal Court of Australia's jurisdiction in proceedings brought in the wake of the Cambridge Analytica data privacy scandal. The central issue is whether Facebook Inc 'carries on business' in Australia so as to be within the extraterritorial reach of the *Privacy Act 1988* (Cth). I argue that it does. Although traditional indicia for 'carrying on a business' may be absent in Facebook Inc's operations as relevant to this case, the assessment should be approached having regard to the limitations of territorial thinking for analysis of digital subject matter. A purposive construction of the *Privacy Act* favours this analysis. I argue that the Federal Court was warranted in finding that the Commissioner had established a prima facie case sufficient to justify the Court's exercise of its long-arm jurisdiction.

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I Introduction

Millions of Australian consumers use digital platforms like Facebook whose functionality is underpinned by transnational corporate groups that purport to silo certain functionality into certain jurisdictions. Transnational corporate structures are not used simply for tax reasons.[1] A transnational structure may create a 'jurisdictional veil'[2] by which the entities behind digital platforms might shield themselves from other foreign regulation contrary to their commercial interests.

In *Facebook Inc v Australian Information Commissioner*,[3] the High Court of Australia will consider whether the American technology company, formerly known as 'Facebook Inc' and now known as Meta Platforms Inc ('Meta'), carries on business within Australia for the purposes of the *Privacy Act 1988* (Cth) ('*Privacy Act*'). Resolution of that question will determine whether the Federal Court of Australia's exercise of long-arm jurisdiction over Facebook Inc is appropriate. These issues arise in the context of a broader pursuit by Australia's privacy regulator, the Office of the Australian Information Commissioner ('Commissioner'), to hold Facebook Inc to account for the Cambridge Analytica data privacy scandal.

After setting out the background and procedural history to the High Court appeal, I address two issues that will be ventilated before the Court: the concept of 'carrying on business', and the test for exercise of the Federal Court's long-arm jurisdiction. I also consider how recent changes to the *Federal Court Rules 2011* (Cth) ('*FCR*') concerning service outside Australia could impact this appeal.

II Background and Procedural History

Between 2014 and 2015, consulting firm Cambridge Analytica used data obtained from Facebook to build voter profiles.[4] The data were the product of a Facebook application ('app') called 'This is Your Digital Life'. The app would gather data not just about the installing user, but also about the user's contacts ('Facebook friends'). The result was the collection of 50 million user profiles, of which approximately 270,000 users had consented to their personal information being harvested.[5] The

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1 See Bernard Pulle, 'Tax Avoidance by Multinational Enterprises — Australian Government Initiatives to Avoid Erosion of Corporate Tax Base' (Parliamentary Library Briefing Book, 44th Parliament of Australia, December 2013); Sebastian Beer, Ruud de Mooij and Li Liu, 'International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots' (2020) 34(3) *Journal of Economic Surveys* 660.

2 A term coined by Peter Muchlinksi, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50(1) *International and Comparative Law Quarterly* 1, 17, and considered in Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, Sydney, 2005) 66–7.

3 *Facebook Inc v Australian Information Commissioner* (High Court of Australia, Case No M137/2022).

4 This account is summarised in Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far', *The New York Times* (online, 4 April 2018) <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

5 *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307, [1]–[11] ('*AIC v Facebook (No 2)*'); Kevin Granville, 'Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens', *The New York Times* (online, 19 March 2018) <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

corporations behind the Facebook platform allowed Cambridge Analytica to access the personal information of millions of people without those persons' knowledge or consent. This drew the ire of regulators around the world, including in Australia.

On 9 March 2020, the Commissioner commenced Federal Court proceedings against Facebook Inc and Facebook Ireland Ltd ('Facebook Ireland'), alleging contraventions of the *Privacy Act* s 13G with respect to 311,127 Australian Facebook users between 12 March 2014 and 1 May 2015:[6]

> (1) Facebook disclosed the users' personal information for a purpose other than that for which it was collected, in breach [of] Australian Privacy Principle (APP) 6;
>
> (2) Facebook failed to take reasonable steps to protect the users' personal information from unauthorised disclosure in breach of APP 11.1(b);
>
> (3) these breaches amounted to serious and/or repeated interferences with the privacy of the users, in contravention of s 13G of the *Privacy Act*.[7]

The Commissioner sought declarations and civil pecuniary penalties under statute. The litigation so far has focused on a threshold issue: the Federal Court's authority to decide this dispute.

The respondents to the proceedings are not located in the forum. Facebook Inc (Meta) is incorporated in Delaware and headquartered in California. Facebook Ireland is a Meta subsidiary based in the Republic of Ireland. Neither was registered to carry on business in Australia.[8] Facebook Inc's subsidiary, Facebook Australia Pty Ltd, is not party to the proceeding.

In April 2020, the Commissioner applied ex parte to serve the respondents outside of the jurisdiction. Orders to that effect were made on 22 April 2020.[9] Facebook Inc then applied to set aside those orders and the service of the originating application on Facebook Inc, arguing that the Court lacked jurisdiction.[10] Facebook Ireland appeared but did not press for the same relief.[11]

As the rules as to service define the limits of an Australian court's personal jurisdiction,[12] the application turned on construction of the *FCR* authorising service outside of the jurisdiction.[13] The Rules provided that a party may apply for leave to serve a person overseas if the Court is satisfied that:

> (a) it has jurisdiction in the proceeding;
>
> (b) the proceeding is of a kind listed in another rule, *FCR* r 10.42; and

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6 *Australian Information Commission v Facebook Inc* (2020) 144 ACSR 88, 89 [1]–[2] ('*AIC v Facebook (No 1)*'); *AIC v Facebook (No 2)* (n 5) [1], [5].

7 *AIC v Facebook (No 2)* (n 5) [12].

8 See *Corporations Act 2001* (Cth) ss 601CD, 601CX(1).

9 *AIC v Facebook (No 1)* (n 6).

10 *AIC v Facebook (No 2)* (n 5) [15].

11 Ibid [17].

12 *Laurie v Carroll* (1957) 98 CLR 310, 323 (Dixon CJ, Williams and Webb JJ).

13 See below Part V for an explanation of how relevant aspects of the *Federal Court Rules 2011* (Cth) ('*FCR*') have since been amended.

(c) the party seeking leave has a prima facie case for any or all of the relief claimed in the proceeding.[14]

The first two criteria were easily satisfied. The real issue, which has been the focus of consideration at each stage of the proceedings, was the third criterion for leave to serve: whether the Commissioner has a prima facie case. As Thawley J framed it, in this context 'prima facie case' is used 'to test whether there exists a controversy which is sufficiently made out at the commencement of proceedings to warrant exposing the respondent to litigation in Australia'.[15]

Facebook argued that the Commissioner had failed to make out a prima facie case because the text of the *Privacy Act* did not have extraterritorial effect in these circumstances. The *Privacy Act* applies to 'an act done, or practice engaged in, outside Australia' by an entity with an 'Australian link'.[16] An entity will have an Australian link if it carries on business in Australia.[17] Among other things, Facebook argued that the Commissioner had failed to establish that Facebook had an Australian link because it failed to establish that Facebook carried on business in Australia.[18] Thawley J rejected that argument.[19] Facebook Inc sought leave to appeal to the Full Court of the Federal Court of Australia. In early 2022, the Full Federal Court granted leave to appeal and dismissed the appeal.[20]

The bulk of the Full Federal Court's reasons were delivered by Perram J, with whom Allsop CJ and Yates J agreed.[21] Perram J dissected the s 5B(3)(b) issue into two questions: (1) what activities was Facebook Inc carrying on?; and (2) was that business being carried on in Australia? In answering these questions, his Honour considered a Data Processing Agreement between Facebook Inc and Facebook Ireland, pursuant to which Facebook Inc agreed to process personal data provided to it by the Irish subsidiary. Those data were 'generated, shared and uploaded by the registered users of the Facebook platform'.[22] The purpose of the data processing was to 'faciltate communications across the Facebook platform',[23] which included personalising content and targeting advertisements.[24]

Part of the business conducted by Facebook Inc was the installation of cookies on Australian users' devices,[25] and the provision to Australian developers of

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14 See the historical version of *FCR* (n 13) r 10.43(4), in force before 13 January 2023; *AIC v Facebook (No 1)* (n 6) 91 [14].

15 *AIC v Facebook (No 2)* (n 5) [30].

16 *Privacy Act 1988* (Cth) s 5B(1A) ('*Privacy Act*').

17 Ibid s 5B(3)(b).

18 *AIC v Facebook (No 2)* (n 5) [126]. To have an Australian link a company must also have collected or held personal information in Australia: *Privacy Act* (n 16) s 5B(3)(c). The lower courts' reasoning on this requirement is not in issue before the High Court.

19 *AIC v Facebook (No 2)* (n 5) [156].

20 *Facebook Inc v Australian Information Commissioner* (2022) 289 FCR 217 ('*Facebook v AIC (FCAFC)*').

21 Ibid 218 [1], 255 [166].

22 Ibid 224 [30].

23 Ibid 224 [31].

24 Ibid 224–5 [31].

25 'A cookie is a small data file stored on your device's browser. Its purpose is to help a website keep track of your visits and activity.': Office of the Australian Information Commissioner (Cth), *Targeted*

'Graph API' — a platform by which developers could enable third party applications to utilise the Facebook login.[26] With respect to cookies, Perram J considered that whether installation in Australia amounts to carrying on business in Australia is a question 'unlikely to have a single answer'.[27] With respect to the Graph API, his Honour held that the inference was open on the available evidence that Facebook Inc's management of the Graph API included providing the login to Australian developers for use in Australia.[28]

Facebook Inc argued that these attributes were not enough to characterise it as carrying on business in Australia for the purposes of s 5B(3)(b). It argued that the activities carried on in Australia lacked a commercial quality; the only business carried on in Australia was that of its subsidiary, Facebook Ireland, which was party to contracts with Australian developers. Perram J rejected that submission by applying *Hope v Bathurst City Council*, where Mason J framed the carrying on of a business as 'activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis'.[29] Perram J split the definition into two limbs: '(a) activities undertaken as a commercial enterprise as a going concern with a view to a profit; and (b) carried on in a continuous and repetitive basis'.[30] His Honour explained:

> if a company conducts business in a foreign jurisdiction and it does acts within Australia as part of that business which fall within either limb in *Hope* then, subject to any contrary implication arising from the statutory context, it will conduct business in Australia.[31]

There was a prima facie case that Facebook Inc was carrying on business in both foreign jurisdictions and in Australia, which was enough to engage s 5B(3) of the *Privacy Act*.[32]

The High Court will consider two issues:

(1) whether a foreign corporation can 'carry on business' for the purposes of s 5B(3)(b) of the *Privacy Act* in the absence of the traditional indicia of carrying on business in the forum; and

(2) what evidence is required to establish a 'prima facie case' for the purposes of leave to serve under *FCR* r 10.43(4)(c).

Advertising (Web Page) <https://www.oaic.gov.au/privacy/your-privacy-rights/advertising-and-marketing/targeted-advertising> cf Facebook, *Cookies on Facebook* (Web Page) <https://www.facebook.com/help/336858938174917>.

26 *Facebook v AIC (FCAFC)* (n 20) 225 [35].

27 Ibid 228 [46].

28 Ibid 232 [64].

29 Ibid 238 [87], 240 [96], quoting *Hope v Bathurst City Council* (1980) 144 CLR 1, 8–9 (Mason J, Gibbs, Stephen and Aickin JJ agreeing).

30 *Facebook v AIC (FCAFC)* (n 20) 240 [96].

31 Ibid 242 [103].

32 Ibid 242–3 [107].

III Carrying on Business

A *Localising Digital Businesses*

Whether Facebook Inc carried on business in Australia for the purposes of s 5B(3)(b) of the *Privacy Act* turns on the text, context and purpose of the provision;[33] a point the Commissioner makes plain in her submissions to the High Court.[34] The context for the extraterritorial operation of the *Privacy Act* includes the common law and other legislation in which the concept of 'carrying on business in the forum' grounds jurisdictional analyses.

The common law of Australia maintains a territorial doctrine of personal jurisdiction.[35] Generally, the defendant must be served while present in the territory of the court that issued the originating process in order to be amenable to that court's command.[36] For corporate persons, at common law, a defendant is considered present for the purposes of service if it carries on business within the forum territory.[37] Whether a company carries on business in the forum is a question of fact,[38] to be answered with reference to common indicia. Those indicia include that a local agent has authority to bind the corporation within the forum; that the business is carried on at a fixed and definite place within the forum; and the business has been carried on for a sufficient period of time.[39] The nature of the defendant's business is relevant to determining the factual issue.[40]

The common law test for jurisdiction over corporations has been adopted by various legislatures in formulating criteria for determining whether a jurisdiction has authority over a foreign corporation.[41] That is, legislatures have repeated the concept of 'carrying on business in the forum' in defining the jurisdictional scope of various

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33 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, 966 [43] ('*Impiombato*'); *Acts Interpretation Act 1901* (Cth) s 15AA ('*Acts Interpretation Act*').

34 Australian Information Commissioner, 'First Respondent's Submissions', Submission in *Facebook Inc v Australian Information Commissioner*, Case No M137/2022, 2 December 2022, [12] ('AIC's Submissions').

35 *Gosper v Sawyer* (1985) 160 CLR 548, 564 (Mason and Deane JJ). For a critique, see Andrew Dickinson, 'Keeping up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts' (2016) 86(1) *British Yearbook of International Law* 6.

36 *Laurie v Carroll* (n 12) 323 (Dixon CJ, Williams and Webb JJ).

37 *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156, 165; *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715 (CA) 718–20, 722. Early authority described carrying on business in the forum as indicating the company was 'resident' in the forum and amenable to service: *Dunlop Pneumatic Tyre Co Ltd v Actien-Gesellschaft für Motor und Motorfahrzeubau Vorm Cudell & Co* [1902] 1 KB 342 (CA) 346–7, 349.

38 *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd* (2018) 259 FCR 514, 538 [99] (Nicholas, Yates and Beach JJ), citing *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 186 ('*Luckins*').

39 *National Commercial Bank v Wimborne* (n 37) 165.

40 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725, 731–2.

41 With respect to adjudicatory jurisdiction, see Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th ed, 2022) vol 1, 471–6 [11-050]–[11-061]; Trevor C Hartley, 'Basic Principles of Jurisdiction in Private International Law: The European Union, the United States and England' (2022) 71(1) *International & Comparative Law Quarterly* 211, 214–15.

pieces of Australian legislation,[42] ousting the presumption that general words of legislation do not extend to subject matter outside of the legislature's territory.[43] The *Privacy Act* operates to that effect.

When grappling with each of these statutory contexts, courts must engage in a process of construction that is familiar to the characterisation exercises within the discipline of private international law. Connecting persons, things and events to a particular territory is often necessary to resolve jurisdictional issues and to identify the applicable law. The task might be described as 'localisation', or as applying the 'connecting factor'; a form of characterisation.[44]

Localisation is not always simple. An event may be the product of a series of causes attributable to various fora, as in the case of a man who suffered asbestos-related injuries after exposure in Belgium and Malaysia.[45] In the case of localising a wrong, 'the place of the tort may be ambiguous or diverse'.[46] Where the relevant subject matter is on the internet, the ambiguity is magnified. A single matter may have an overwhelming number of connections to diverse legal systems.[47]

Localisation problems are most acute where the task is to identify a single 'natural' forum for a cross-border matter,[48] or a place with which a cross-border matter has its 'centre of gravity'.[49] Different factors may point in different directions.[50] Fortunately, for the purpose of most carrying-on-business tests, there is no need to identify a single forum. A business may be carried on in multiple places simultaneously. It may be carried on overseas, but also in Australia. As much is obvious if one observes the global goods and services brands that Australians engage with each day. As McKerracher J noted in *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (No 2)*, '[p]articularly, in modern times, a company may

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42 See, eg, *Corporations Act 2001* (Cth) ss 9 (definition of 'Part 5.7 body'), 582, considered in *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 ('*Tiger Yacht*'). See also *Competition and Consumer Act 2010* (Cth) s 5(1)(g), considered in *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647 (Edelman J) ('*ACCC v Valve (No 3)*'), affirmed in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190 ('*Valve v ACCC*'); *Carnival plc v Karpik* (2022) 404 ALR 386 ('*Ruby Princess*').

43 A presumption in favour of comity: *Impiombato* (n 33) 962–3 [23]. On the diminishing role of the presumption for cross-border litigation, see Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation after *Valve*' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 201.

44 See Symeon C Symeonides, *Choice of Law* (Oxford University Press, 2016) 64; Martin Davies, Andrew Bell, Paul Le Gay Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) ch 13; Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41(2) *University of New South Wales* (*UNSW) Law Journal* 490, 492.

45 *Puttick v Tenon Ltd* (2008) 238 CLR 265.

46 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 538 [81] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

47 Tobias Lutzi, *Private International Law Online: Internet Regulation and Civil Liability in the EU* (Oxford University Press, 2020) 27 [2.36].

48 See Andrew Bell, 'The Natural Forum Revisited' in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion* (Oxford University Press, 2021) 3.

49 A term used in identifying the law applicable to a contract with foreign elements: see *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 437 (Toohey, Gaudron and Gummow JJ).

50 *ACCC v Valve (No 3)* (n 42) 662 [69] (Edelman J).

be found to be carrying on business in Australia even though the bulk of its business is conducted elsewhere'.[51]

Facebook Inc has placed much weight on the fact that the traditional indicia of carrying on business in a place — local physical assets, revenues and so on — are absent in the case of its business.[52] But indicia are just that. They may indicate that a business is carried on locally, but they are not exhaustive of the circumstances in which a business is carried on locally.[53] Whether a business is carried on in the forum is a question of fact, which should be approached with regard to the character of the particular business in question and the reason for which the question is being asked.[54]

Facebook Inc's business is of the digital age. Yet it has appealed to precedent that grappled with the indicia applicable to business models and activities from before the digital age: intra-Australian bus tourism[55] and the sale of Queensland kangaroo skins in New South Wales.[56] Those appeals were understandable, for they aligned to a convenient fiction: that the Facebook platform may derive billions of dollars from Australian consumers, yet the business of the parent company has no real connection to Australia.

Approaches to localisation that depend on traditional physical indicia are ill-suited to digital business models.[57] With this in mind, as recognised in the Commissioner's submissions, the extraterritorial reach of the *Privacy Act* was specifically designed to extend to entities 'who have an online presence (but no physical presence) in Australia, and collect personal information from people who are physically in Australia'.[58] In the case of Facebook Inc, as with so many other modern businesses, the business is about deriving value from information about consumers.[59] Facebook Inc extracts a huge amount of value from Australians through the collection and exploitation of a large amount of Australians' data. It actively seeks Australians' contribution to that value-extraction, by allowing Australian developers to utilise Facebook login functionality in third-party apps, and installing cookies on Australian users' devices. With respect, Allsop CJ was right to imply that Facebook Inc's analysis of territorial connection was 'to mischaracterise by oversimplification through the application of a false taxonomy of activity'.[60]

While businesses that engage in one-off or limited cross-border transactions into Australia are unlikely to be characterised as 'carrying on business in

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51 *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (No 2)* (2019) 369 ALR 192, 197 [19].

52 See, eg, Facebook Inc, 'Appellant's Submissions', Submission in *Facebook Inc v Australian Information Commissioner*, Case No M137/2022, 4 November 2022, [11], [24]–[26] ('Facebook Inc's Submissions').

53 *Club Resorts Ltd v Van Breda* [2012] 1 SC 572, 618–19 [91] (LeBel J).

54 *Facebook v AIC (FCAFC)* (n 20) 219 [5] (Allsop CJ); *Valve v ACCC* (n 42) 230 [133].

55 *Luckins* (n 38).

56 *Smith v Capewell* (1979) 142 CLR 509.

57 See Peter D Trooboff, 'Globalization, Personal Jurisdiction and the Internet: Responding to the Challenge of Adapting Settled Principles and Precedent' (2021) 415 *Recueil des Cours* 9, 45.

58 See AIC's Submissions (n 34) [15], quoting the Explanatory Memorandum accompanying the introduction of *Privacy Act* (n 16) s 5B(3)(b): Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), 218 [Item 6 Subsection 5B(3)].

59 *Facebook v AIC (FCAFC)* (n 20) 218–19 [3] (Allsop CJ).

60 Ibid 219 [4] (Allsop CJ).

Australia',[61] the business of Facebook Inc involves more than isolated activity in Australia. It involves continuous, repetitive extraction of value from Australian consumers through digital technologies that may be notionally physically located in both Australia and elsewhere. For Facebook Inc to deny its obvious connection to Australia 'has an air of unreality'.[62]

B *A Purposive Construction*

While the context of s 5B(3)(b) of the *Privacy Act* is important, the primary question before the High Court is not the meaning of 'carrying on business' in the abstract, but with respect to the extraterritorial scope of the Act. The purpose of the particular statute is important. Perram J recognised as much by invoking the objects expressed in s 2A of the *Privacy Act*, which include facilitating 'the free flow of information across national borders while ensuring that the privacy of individuals is respected'.[63] The latter part of that object echoes s 2A(a), the first-listed object: 'to promote the protection of the privacy of individuals'.

That primary object should inform the High Court's approach to analysis of whether Facebook Inc carries on business in Australia under s 5B(3)(b). Characterising territorial connection for the purposes of the statute depends on more than logic; the task has normative content. As Allsop CJ has written extrajudicially, characterisation may involve value judgments 'that are often disguised, hidden and suppressed'.[64] In this case, the characterisation of Facebook's territorial connection should be undertaken with express consideration of the value of Australian consumers' privacy, the importance of which is expressed in the objects of the *Privacy Act*.

If Facebook Inc's territorial analysis is preferred, the practical result is that the Australian public, through the standing of the Commissioner, is left without a remedy for a gross invasion of their privacy. It is left in that position for the convenience of a multinational business, which has shielded itself from the externalities of its business through a cross-border structure and clever contracting within its corporate group. Moreover, if Facebook Inc's position is preferred, then various other multinational businesses, and especially those behind the digital platforms on whom millions of Australian consumers increasingly depend,[65] will be beyond the reach of other important Australian consumer protection legislation. The mischief to which that legislation is primarily directed will continue. As a matter of orthodox statutory construction, the Court is justified in piercing Facebook's jurisdictional veil[66] via the localisation exercise in s 5B(3)(b) with appeal to the

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61 See Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 577. See also, eg, *Lucasfilm Ltd v Ainsworth* [2010] Ch 503 (CA) 552–3 [192]–[193].

62 Cf Google's approach in *Google LLC v Defteros* (2022) 96 ALJR 766, 791 [112] (Gordon J).

63 *Facebook v AIC (FCAFC)* (n 20) 234 [70], quoting *Privacy Act* (n 16) s 2A(f).

64 Chief Justice James Allsop, 'Characterisation: Its Place in Contractual Analysis and Relation Enquiries' (2017) 91(6) *Australian Law Journal* 471, 471.

65 See generally Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019).

66 Cf the task in other jurisdictional contexts: see, eg, *Adams v Cape Industries plc* [1990] Ch 433 (CA).

policy of the *Privacy Act*. With respect, in this circumstance, Facebook Inc's appeal to the construction of 'carrying on business' in other jurisdictions[67] runs contrary to the purposive approach to statutory construction mandated by Australian law.[68]

IV The Exercise of the Federal Court's Long-Arm Jurisdiction

Historically, the test for leave to serve outside of the jurisdiction in the Federal Court of Australia has differed to that applicable in other Australian jurisdictions.[69] In the Federal Court, an applicant for leave to serve must demonstrate a prima facie case. With respect, the nature of this test was never particularly controversial; the Court applied it without issue all the time. As the Full Court noted in *Tiger Yacht Management Ltd v Morris*, the requirement related 'to "all or any" of the relief claimed in the proceeding', and it was 'not necessary to demonstrate merit in all of the claims made in the proceeding'.[70] The evidence necessary to establish a prima facie case for the purposes of leave to serve was obviously less extensive than that required to establish a cause of action.[71]

On 13 January 2023, before the High Court had heard this matter, but after submissions were filed, the *Federal Court Legislation Amendment Rules 2022* (Cth) ('Amendment Rules') came into force. The amended *FCR* scrap the historical approach to service outside Australia, replacing it with a regime that is shared by most Australian state and territory Supreme Courts and agreed to by the Council of Chief Justices' Harmonised Corporations Rules Monitoring Committee.[72] In most cases, leave to serve is no longer required.[73] The 'prima facie case' aspect of the historical test for leave is therefore gone. However, in cases where service has occurred, an analogue is in the new *FCR* r 10.43A(2)(c). A court may allow an application by a person served to stay or dismiss the proceeding, or to set aside service, if 'the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending it'.[74]

The Amendment Rules may warrant the High Court revoking the grant of special leave as regards this second issue. But if the Court were to express an opinion on the historical rule, it would not be without value for the development of the law.

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67 Facebook Inc's Submissions (n 52) [8], [16]–[23].

68 *Acts Interpretation Act* (n 33) s 15AA.

69 See generally Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4th ed, 2019) 46–74; Michael Douglas and Vivienne Bath, 'A New Approach to Service outside the Jurisdiction and outside Australia under the *Uniform Civil Procedure Rules*' (2017) 44(2) *Australian Bar Review* 160.

70 *Tiger Yacht* (n 42) 557 [45].

71 *Ruby Princess* (n 42) 465 [303] (Derrington J). Cf Facebook Inc's Submissions (n 52) [38].

72 See *Court Procedures Rules 2006* (ACT) div 6.8.9; *Uniform Civil Procedure Rules 2005* (NSW) pt 11, sch 6; *Uniform Civil Procedure Rules 1999* (Qld) ch 4 pt 7 div 1; *Supreme Court Civil Rules 2006* (SA) ch 3 pt 4 div 2; *Supreme Court Rules 2000* (Tas) div 10; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ord 7 pt 1.

73 See the new *FCR* (n 13) r 10.42 as substituted by the *Federal Court Legislation Amendment Rules 2022* sch 1, with effect from 13 January 2023.

74 *FCR* (n 13) r 10.43A(2)(c) as substituted by the *Federal Court Legislation Amendment Rules 2022* sch 1, with effect from 13 January 2023.

The position under the Amendment Rules also considers the strength of the applicant's case, albeit with different language, in considering whether the circumstances warrant putting a foreigner to the trouble of defending a claim.[75] The issue informs the proper exercise of the Court's discretion,[76] taking into consideration the overarching purposes of case management.[77]

With respect to Facebook Inc's challenge to the grant of leave in this case, the High Court will surely be mindful that appellate courts should be hesitant to interfere with such an exercise of discretion.[78] This is especially the case given that considerations that have historically militated against long-arm jurisdiction are of diminishing significance. As Lord Sumption JSC once stated,

> service of the English Court's process out of the jurisdiction [has been described] as an 'exorbitant' jurisdiction … This is no longer a realistic view of the situation. … Litigation between residents of different states is a routine incident of modern commercial life.[79]

The carrying on business text ensures 'a jurisdictional nexus as a matter of comity',[80] but the assertion of personal jurisdiction over a foreign company operating a global business is no affront to comity. Rather, to adapt the words of Lord Sumption, it is a routine incident of the consumer protection necessary for our digital lives.

V Conclusion

Facebook Inc's place of business is not 'Facebookistan' — there is no such place.[81] Facebook's natural habitat is the internet, and the internet's 'natural habitat is global'.[82] There is no single jurisdiction in which it carries on its business. Australia is part of the world in which Facebook Inc has chosen to do business, and therefore Facebook ought reasonably to expect to face regulation from Australia. As Kirby J stated in *Regie Nationale des Usines Renault SA v Zhang*, '[g]enerally speaking, the law should not be applied in a way that takes ordinary expectations by surprise'.[83] It is sound policy that Facebook Inc should be amenable to Australian jurisdiction.

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75 See *Michael Wilson & Partners Ltd v Emmott* (2021) 396 ALR 497, 520–6 [64]–[79], 539 [121] (Brereton JA); *International Management Group of America Pty Ltd v Media Niugini Ltd* [2020] NSWSC 559, [104]–[105] (Stevenson J).

76 See *Trina Solar (US), Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, 7 [18] (Greenwood J), 23 [100] (Beach J) ('*Trina Solar*').

77 *Federal Court of Australia Act* 1976 (Cth) s 37M.

78 *Trina Solar* (n 76) 24 [102] (Beach J); *House v The King* (1936) 55 CLR 499.

79 *Abela v Baadarani* [2013] 1 WLR 2043, 2062 [53] (Lord Sumption JSC), partly quoted in *Morris v McConaghy Australia Pty Ltd* [2018] FCA 435, [40] (Rares J), quoted in *Tiger Yacht* (n 42) 565–6 [89], Steven Rares, 'Commercial Issues in Private International Law' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 1, 1.

80 *Tiger Yacht* (n 42) 539 [50] (McKerracher, Derrington and Colvin JJ).

81 See Anupam Chander, 'Facebookistan' (2012) 90(5) *North Carolina Law Review* 1807; Niloufer Selvadurai, 'The Proper Basis for Exercising Jurisdiction in Internet Disputes: Strengthening State Boundaries or Moving towards Unification?' (2013) 13 (Spring) *Pittsburgh Journal of Technology Law and Policy* 1, 13; Alex Mills, 'The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' (2015) 7(1) *Journal of Media Law* 1.

82 *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824, 827 (Abella J for the Court).

83 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 538 [130].

It is also sound policy that the Australian public should be able to secure justice, according to the policy of Australian law — including Australian private international law — when foreign businesses wrong them.[84] Recent steps to strengthen Australia's privacy laws[85] signal that Facebook Inc's attempts to avoid accountability for the Cambridge Analytica scandal run contrary to the values that Australians expect to be expressed in our law.

[84] A similar point was made a century ago: William F Cahill, 'Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within Territory' (1916–17) 30(7) *Harvard Law Review* 676, 676.

[85] *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth).

Comment

Not Ready, Not Right: Key Objections to Criminalising Coercive Control in New South Wales

Libby Newton*

Abstract

In recent years, the New South Wales ('NSW') government has taken substantial steps toward legislating a criminal offence of coercive control. In November 2022, these steps culminated in the passage through Parliament of a Bill featuring a proposed offence of 'abusive behaviour towards current or former intimate partners'. This comment explores the main objections to criminalising coercive control by examining the NSW legislation and the vigorous public policy debate surrounding its introduction, along with leading scholarship and evidence from within and outside Australia. These objections tend to be based in one of two concerns: (i) that the criminal justice system is not ready for a discrete offence of coercive control and (ii) that the criminal law cannot provide an answer to the problem of domestic and family violence. An examination of these two framings reveals that criminalisation is presently seen as a high-risk, short-sighted response to an inherently complex social problem. This position appears to be taken irrespective of any overall belief in the utility or appropriateness of criminal justice–based solutions to domestic and family violence. Implications for the 2022 NSW reforms are duly considered.

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I Introduction

Global responses to domestic and family violence ('DFV') have undergone marked evolution in recent decades.[1] One ongoing development in many English-speaking countries is the take-up by legal systems and discourses of coercive control as a conceptual lens through which to view and understand DFV, particularly intimate partner violence. Developed in the work of American feminists Ann Jones[2] and Susan Schechter,[3] among others, and popularised by Evan Stark,[4] coercive control denotes a course of conduct the objective of which is to subordinate a family member (ordinarily a female intimate partner) by depriving them of their independence and autonomy. Stark describes coercive control as a 'gender specific … liberty crime'[5] whereby men seek to shore up their privilege and dominance in the face of the hard-won gains of women's liberation movements, including women's expanded freedoms, agency and formal equality with men.[6] Stark's conception of DFV as a pattern of behaviours comprising relationship-specific permutations of physical and/or non-physical control tactics[7] has been highly influential in the criminal law and policy space. His work has been credited with providing the foundations for offences introduced in England and Wales, the Republic of Ireland, Scotland and Northern Ireland.[8]

The key utility of the concept and its attractiveness for anti-violence advocates lies in its reframing of DFV to better reflect the lived experience of victim-survivors. In emphasising the patterned, individualised and often covert nature of DFV, coercive control compels a shift in community and institutional understandings of DFV. Crucially, definitions such as Stark's are anchored in an appreciation that in the vast majority of cases the most severe DFV-related injuries are not to the body but to personhood, and are continuously and routinely — rather than merely episodically — inflicted.[9]

Towards the end of 2022, NSW took the decisive step of criminalising coercive control. In October 2022, the NSW government introduced a Bill including a proposed offence of 'abusive behaviour towards current or former intimate

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1 For a comprehensive account of this evolution, see Eve S Buzawa and Carl G Buzawa (eds), *Global Responses to Domestic Violence* (Springer, 2017). See also Mandy Burton, *Domestic Abuse, Victims and the Law* (Routledge, 2022).

2 See, eg, Ann Jones, *Women Who Kill* (Beacon Press, 1980); Ann Jones, *Next Time, She'll Be Dead: Battering and How to Stop It* (Beacon Press, 1994).

3 See, eg, Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (South End Press, 1982).

4 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2009).

5 Ibid 16.

6 Ibid 171.

7 Ibid 206.

8 Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) x.

9 This is consistently reinforced by victim-survivors' accounts: see ibid ix; Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* (New York University Press, 2011) 30, 37.

partners'.[10] The Bill passed both Houses, and received the Governor's assent on 23 November 2022,[11] with a commencement date between 1 February 2024 and 1 July 2024.[12] This comment explores the main objections to criminalising coercive control by examining the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) ('*Coercive Control Act*') and the public policy debate surrounding its introduction, along with leading scholarship and evidence from within and outside Australia. These objections tend to reflect one of two overarching concerns: (i) that the criminal justice system is not ready for a discrete offence of coercive control and (ii) that the criminal law cannot provide an answer to the problem of DFV. An examination of these two framings reveals that criminalisation is widely regarded as a high-risk, myopic response to an inherently complex social problem. Importantly, this assessment appears to resonate among stakeholders and experts irrespective of any overall belief in the utility or appropriateness of criminal justice–based solutions to DFV.

II Background

A *Criminalising Coercive Control: The Debate*

There are various potential avenues for translating the concept of coercive control into criminal law — for instance, as an adjunct to existing offences, a partial or complete defence to homicide, or a matter for expert witness evidence to support invocation of the defence of self-defence in cases where an abused woman kills her abuser.[13] Criminalisation via offence creation, however, has attracted the most attention in law reform circles and has emerged as the intervention of choice in many anglophone jurisdictions.[14]

Proponents of a standalone coercive control offence feel that much can be gained from harnessing the symbolic power, educative function and condemnatory force of the criminal law in relation to DFV.[15] Criminalisation is seen as an opportunity to sharpen the criminal justice system's crude understanding of DFV, validate victim-survivors' experiences,[16] communicate the 'moral gravity' and

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10 Crimes Legislation Amendment (Coercive Control) Bill 2022 (NSW) sch 1.

11 'Crimes Legislation Amendment (Coercive Control) Bill 2022', *Parliament of New South Wales* (Web Page) <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=4024>.

12 Attorney-General (NSW), 'Taskforce to Implement State's Coercive Control Laws Begins Ahead of Schedule' (Media Release, 30 November 2022) <https://www.nsw.gov.au/media-releases/coercive-control-laws>.

13 Charlotte Barlow, Kelly Johnson, Sandra Walklate and Les Humphreys, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) *British Journal of Criminology* 160, 160–1.

14 Sandra Walklate and Kate Fitz-Gibbon, 'Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women through Furthering the Power of the State' (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 1, 3–4; Charlotte Barlow and Sandra Walklate, *Coercive Control* (Routledge, 2022) 88.

15 Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize?' (2018) 18(1) *Criminology and Criminal Justice* 50, 51–53; Julia Quilter, 'Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 111, 126–7.

16 Tolmie (n 15) 51–53.

distinctness of the wrong[17] and correct a dangerous legal lacuna.[18] Because existing offence categories such as assault ignore the underlying architecture of DFV, law enforcement and judicial officers are purportedly unable to adequately protect victim-survivors and sanction perpetrators.[19] In this connection, Tolmie refers to the expectation that a coercive control offence, in making less-overt harms cognisable, will ensure 'fair labelling' in charging and conviction and proportionality in the sentencing of DFV offenders.[20] Furthermore, it is said that an offence that captures the context-specific nature of DFV could facilitate a departure from the criminal law's customary focus on incidents of physical violence, in turn enabling and encouraging police and the courts to intervene before lower level, non-physical abuse escalates into life-threatening violence and/or notwithstanding the absence of physical abuse (the 'intervention point argument').[21]

The argument that criminalising coercive control means installing a life-saving early intervention point has been regularly invoked in the policy debate in NSW.[22] Government action in recent years has occurred in tandem with increased public awareness of the lethality of coercive control. Research conducted by the NSW Domestic Violence Death Review Team ('DVDRT') in the period 2010–21, for instance, confirms the status of coercive control as a major predictor of intimate partner homicide. The DVDRT's four most recent reports to Parliament found that more than 95% of intimate partner homicides in NSW are preceded by coercive and controlling behaviour on the part of the perpetrator.[23] Growing awareness of the link between coercive control and intimate partner homicide, along with the high-profile murders of Dr Preethi Reddy and Hannah Clarke by their partners in 2019 and 2020 respectively,[24] has kept the DFV death toll front of mind for the Australian public. This may account for the dominance of the death prevention rationale in the government's defence of the NSW legislation and its coverage by mainstream media. The intervention point argument is discussed further in Part IV(B)(1) below.

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17 Quilter (n 15) 127.

18 Marilyn McMahon and Paul McGorrery, 'Criminalising Coercive Control: An Introduction' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 3, 5–6.

19 Tolmie (n 15) 51–2.

20 Ibid 52–3.

21 Ibid.

22 See, eg, Attorney-General (NSW), 'NSW Government Delivers on Coercive Control Law' (Media Release, 11 October 2022) 1 <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2022/nsw-government-delivers-on-coercive-control-law.html>; Amy Dale, 'Family Violence: Criminalising Coercion' (2020) 70 *LSJ: Law Society Journal* 28, 30; Joint Select Committee on Coercive Control, Parliament of NSW, *Coercive Control in Domestic Relationships* (Report No 1/57, June 2021) iv.

23 Domestic Violence Death Review Team, *Report 2019–2021* (2022) 27–31, *Report 2017–2019* (2020) 154, *Report 2015–2017* (2017) 121, *Report 2013–2015* (2015) ix.

24 Kelly Hughes, 'Hannah Clarke's Domestic Violence Murder Highlighted Coercive Control — But Has Anything Changed?', *ABC News* (online, 10 August 2020) <https://www.abc.net.au/news/2020-08-10/anti-domestic-violence-laws-to-criminalise-coercive-control/12377952>; Kelly Fuller, 'New South Wales MP Names Proposed Coercive Control Bill for Murder Victim Preethi Reddy', *ABC News* (online, 25 September 2020) <https://www.abc.net.au/news/2020-09-25/proposed-coercive-control-bill-named-for-victim-preethi-reddy/12698074>.

B *Legal Responses to DFV in NSW and Australia*

Closely linked to the intervention point argument is another key claim made by those in favour of the legislation: that a discrete offence of coercive control will perform an important gap-filling function.[25] To test this claim, it is necessary to consider the existing legal framework and reform context in NSW.

The criminal law has figured in responses to DFV in NSW and Australia, but its role has been small compared to developments in other legal domains. Statutory civil protection order regimes, for instance, have been the prevailing legal response to DFV in Australia since the 1980s.[26] In 1983, NSW became the first Australian state to institute civil protection orders.[27] These orders, known in NSW as apprehended domestic violence orders ('ADVOs'),[28] impose constraints on a DFV perpetrator's conduct, typically limiting or prohibiting contact with the victim.[29] They can be applied for by a victim or by police on a victim's behalf.[30] In NSW, a court may make an ADVO if satisfied that the applicant reasonably fears the commission of a prescribed 'domestic violence offence'[31] or stalking or intimidatory behaviour by the respondent.[32] These ADVOs are hybrid civil–criminal mechanisms where breach of the order triggers criminal sanctions.[33]

Within Australia's federal compact, the states and territories have primary responsibility for making criminal law.[34] Until recently, no specific DFV offence had been codified in NSW law or the law of any other state (although certain types of non-physical abuse have been criminalised in Tasmania since 2004).[35] Domestic and family violence is instead dealt with via more general offences such as assault, property damage and sexual assault, as well as offences tailored to particular DFV behaviours such as stalking and intimidation, and breach of protection orders.[36] The existence of these offences has led to suggestions that at least some aspects of coercive control are already criminalised in NSW.[37] This point is addressed in Part IV(B)(1) below.

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25 See, eg, Amy Dale, 'Law Society Joins Calls to Criminalise Coercive Control' (2021) 75(1) *LSJ: Law Society Journal* 14.

26 Julie Stubbs and Jane Wangmann, 'Australian Perspectives on Domestic Violence' in Eve S Buzawa and Carl G Buzawa (eds), *Global Responses to Domestic Violence* (Springer, 2017) 167, 174.

27 Ibid.

28 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) pt 4 ('*CDPV Act*').

29 Ibid pt 8.

30 See, eg, ibid s 48.

31 Ibid s 16(1)(a). A 'domestic violence offence' is an existing criminal offence that is either a personal violence offence or intended to coerce or control, or intimidate or induce fear in, the applicant: s 11(1).

32 Ibid s 16(1)(b).

33 Ibid s 14. See generally Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34(4) *Sydney Law Review* 695.

34 Quilter (n 15) 122.

35 Kerryne Barwick, Paul McGorrery and Marilyn McMahon, 'Ahead of Their Time? The Offences of Economic and Emotional Abuse in Tasmania, Australia' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 135.

36 Stubbs and Wangmann (n 26) 178.

37 See, eg, Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *Melbourne University Law Review* 434.

III The Coercive Control Offence

New South Wales is the only Australian state that has legislated a standalone offence of coercive control, although parallel processes of offence creation are either under consideration or under way in all other states and territories.[38] In this, the Australian states are following in the footsteps of England and Wales, the Republic of Ireland, Scotland and Northern Ireland, all of which have introduced discrete offences of coercive control, beginning with England and Wales in 2015.[39]

The *Coercive Control Act* amends the *Crimes Act 1900* (NSW) ('*Crimes Act*'), inserting into pt 3 a new offence of 'abusive behaviour towards current or former intimate partners' (the 'coercive control offence').[40] Abusive behaviour is defined broadly in s 54F and makes explicit reference to 'coercion or control' of the current or former intimate partner.[41] The section contains a non-exhaustive list of actual or threatened behaviours capable of constituting abusive behaviour.[42] These include behaviour that (i) causes harm to a person other than the person to whom the behaviour is directed (including a child);[43] (ii) is economically or financially abusive;[44] (iii) shames, degrades or humiliates;[45] (iv) harasses or monitors a person or their activities (including via technological means);[46] (v) causes damage to or destruction of property;[47] (vi) isolates the person;[48] (vii) prevents the person from engaging in cultural or spiritual practices or expressing their cultural identity;[49] (viii) causes death or injury to an animal;[50] or (ix) deprives a person of liberty, including by unreasonably controlling or regulating the person's day-to-day activities.[51]

The offence consists of five elements, all of which must be proven beyond reasonable doubt.[52] The prosecution must establish (i) a course of conduct (defined as behaviour engaged in repeatedly and/or continuously);[53] (ii) consisting of abusive

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38 The Queensland government announced its own proposed coercive control laws two days after the NSW Bill was introduced into Parliament: Attorney-General (Qld), 'Legislation to Strengthen Response to Coercive Control Introduced into Parliament' (Media Release, 14 October 2022) 1 <https://statements.qld.gov.au/statements/96337>.

39 *Serious Crime Act 2015* (UK) s 76; *Domestic Violence Act 2018* (Irl) s 39; *Domestic Abuse (Scotland) Act 2018* (UK) s 1; *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021* (NI) ch 1.

40 *Crimes Act 1900* (NSW) s 54D (as inserted by *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) sch 1 item 1).

41 *Crimes Act 1900* (NSW) s 54F(1)(b).

42 Ibid s 54F(2).

43 Ibid s 54F(2)(a), (b).

44 Ibid s 54F(2)(c).

45 Ibid s 54F(2)(d).

46 Ibid s 54F(2)(e).

47 Ibid s 54F(2)(f).

48 Ibid s 54F(2)(g).

49 Ibid s 54F(2)(g)(ii), (iii).

50 Ibid s 54F(2)(h).

51 Ibid s 54F(2)(i).

52 Ibid s 54H(2)(a).

53 Ibid s 54G(1).

behaviour (which may include any combination of abusive behaviours);[54] (iii) directed against a former or current intimate partner;[55] (iv) with intent to coerce or control;[56] (v) in circumstances where a reasonable person would consider the course of conduct likely to cause fear of violence[57] or restraint of liberty in terms of 'a serious adverse impact on the person's capacity to engage in some or all of their ordinary daily activities'.[58] The offence carries a maximum penalty of seven years' imprisonment.[59] A defence is established if the course of conduct in question was 'reasonable in all the circumstances'.[60]

IV Objections

A *Two Camps*

In NSW, responses to the new offence have been mixed. Journalism, media reporting, public consultation processes and other physical and online spaces playing host to law reform debates and commentary have provided the vehicle for formation of a countermovement, with a number of legal practitioners, academics, advocates, peak organisations and victim-survivors using these avenues to register their dissent.[61] Within this countermovement, I identify a loose bifurcation between those who accept the premise and/or rationale of criminalisation but question whether the NSW criminal justice system is 'ready' for a discrete offence of coercive control, and those who reject criminalisation as a solution to the problem of DFV, insisting that the offence cannot and will not do 'right' by victim-survivors and the community.

The 'not ready' camp is wary of any policy approach that leans on legislation as a panacea when it comes to DFV. They acknowledge that the law tends to be a blunt instrument for carving out responses to gendered violence,[62] but are not willing to discount criminal justice–based measures altogether. To the extent that members of this camp contemplate penal sanctions (including imprisonment) as part of the solution, there is some alignment with carceral feminism and the mainstream anti-

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54 Ibid s 54D(2)(a).

55 Ibid s 54D(1)(b).

56 Ibid s 54D(1)(c).

57 Ibid s 54D(1)(d)(i).

58 Ibid s 54D(1)(d)(ii).

59 Ibid s 54D.

60 Ibid s 54E.

61 See Paige Cockburn, 'NSW Government Rushes to Pass Coercive Control Bill Despite Opposition from Domestic Violence Advocates', *ABC News* (online, 12 October 2022) <https://www.abc.net.au/news/2022-10-12/nsw-coersive-control-bill-parliament-domestic-violence/101527312>; Christine Robinson, 'Why Aboriginal Women Fear NSW's New Coercive Control Laws Could Do More Harm than Good', *The Guardian (Australia)* (online, 25 October 2022) <https://www.theguardian.com/society/2022/oct/25/why-aboriginal-women-fear-nsws-new-coercive-control-laws-could-do-more-harm-than-good>.

62 See, eg, Barlow and Walklate (n 14) 86; Sandra Walklate and Kate Fitz-Gibbon, 'The Criminalisation of Coercive Control: The Power of Law?' (2019) 8(4) *International Journal for Crime, Justice and Social Democracy* 94, 99, 102.

violence movement.[63] In respect of the NSW reforms, they highlight the importance of systemic change in criminal justice practice and procedure as a precursor or adjunct to the introduction of any new DFV offence.[64] This approach is discussed in more detail in Part IV(B) below.

Members of the 'not right' camp envision a pared-back role for criminal legal frameworks in DFV policy. They favour alternative approaches designed to correct gender- and race-based power imbalances and expand victim-survivors' agency, targeting the economic, sociocultural, political and other conditions that render individuals and communities vulnerable to DFV.[65] Importantly, the 'not right' camp resists inclusion in the white, middle-class battered women's movement,[66] and underscores how differences among women subjected to DFV necessitate more innovative justice strategies in lieu of the criminal law's brute equalising force.[67] Paradigms and perspectives drawn on include anti-carceral feminism, postcolonial criminology, and critical race theory. A central contention of this camp is that criminalisation does not work but rather produces tangible harms, particularly for marginalised women. This perspective is discussed further in Part IV(C) below.

B *Not Ready*

1 *The Implementation Gap*

One argument that has dominated responses to the NSW Bill is that a discrete offence of coercive control is premature and/or reflects a misdiagnosis of the problem, ignoring serious deficiencies in the *implementation* (rather than the content) of existing law and policy.[68] This argument refutes the 'legislative gap' paradigm as it applies to coercive control, instead underscoring the role of extra-legal factors — professional cultures, practitioner attitudes, training and perceptions — that underpin criminal justice processes and shape legal outcomes.[69]

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63 See Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (University of California Press, 2018); Rachel Killean, '"A Leap Forward"? Critiquing the Criminalization of Domestic Abuse in Northern Ireland' (2020) 71(4) *Northern Ireland Legal Quarterly* 595.

64 See Jane Wangmann, Submission to Standing Committee on Social Issues, Parliament of NSW, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022).

65 See Goodmark, *Decriminalizing Domestic Violence* (n 63); Heather Nancarrow, *Unintended Consequences of Domestic Violence Law: Gendered Aspirations and Racialised Realities* (Palgrave Macmillan, 2019).

66 Ellen Reeves and Silke Meyer, 'Marginalized Women, Domestic and Family Violence Reforms and Their Unintended Consequences' in E Erez and P Ibarra (eds), *The Oxford Research Encyclopedia of International Criminology* (online at 22 January 2021) 6, 15.

67 Nancarrow (n 65) 215; Goodmark, *Decriminalizing Domestic Violence* (n 63) 10–11.

68 Wangmann, Submission (n 64) 5.

69 See, eg, Quilter (n 15) 126; Jane Wangmann, 'Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Law* (Springer, 2020) 219, 221; Killean (n 63) 602.

A singular focus on criminalisation tends to presume and unduly emphasise the existence of a legislative gap.[70] Scholars have critiqued the logic of the legislative gap framing for its preoccupation with the law's coverage and implicit assumption that so long as statute makes provision for a particular subject matter, that subject matter is sufficiently dealt with by the law.[71] In NSW, it is unlikely that any statutory 'gap' can account for the criminal justice system's failure to come to grips with DFV, given the extent to which existing laws are amenable to contextual approaches to policing, prosecuting and adjudicating DFV matters.[72] This is supported by the findings of the Australian and NSW Law Reform Commissions. In their joint review of national family violence laws, the Commissions identified the need for improvements in the enforcement of existing offences as a key factor militating against the creation of new DFV-related offences.[73]

Importantly, existing laws in NSW *do* criminalise ongoing and non-physical forms of DFV. Because of the way they are formulated, 'course of conduct' offences — such as stalking or intimidation in s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('*CDPV Act*') — should, in theory, prompt criminal justice personnel to take an expansive rather than snapshot view of victim–perpetrator relationships, including any history of abuse therein. In determining whether the offence of stalking or intimidation is made out, for instance, the court is permitted to consider 'any pattern of violence in the relationship'.[74] The stalking or intimidation offence, moreover, captures a broad range of abusive behaviours, both on its face and in practice. Intimidation is expressed to include, inter alia, (i) harassment or molestation;[75] (ii) unwanted approaches (including via technology) that lead a person to fear for their safety;[76] or (iii) conduct causing reasonable apprehension of injury,[77] violence to any person,[78] damage to property[79] or harm to an animal[80] — all of which would likely satisfy the conduct element of the new coercive control offence.

The behaviours listed in s 13 of the *CDPV Act* and in the new s 54F(2) of the *Crimes Act* are substantially similar, and there are reasons to suspect that this duplication will have more than merely textual or theoretical significance. A recent Bureau of Crime Statistics and Research ('BOCSAR') paper on DFV-related stalking and intimidation offences in NSW, for instance, confirms that police do in practice rely on s 13 to target forms of abuse at which the coercive control offence

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70 Quilter (n 15) 124.

71 Ibid.

72 Douglas, 'Do We Need a Specific Domestic Violence Offence?' (n 37).

73 Australian Law Reform Commission ('ALRC') and New South Wales Law Reform Commission ('NSWLRC'), *Family Violence — A National Legal Response* (ALRC Report No 114 and NSWLRC Report No 128, October 2010) 587.

74 *CDPV Act* (n 28) ss 7(2), 8(2), although the courts have tended to interpret this narrowly, limiting the utility of this permissive provision: see *DPP (NSW) v Lucas* [2014] NSWSC 1441, [27].

75 *CDPV Act* (n 28) s 7(1)(a).

76 Ibid s 7(1)(b).

77 Ibid s 7(1)(c)(i).

78 Ibid s 7(1)(c)(ii).

79 Ibid s 7(1)(c)(iii).

80 Ibid s 7(1)(c)(iv).

is directed — namely, threatening and intimidatory behaviour and verbal abuse.[81] Applying the legislative gap rhetoric then, there is much to be said for the counterargument that offences on the books in NSW already 'cover' coercive and controlling behaviour, at least in part. Real questions arise as to how the s 54D offence will interact with the s 13 offence, and the potential for their imbrication to generate confusion among criminal justice practitioners.[82]

Of course, formal criminalisation does not automatically equate to substantive criminalisation.[83] Treating DFV as a legislative gap to be filled is misconceived because of the role played by acts of discretion at various points in the criminal justice process.[84] Victim or witness reporting, police and prosecutorial decision-making, and acts of judicial interpretation and reasoning are all discretionary matters which mediate legal structures and legal outcomes. Importantly, a new offence framed in terms of repeated or continuous acts and including specific reference to non-physical abuse can only achieve so much while criminal justice practice and procedure remain shackled to the violent incident model of crime. In the absence of training and education initiatives capable of engendering cultural change within the key professions and institutions tasked with responding to DFV (including the police force), it is likely that practice will remain so shackled.[85]

The utility of existing 'course of conduct' offences, for instance, has been undermined by the dominance of incident-based models of policing. Evidence from other jurisdictions indicates that instead of sensitising law enforcement officials to the routinised, everyday nature of intimate partner violence, stalking and intimidation offences tend to be administered in an 'incident additive' manner whereby 'individual incidents are examined and proven to determine whether they add up to a course of conduct'.[86] This additive approach has characterised police implementation of the coercive control offence in England and Wales (discussed in Part IV(B)(2) below). This suggests that rather than embedding contextualised understandings of DFV, legislated offences intended to capture ongoing and non-physical abuse are only used where there are identifiable incidents of violence; and because physical violence is more readily evidenced and identifiable by police, the result is a reversion to the violent incident focus.[87]

There is a real risk that the NSW coercive control offence will face the same practical problems. Further, offences of this kind are uniquely difficult to implement because of the highly nuanced factual analysis that successful implementation

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81 Stephanie Ramsey, Min-Taec Kim and Jackie Fitzgerald, 'Trends in Domestic Violence–Related Stalking and Intimidation Offences in the Criminal Justice System: 2012 to 2021' (BOCSAR, Bureau Brief No 159, June 2022) 6.

82 Wangmann, Submission (n 64) 12.

83 Quilter (n 15) 126.

84 Ibid.

85 Wangmann, Submission (n 64) 4–6.

86 Tolmie (n 15) 59; Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2015) 66(2) *Northern Ireland Legal Quarterly* 179, 189.

87 Barlow et al (n 13) 169.

requires.[88] Criminal justice actors, police especially, are neither accustomed nor equipped to carry out the necessary inquiries.

To illustrate, the coercive control offence definition includes a catalogue of behaviours,[89] many of which, at face value, may cohere with regular family dynamics and/or an agreed division of household responsibilities. In most cases, the intention, meaning and effect of a particular course of conduct (control of the family's finances by one partner, for instance) plus its interrelation with other dynamics in the relationship, will determine whether it is capable of falling within the intended meaning of 'abusive behaviour' and thus constituting a crime. As Walklate, Fitz-Gibbon and McCulloch have observed, when coercive control is displaced from clinical frameworks, it can be an extremely slippery concept[90] — perhaps too slippery for the criminal legal system and its actors to operationalise. The question arises whether police, who are primed to lay charges on the basis of formulaic offences,[91] are the appropriate persons to conduct these assessments and trigger the intervention of the state in individuals' private lives. In practice, delays in reporting and unwilling witnesses and victims are additional obstacles to developing a full picture of what has occurred in any case and thus detecting, evidencing and prosecuting coercive and controlling behaviour.[92]

2 *The (In)effectiveness of Criminalisation*

Evidence as to the success of criminal justice interventions targeting coercive control is limited and inconclusive.[93] There are, moreover, signs that coercive control offences introduced in other jurisdictions are not working as intended. Although most of these offences are in their infancy, it is nonetheless concerning that early assessments of their operation consistently demonstrate under-utilisation or utilisation only in conjunction with offences characterised by more obvious physical forms of violence. The latter trend is especially significant insofar as it suggests that a discrete offence of coercive control in NSW will lack any independent utility.

The experience of Tasmania in relation to its offences of economic abuse and emotional abuse[94] is instructive. There has been a dearth of charges and prosecutions on the basis of these offences: none in the first three years of their operation[95] and only 73 prosecutions in total over 12 years.[96] Against this, 3,174 charges were laid for breach of a family violence order in the space of a single year.[97] While uptake is

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88 Tolmie (n 15) 54.

89 See *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW) s 54F.

90 Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18(1) *Criminology and Criminal Justice* 115, 115.

91 Douglas, 'Do We Need a Specific Domestic Violence Offence?' (n 37) 440.

92 Ibid.

93 Australia's National Research Organisation for Women's Safety ('ANROWS'), *Defining and Responding to Coercive Control: Policy Brief* (ANROWS Insights 01/2021, 2021).

94 *Family Violence Act 2004* (Tas) ss 8, 9.

95 Barwick, McGorrery and McMahon (n 35) 137.

96 Ibid.

97 Ibid 149.

not to be conflated with efficacy, *lack* of uptake of the offences in the absence of a marked reduction in DFV rates points to missed opportunities for their use.[98] In accounting for the scarcity of charges and prosecutions, commentators have referred to drafting and formulation issues as well as ongoing challenges in the implementation of the offences,[99] reinforcing once more the significance of the implementation gap.

In England and Wales, the offence of controlling or coercive behaviour in an intimate or family relationship[100] has encountered similar problems. Despite considerable early uptake, use of the offence has waned with few charges laid and fewer proceedings brought.[101] Barlow et al's empirical analysis of police practice in one English district since the introduction of the offence reveals several problematic trends.[102] The authors found that investigative efforts remained focused on evidencing violent incidents such as assault or property damage to the exclusion of patterns of abusive behaviour, even where repeated coercive and controlling behaviours were present or reported.[103] Coercive control rarely triggered use of police powers in the absence of an accompanying incident-based offence characterised by physical violence.[104] Significantly, only 3.1% of cases involving coercive control unaccompanied by evidence of physical violence resulted in coercive control charges being laid, compared to 20.7% of cases where physical violence was also present.[105] This is symptomatic of the continued normalisation and minimisation of 'lower' levels of abuse, their implicit classification as benign, and the prevailing attitude that abuse is only a problem where it is visible, physical and violent.[106] Such trends raise questions about the capacity of a standalone offence to provide an intervention point where one does not already exist in law, given that charges of coercive control, where laid, are simply being tacked on to other charges referrable to violent incidents.

3 *Attendant Risks and Harms*

Many commentators anticipate that, in addition to having limited or no utility, the NSW legislation in its present form will be attended by adverse consequences for victim-survivors. In particular, there are fears that the new offence will contribute to the problems of misidentification, systems abuse and re-traumatisation of victim-survivors. Upon attending a scene where one or both parties appear to have used violence, in circumstances where it is not easy to ascertain whether the violence was used for an offensive or a defensive purpose, there is a risk that police will mistake a victim of DFV for a perpetrator. This risk is elevated by poor police practice, such

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98 Walklate and Fitz-Gibbon (n 14) 3; Wangmann, 'Coercive Control as the Context for Intimate Partner Violence' (n 69) 230.

99 See Barwick, McGorrery and McMahon (n 35).

100 *Serious Crime Act 2015* (UK) s 76.

101 Barlow et al (n 13) 163–4.

102 Ibid 172.

103 Ibid 170.

104 Ibid 169, 171.

105 Ibid 171.

106 Tolmie (n 15) 60.

as failing to take statements from both parties separately, and acting on the basis of moment-in-time impressions. It is also elevated by manufactured retellings of the action by the primary aggressor, who may present as calmer and therefore the more 'rational' and credible witness of the two.[107]

Linked to victim misidentification is the opportunity for what Douglas calls 'systems abuse', where the perpetrator uses the legal system and its processes to maintain or further the victim's subordination.[108] The NSW offence may be particularly susceptible to being wielded in this manner. As observed by one stakeholder group, the legislation could support attempts to characterise non-coercive and controlling behaviours — such as a victimised mother's decision to cease contact or visitation of her children with their father due to safety concerns[109] — as abusive behaviour for the purpose of the offence.[110] The legislation as it stands does not guard against the deployment of disingenuous arguments that weaponise children of the relationship and demonise (or seek to criminalise) protective mothers.[111]

Victim re-traumatisation is another foreseeable harm. Where coercive control is alleged in the course of legal proceedings, it is highly likely that the complainant will be required to testify. This is due to the inherent difficulty of evidencing coercive and controlling behaviour, a difficulty underwritten by persistent myths and misconceptions about 'willing victims' and 'masochistic women', as well as the legal system's preoccupation with bodily injury as a definitive marker of DFV.[112] Because of these evidentiary barriers, there is a greater need for victim involvement in the presentation of the prosecution's case. This will mean exposing victims to the adversarial process — including defence tactics designed to discredit the victim as a witness.[113] This in turn may lead to the victim's re-traumatisation through continued denial of her reality, and the legal process acting as a 'secondary abuser'.[114]

C *Not Right*

1 *Racialised Policing of DFV*

The implementation problem and associated systemic issues in the administration of criminal justice have led some to argue that criminalisation is fundamentally the

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107 Madeleine Ulbrick and Marianne Jago, '"Officer She's Psychotic and I Need Protection": Police Misidentification of the "Primary Aggressor" in Family Violence Incidents in Victoria' (Policy Paper No 1, July 2018, Women's Legal Service Victoria).

108 Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 84.

109 See Barlow and Walklate (n 14) 25.

110 Women's Legal Service NSW, Submission to Standing Committee on Social Issues, Parliament of NSW, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022) 46.

111 Ibid.

112 See Bettinson and Bishop (n 86).

113 Tolmie (n 15) 55.

114 Douglas, 'Legal Systems Abuse and Coercive Control' (n 108) 94.

wrong mechanism to address DFV.[115] This dovetails with concerns about how marginalised groups, including First Nations peoples, are often the worst affected by deficiencies in criminal justice practice and procedure. Situational barriers to justice combined with structural racism and sexism mean that First Nations women are both excluded from DFV solutions based in criminal justice interventions and *actively harmed* by those purported solutions. In particular, First Nations women who experience DFV are adversely impacted by ingrained beliefs not only about what DFV looks like (violent incidents), but also about what a victim of DFV looks like and where Indigenous women 'fit' in terms of the victim–offender binary.[116] These are issues which a new offence cannot rectify, and may even exacerbate.

Cunneen describes police relations with Indigenous peoples as a 'contiguous zone' in which the evils of racism, colonialism and violence converge.[117] First Nations victim-survivors' experiences of DFV policing demonstrate the dysfunctionality and dangerousness of this zone. In particular, documented over- and under-policing of DFV involving First Nations women — the twin products of a tendency to view First Nations women as criminals first and never as 'deserving' victims[118] — points to problems with reliance on DFV solutions that rest on the expansion of police powers.

Buxton-Namisnyk delivers a clear picture of these problems. In her study of homicide cases involving the death of First Nations women at the hands of male partners across six Australian jurisdictions between 2006 and 2016, she found that contact with police was uniformly harmful for these women. Policing failures and police inaction frequently contributed to fatal outcomes:

> [I]n almost a fifth of cases … there was evidence that First Nations women had asked officers to take action on their behalf, usually to apply for a [domestic violence order] or to progress charges against their partner, but police failed to act. For example, in one case from the [Northern Territory], a First Nations woman attended the police station after an assault, and while police entered her details into the system, they did not take her statement. She left the station after a long wait in the public waiting area in view of passing community members. Police failed to follow up with her, their records describing that officers were dispatched to an 'urgent' job. She was killed later that night.[119]

Buxton-Namisnyk's findings demonstrate that police action is similarly responsible for poor outcomes for First Nations victims of DFV. Too often, police responses

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115 See Goodmark, *Decriminalizing Domestic Violence* (n 63).

116 See Lisa Young Larance, Margaret Kertesz, Cathy Humphreys, Leigh Goodmark and Heather Douglas, 'Beyond the Victim–Offender Binary: Legal and Anti-Violence Intervention Considerations with Women Who Have Used Force in the US and Australia' (2022) 37(3) *Affilia: Feminist Inquiry in Social Work* 466.

117 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001), cited in Emma Buxton-Namisnyk, 'Domestic Violence Policing of First Nations Women in Australia: "Settler" Frameworks, Consequential Harms and the Promise of Meaningful Self-Determination' (2021) 62(6) *British Journal of Criminology* 1323, 1325.

118 Emma Buxton-Namisnyk, 'Domestic Violence Policing of First Nations Women in Australia: "Settler" Frameworks, Consequential Harms and the Promise of Meaningful Self-Determination' (2021) 62(6) *British Journal of Criminology* 1323, 1332.

119 Ibid.

have the effect of undermining victim agency and diminishing confidence in the legal system for First Nations women.[120] Across the cases analysed, implementation of DFV law and policy by law enforcement officials tended to be paternalistic and inattentive to context.[121] In several cases, for example, police secured civil protection orders against the express wishes of victims, including one case in NSW where the victim and respondent remained in a relationship and were co-habiting at the relevant time.[122]

Furthermore, there is evidence that DFV policing contributes to the criminalisation of First Nations women.[123] Indigenous women are convicted of DFV offences at rates far higher than non-Indigenous women.[124] In nearly one-third of the intimate partner homicides analysed by Buxton-Namisnyk, the victim had previously been identified by police as a DFV perpetrator.[125] In 22% of cases, police attending a DFV call-out pursued criminal charges against the victim for unrelated minor offences[126] — a clear example of police practice driven by racist perceptions of women of colour as criminals rather than victims in need of protection. These figures suggest a pattern of false mutualisation,[127] driven by failures to recognise the self-defensive or retaliatory nature of violence used by First Nations women against their abusive partners,[128] as well as the influence of gendered and racialised stereotypes such as that of the 'angry black woman'.[129] The racism and sexism that pervade policing responses to DFV raise questions about the capacity of a new DFV offence — the implementation of which will fall squarely on the shoulders of law enforcement authorities — to deliver on its promise of better responding to and protecting DFV victim-survivors.

2 *The Intervention Point Argument*

The claim that the new offence will provide a point of intervention facilitating the prevention of DFV-related deaths (mentioned in Part II) is also highly dubious, not least because police already have the necessary powers and capacity to intervene to protect victims of DFV but frequently do not (especially where the victim is a First Nations woman).[130] Moreover, many women who experience DFV are reluctant to engage with police in the first place.[131] Under-reporting of DFV by Aboriginal and

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120 Ibid 1334.
121 Ibid 1333–4.
122 Ibid 1334.
123 Nancarrow (n 65) 21.
124 Ibid 11.
125 Buxton-Namisnyk (n 118) 1335.
126 Ibid.
127 See Elizabeth A Sheehy, 'Criminalising Private Torture as Feminist Strategy' in Kate Fitz-Gibbon, Sandra Walklate, Jude McCulloch, JaneMaree Maher (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 2018) 251, 266.
128 Referred to in the literature as 'violent resistance': Buxton-Namisnyk (n 118) 1335.
129 Ibid; Larance et al (n 116) 471.
130 Buxton-Namisnyk (n 118) 1340.
131 See Goodmark, *Decriminalizing Domestic Violence* (n 63).

Torres Strait Islander[132] women is a particular issue,[133] though hardly inexplicable. Under-reporting stems from a matrix of factors: fears of discriminatory police responses, of being ostracised by one's community, and of perpetrator retaliation;[134] fears about ramifications for the perpetrator (including the possibility of incarceration, and the very real dangers to which being in prison exposes Aboriginal men and women) and for oneself (if the victim has a criminal record or is otherwise known to police);[135] lack of culturally appropriate services; and awareness of the 'direct pathway' from police contact to child protection involvement.[136] Importantly, many women do not wish, and (due to financial dependency)[137] cannot afford, for the perpetrator to be removed from their lives. They just want the violence to end.[138]

For First Nations and other marginalised women, these factors operate to discourage engagement with a system ostensibly designed to assist and protect them, in circumstances where viable alternative avenues (such as community- and Elder-led programs) are either chronically underdeveloped or simply do not exist.[139] Because First Nations women have long experienced the law itself as a coercive and controlling force, intent from the very beginning on 'break[ing] up' Aboriginal families,[140] violence at the hands of an intimate partner may be seen as the lesser of two evils, more tolerable than intervention by the state. For these reasons, in these contexts in particular, the intervention point argument labours under a lack of realism.

3 *Governing through Crime*

Anti-carceral feminists have denounced the criminalisation agenda adopted by mainstream anti-violence movements, offering a counter-discourse to the criminalisation thesis in its application to gendered violence.[141] They point to established policy learnings, two of which have particular resonance in the debate on criminalising coercive control: one, that the deterrent value of criminalisation is, with few exceptions, minimal;[142] the other, that criminalisation disproportionately affects marginalised groups.[143] While there are some benefits of penal responses for

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132 The terms 'Aboriginal and Torres Strait Islander', 'Indigenous' and 'First Nations' are used throughout this comment to refer to the First Nations peoples of Australia. I pay my respects to the traditional owners of Australia's lands and waters.

133 Reeves and Meyer (n 66) 7.

134 Ibid 8.

135 Ibid 10.

136 Buxton-Namisnyk (n 118) 1335.

137 Reeves and Meyer (n 66) 14.

138 Ibid 8.

139 ANROWS (n 93) 9.

140 Reeves and Meyer (n 66) 14.

141 See Goodmark, *Decriminalizing Domestic Violence* (n 63); Nancarrow (n 65) 225; Chelsea Watego, Alissa Macoun, David Singh and Elizabeth Strakosch, 'Carceral Feminism and Coercive Control: When Indigenous Women Aren't Seen as Ideal Victims, Witnesses or Women', *The Conversation* (online, 25 May 2021) <https://theconversation.com/carceral-feminism-and-coercive-control-when-indigenous-women-arent-seen-as-ideal-victims-witnesses-or-women-161091>.

142 Goodmark, *Decriminalizing Domestic Violence* (n 63) 12, 24; Buxton-Namisnyk (n 118) 1334.

143 Goodmark, *Decriminalizing Domestic Violence* (n 63) 17, 19, 21; Watego et al (n 141).

some victim-survivors of DFV (such as incapacitation of the abuser and associated peace of mind for the victim),[144] the truth remains that treating coercive control like any other crime does not, and cannot, solve the problem on its own since it does not lead to a reduction in the impugned behaviour. Nor does it cure the socials ills that create the conditions necessary for the impugned behaviour to flourish.[145] Rather, criminalisation tends to exacerbate those very ills, through ripple effects that travel far beyond the lives of the immediate victim and perpetrator.[146]

The findings of Buxton-Namisnyk are again illustrative. Her research shows that attaching the threat of arrest, prosecution, conviction and punishment to a certain behaviour does not necessarily deter perpetrators or prevent recidivism. She notes that

> for almost three-quarters of all of the First Nations women who were killed by their partner … the woman's partner had previously been convicted of domestic violence offences. Prior convictions accordingly did not stop the victim's partner from using violence, including fatal violence.[147]

The clear failure of specific deterrence in this context calls into question the effectiveness of DFV offences and the rationale of criminalisation as a whole.

Criminalisation also aggravates the conditions within intimate relationships and society that contribute to DFV. Goodmark has written extensively on this. She underlines the fact that individuals with criminal histories are likely to encounter social stigma, prolonged unemployment, and financial hardship.[148] Moreover, the 'warehousing' in prison of men who would otherwise be serving as the primary income earners in their families, engaging in unpaid domestic work such as childcare, and supporting the local economy through their spending leads to dislocation and instability in both families and communities.[149] One of Goodmark's core arguments is that offence creation or 'governing through crime'[150] is no stand-in for, and indeed distracts and detracts from,[151] targeted policymaking designed to address social problems which frequently coalesce with DFV, including poverty, homelessness and mental illness.[152]

In this vein, it has been suggested that addressing DFV within the Australian settler-colonial context will necessarily involve a parallel decolonising process, whereby power is vested (and funds invested) in First Nations justice structures.[153] Such an approach is preferable to legislating new DFV offences in light of the implementation gap, but also and especially because the concept of coercive control formulated in statute is unlikely to capture DFV as it is experienced within and

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144 Goodmark, *Decriminalizing Domestic Violence* (n 63) 15–16.
145 Ibid 17.
146 Ibid.
147 Buxton-Namisnyk (n 118) 1334.
148 Goodmark, *Decriminalizing Domestic Violence* (n 63) 26–7.
149 Ibid 26–8.
150 Ibid 153–4.
151 As Goodmark observes, funding is often a 'zero-sum game': *Decriminalizing Domestic Violence* (n 63) 22.
152 Ibid 18.
153 Reeves and Meyer (n 66) 20.

understood by Indigenous communities.[154] The manner in which the coercive control offence is packaged in the *Coercive Control Act*, for instance, reflects 'white' conceptions of DFV which do not map neatly onto the reality of family violence as it is experienced by many Indigenous peoples.[155] The limitation of the proposed offence to intimate partners is particularly problematic insofar as it fails to pick up forms of violence perpetrated by other family members (including within kin relationships under customary law) which may be more prevalent in Indigenous communities. Financial elder abuse is a key example.[156]

4 *Dangers of Criminalisation: Hyper-Incarceration and Misidentification*

Several commentators have drawn attention to the unintended (though 'not unanticipated')[157] consequences likely to attend the NSW reforms, with particular emphasis given to the ways the coercive control offence will disadvantage already vulnerable groups.[158] Among the concerns of First Nations–led organisations is the potential net-widening effect of the offence for First Nations peoples: the possibility that it will act as an additional entry-point into the criminal justice system and contribute to the hyper-incarceration of Indigenous Australians.[159] Recent BOCSAR figures reveal that changes in the implementation of DFV offences have a pronounced effect on the First Nations population. The overall increase in recorded incidents of domestic violence–related stalking and intimidation in NSW observed over the 10 years to 2021, for instance, occurred in tandem with a doubling of the number of Indigenous people receiving custodial penalties for these offences.[160] In 2021, legal proceedings against First Nations people for stalking or intimidation offences were brought at a rate seven times that of the general population.[161] The overrepresentation of Aboriginal people in proceedings for the s 13 offence justifies concerns about the disproportionate impact that a novel coercive control offence will have upon First Nations people.

As mentioned in Part IV(B)(3) above, the potential for police to mistake a victim of DFV for a perpetrator is a risk for victim-survivors generally, due to poor police practice and situational ambiguity. However, the risk of misidentification has unique dimensions for two groups of DFV victims. One group is culturally and

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154 See Wirringa Baiya Aboriginal Women's Legal Centre ('AWLC'), Submission to Standing Committee on Social Issues, Parliament of NSW, *Crimes Legislation Amendment (Coercive Control) Bill 2022* (31 August 2022) 10–11.

155 See Harry Blagg, Victoria Hovane, Tamara Tulich, Donella Raye, Suzie May and Thomas Worrigal, 'Law, Culture and Decolonisation: The Perspectives of Aboriginal Elders on Family Violence in Australia' (2022) 31(4) *Social and Legal Studies* 535.

156 See ibid; Wirringa Baiya AWLC (n 154) 10.

157 Emma Buxton-Namisnyk, Althea Gibson and Peta MacGillivray, 'Unintended but Not Unanticipated: Coercive Control Laws Will Disadvantage First Nations Women', *The Conversation* (online, 26 August 2022) <https://theconversation.com/unintended-but-not-unanticipated-coercive-control-laws-will-disadvantage-first-nations-women-188285>.

158 Ibid.

159 Ibid; Watego et al (n 141).

160 Ramsey, Kim and Fitzgerald (n 81) 16.

161 Ibid 9.

linguistically diverse women — who are vulnerable to having their version of events undermined in the absence of an interpreter, especially where their abuser is more fluent in English and thus in a better position to communicate his account.[162] The other is Aboriginal and Torres Strait Islander women, due to gendered and racialised stereotypes of the kind discussed above. Research shows that First Nations women are sanctioned for DFV at rates much higher than non-Indigenous women, and that police regularly take action against First Nations victim-survivors instead of perpetrators.[163] Women who retaliate or defend themselves, or who are distressed and in no fit state to answer police questions are often deemed unwilling or uncooperative and dismissed[164] or, worse, mistakenly identified as the perpetrator and sanctioned in kind.[165] The devastating bind is that women of colour are more likely to resort to self-help and 'fight back' against their abusers precisely because they are unable to access the protection and resources that are available to white, middle-class women, so embedded are constructions of 'ideal victimhood' as well as structural racism.[166] The failure of the criminal justice system to protect marginalised women in turn leads to their criminalisation.

All of this has clear implications for the introduction of any new DFV offence in NSW. As Christine Robinson of Wirringa Baiya Aboriginal Women's Legal Centre recently stated:

> [If an] Aboriginal woman is uneasy or unable to persuade a police officer that she is the primary victim of physical violence [under the current law] what hope, or incentive is there to persuade a police officer that she has experienced ongoing psychological and/or economic abuse [under the new law]?[167]

V Conclusion

In November 2022, the NSW Parliament legislated a standalone offence of coercive control. The *Coercive Control Act* has been lauded as an essential and long overdue piece of reform, designed to extend the criminal law's reach beyond physical abuse between intimate partners to patterns of abuse which often precede fatal acts of violence and which function to deprive victims of their personal autonomy. This comment has canvassed the key objections to the criminalisation of coercive control, with reference to the NSW and broader Australian (and overseas) contexts. A close analysis of these objections reveals their resonance across paradigmatic divides, including on both sides of the criminalisation thesis. Opposition stems from concerns about systemic issues in criminal justice practice and procedure, the lack of a firm evidence base favouring criminalisation of DFV, and the potential harms of criminalisation for victim-survivors. The *Coercive Control Act* provides for the establishment of a Coercive Control Implementation and Evaluation Taskforce to

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162 Reeves and Meyer (n 66) 11.
163 Buxton-Namisnyk (n 118) 1335–6.
164 Reeves and Meyer (n 66) 9.
165 Ibid 11.
166 Ibid 7, 9, 15.
167 Robinson (n 61).

oversee implementation of the new offence.[168] Because of the real dangers associated with introducing an offence that has little hope of operating as envisioned and which may come at a significant cost to its intended beneficiaries, the taskforce has substantial work to do between now and the commencement of the offence's operation in 2024.

[168] *Crimes Act 1900* (NSW) s 54I.

Case Note

Google LLC v Defteros: Defamation, Publication and Hyperlinked Search Results

Tom Alchin*

Abstract

This case note examines the High Court of Australia's decision in *Google LLC v Defteros*, in which a majority of the Court held that Google was not liable as a publisher of defamatory matter to which its search results, generated in response to a user query, linked. It explores the increasingly convoluted application of the principles of defamation law — specifically, the element of publication — to search engine operators and other internet intermediaries in the digital age. It argues that the High Court's decision in *Google LLC v Defteros*, while more pragmatic than past jurisprudence in this area, ultimately raises more questions than it provides answers. In particular, it explores three fundamental issues: whether any clear ratio decidendi can be discerned from the Court's decision; the problems with following *Crookes v Newton*, a persuasive Canadian decision which the majority relied on most heavily in this case; and the significance of the Court's decision within the context of the ongoing national defamation law reforms.

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I Introduction

> In point of principle, the law as to publication is tolerably clear. It is the application of it to the particular facts of the case which tends to be difficult, especially in the relatively novel context of internet search engine results.[1]

In *Google LLC v Defteros* ('*Defteros*'),[2] the majority of the High Court of Australia held that Google was not a publisher of defamatory matter to which its search results linked, where those results were generated in response to a user query. The majority, comprising five Justices of the full Bench writing in three separate judgments, allowed Google's appeal from the Victorian Court of Appeal, holding that the appellant was not liable for publishing the defamatory matter complained of. In separate judgments, Gordon and Keane JJ dissented from the majority, agreeing with the finding of the Supreme Court of Victoria at trial and the Court of Appeal that Google was a publisher of defamatory matter to which its search results linked. *Defteros* is the only defamation case the High Court heard in 2022. The Court's decision departs somewhat from previous lower court jurisprudence on the issue of the search engine operator's liability for publication of defamatory matter, which had evinced a clear preference for a conservative and broad approach which imposed liability in most circumstances. By contrast, the High Court in *Defteros* ruled that the mere provision of a hyperlinked search result alone, absent any other feature, will not amount to publication of any defamatory matter to which it links.

This case note examines three of the most salient issues arising from the Court's decision. First, Part II explores the background to the case, including the element of publication in defamation, which has become an increasingly complex and contentious area in relation to internet technologies. Then Part III examines whether any clear and principled ratio decidendi is capable of being distilled from the somewhat difficult and, at times, conflicting majority judgments. In Part IV the case note then turns to consider the majority's problematic following of *Crookes v Newton*,[3] a leading Canadian decision on defamation liability for hyperlinking. Part V places *Defteros* within the ongoing reforms to Australia's national uniform defamation laws — in particular, the development of a 'no-liability' provision for search engine operators. It concludes that whether *Defteros* represents a pragmatic shift in the Court's approach to publication in the digital age, or merely a straightforward application of analogous cases, remains to be seen.

II Background

A *The Element of Publication*

Before turning to the facts and decision in *Defteros*, it is first necessary to explain the element of publication, which was at issue in the case. The principles of publication were recently restated by the High Court in *Fairfax Media Publications*

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1 *Trkulja v Google LLC* (2018) 263 CLR 149, 163–4 (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) ('*Trkulja*').

2 *Google LLC v Defteros* (2022) 96 ALJR 766 ('*Defteros*').

3 *Crookes v Newton* [2011] 3 SCR 269.

Pty Ltd v Voller ('*Voller*'),[4] in which the Court dealt with the liability of social media users for defamatory third-party comments left on their posts. Publication is one of the three elements that a plaintiff must prove to establish a cause of action in defamation in Australia. It has been held to be the actionable wrong that completes a cause of action in defamation and upon which an action is founded.[5] It comprises the 'bilateral' act of the defendant communicating, by any means, the defamatory matter to at least one recipient other than the plaintiff in a comprehensible form.[6] As such, a defendant commits the tort of defamation when (and where) a third party receives the defamatory matter that the defendant has communicated in comprehensible form. Liability for publication is both strict and broad: strict in that any degree of active and voluntary participation in the process of publication amounts to publication itself, and broad in that the 'breadth of activity captured … is vast'.[7]

The principles of publication have become increasingly difficult to apply since the advent of the digital age, particularly to users of internet technologies such as internet service providers,[8] internet search engines[9] and social media platforms and users.[10] However, as Rolph notes, the difficulty lies not necessarily in the sheer scale of publication that internet technologies enable, but in the 'disaggregation of [the] steps [of publication] brought about by internet technologies'.[11] Internet technologies allow 'the creation and dissemination of, and profit from, defamatory matter' to be completed at different stages, by different parties, with different intentions.[12] In attempting to reconcile these emerging and evolving technologies and the novel means of communication they enable with the 'settled' principles of publication, common law courts and academics alike have discovered that '[i]n many ways, internet technologies challenge the basic principles relating to publication in defamation law'.[13]

The issue of the liability of search engine operators has arisen on multiple occasions in Australia. In *Trkulja v Google Inc LLC [No 5]* ('*Trkulja [No 5]*')[14] the Supreme Court of Victoria ruled that Google was the publisher of defamatory search results provided by its search engine in response to user-initiated queries. In his judgment, Beach J reasoned that because Google's search engine 'operate[s] precisely as intended' in producing search results, it had *intended* to publish the matter.[15] When Mr Trkulja commenced further defamation proceedings against Google five years later for allegedly defamatory image results and autocomplete

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4 *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767 ('*Voller*').
5 *Webb v Bloch* (1928) 41 CLR 331, 363 (Isaacs J).
6 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gutnick*').
7 *Defteros* (n 2) 776 [25] (Kiefel CJ and Gleeson J), quoting *Crookes v Newton* (n 3) 281–2 [18] (Abella J).
8 See, eg, *Godfrey v Demon Internet Service* [2001] QB 201.
9 See, eg, *Trkulja* (n 1).
10 See, eg, *Voller* (n 4).
11 David Rolph, 'The Concept of Publication in Defamation Law' (2021) 27(1) *Torts Law Journal* 1, 2.
12 Ibid.
13 Ibid.
14 *Trkulja v Google Inc LLC [No 5]* [2012] VSC 533 ('*Trkulja [No 5]*').
15 Ibid [27].

predictions, McDonald J followed *Trkulja [No 5]* in finding that it was 'strongly arguable' that Google had intentionally participated in publication of the matter.[16] On appeal, the High Court in *Trkulja v Google LLC*[17] did not rule definitively on the issue of publication, although it agreed with McDonald J's finding. In *Google Inc v Duffy* ('*Duffy*'),[18] the Supreme Court of South Australia applied *Trkulja [No 5]* in holding that Google was liable for the publication of defamatory matter contained in search results and in content to which the search results linked.[19] By contrast, in *Bleyer v Google Inc*,[20] McCallum J held that only after Google had received actual notice of defamatory results published by its search engine and failed to remove the results within a reasonable time would it be liable for publication.[21] These cases demonstrate that Australian courts have generally taken a conservative approach to the issue of internet publication (and in particular to proceedings brought against Google), preferring to apply the orthodox principles of publication rather than develop specific exceptions for such cases.[22] The decision in *Defteros* is therefore somewhat surprising given the weight of lower court authority.

B *The Material Facts in Defteros*

1 *The Complaint*

In 2004, Mr Defteros, a criminal law solicitor in Melbourne who acted for figures involved in the infamous 'gangland wars', was charged with conspiracy to murder and incitement to murder together with one of his clients.[23] Although the charges against Mr Defteros were withdrawn in 2005, *The Age* newspaper had published articles on its website reporting on the prosecution in the intervening period, including an article entitled 'Underworld Loses Valued Friend at Court' (the 'Underworld article') which contained material defamatory of Mr Defteros.[24] Rather than sue *The Age* for defamation, Mr Defteros instead sued the authors of a book, one of whom was the author of the Underworld article, which included a chapter based on the Underworld article.[25] The parties agreed to settle the claim and, as a term of the settlement, Mr Defteros released the authors from liability for any article published in *The Age*.[26] In 2016, Mr Defteros became aware that searching the internet for his name using Google's search engine produced a search result which contained a hyperlink to the Underworld article.[27] Subsequently, a solicitor working at Mr Defteros' firm completed a Google 'removal request form' which (although

16 *Trkulja v Google Inc* [2015] VSC 635, [67].
17 *Trkulja* (n 1).
18 *Google Inc v Duffy* (2017) 129 SASR 304 ('*Duffy*').
19 Ibid 465–6 [595] (Hinton J).
20 *Bleyer v Google Inc LLC* (2014) 88 NSWLR 670.
21 Ibid 686 [85].
22 Cheng Vuong, 'Defamation Law and the Search Engine Operator Exception' (2019) 38(4) *Communications Law Bulletin* 15, 17.
23 *Defteros* (n 2) 771 [1] (Kiefel CJ and Gleeson J).
24 Ibid.
25 Ibid 808 [182] (Edelman and Steward JJ).
26 Ibid.
27 Ibid 771 [2] (Kiefel CJ and Gleeson J).

riddled with inaccuracies of the prior dispute with the authors of the book) notified Google of the defamatory matter and requested that Google take action to remove, delink or otherwise disable the hyperlinked search result.[28] After reviewing the request, Google elected not to take action in relation to the hyperlink pursuant to its Reputable Source Defamation Push Back Policy.[29] In response, Mr Defteros brought proceedings against Google in the Supreme Court of Victoria, alleging that Google was a publisher of the defamatory matter in the Underworld article. Google denied publication and pleaded, in the alternative, the defences of common law and statutory qualified privilege and innocent dissemination.[30]

2 *Procedural History*

At trial, Richards J held that Google's 'provision of [the] hyperlink … facilitate[d] the communication of the contents of the linked webpage to such a substantial degree that it amount[ed] to publication of the webpage'.[31] Her Honour also held that Google was only liable, 'as a secondary publisher' when a reasonable time had elapsed after it had been notified of the defamatory matter.[32] The Court of Appeal upheld the conclusion that Google became a publisher of the Underworld article seven days after it received notice in the form of the removal request.[33] In doing so, the Court of Appeal followed the South Australian Court of Appeal's reasoning in *Duffy*. In particular, the Victorian Court of Appeal agreed with the approaches of Hinton J and Kourakis CJ in *Duffy*, which centred on 'enticement' to the reader to click on the hyperlink and 'incorporation' of the defamatory matter in the search result, respectively.[34] Google subsequently applied for special leave to the High Court on four grounds of appeal: first and foremost, 'that the Court of Appeal was wrong to conclude that [Google was a publisher]' and, in the alternative, that 'the Court of Appeal was wrong to reject [Google's] defences of common law and statutory qualified privilege' and innocent dissemination.[35]

3 *The High Court's Decision*

The High Court delivered judgment on 17 August 2022, finding in favour of Google by a 5:2 majority. In three separate judgments, the majority employed markedly different reasoning to find that Google had not published the defamatory matter and therefore did not consider the defences raised.

In the leading joint judgment of Kiefel CJ and Gleeson J, their Honours held that although 'the breadth of activity captured by the traditional publication rule is

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28 Ibid 808 [183]–[185] (Edelman and Steward JJ).
29 Ibid [186].
30 Ibid 771 [3] (Kiefel CJ and Gleeson J).
31 *Defteros v Google LLC* [2020] VSC 219, [55] ('*Defteros Trial*').
32 Ibid [64]. However, as the Court in *Voller* clarified, it is erroneous to draw a distinction between primary and secondary publishers when considering publication alone. A person or entity is either a publisher or not. The distinction is only relevant to the common law and statutory defences of innocent dissemination, which are available only to those deemed secondary publishers: *Voller* (n 4) 784 [84] (Gageler and Gordon JJ).
33 *Defteros v Google LLC* [2021] VSCA 167, [92] (Beach, Kaye and Niall JJA).
34 Ibid [86]–[87].
35 *Defteros* (n 2) 772 [8] (Kiefel CJ and Gleeson J).

vast', it has its limits.[36] In doing so, their Honours distinguished *Defteros* from two of the Court's leading authorities on publication in which the strict and broad publication rule was applied to impose liability: *Webb v Bloch*[37] and *Voller*.[38] In both cases, the defendants had either 'suggested that the matter be written; caused it to be published; approved, concurred or showed their assent or gave their approbation to the libel; or assisted or encouraged the damage to another's reputation' — features absent in the present case.[39] Kiefel CJ and Gleeson J were instead persuaded by the reasoning in a series of United States and Canadian decisions concerning liability for referring to defamatory matter (including via hyperlinking), which their Honours viewed as more closely analogous and readily applicable to the facts in *Defteros*.[40] Of particular salience was the reasoning of Abella J in the Supreme Court of Canada's decision in *Crookes v Newton*, in which the provision of a hyperlink alone was held not to amount to publication, but to 'content-neutral'[41] referencing which merely communicates the *existence* of content rather than the content itself. Their Honours rejected the suggestion that the hyperlinked search result enticed users to read the Underworld article, finding that 'call[ing] attention to' matter does not equate to enticement, especially where users are already seeking the information to which a hyperlink directs them.[42]

Gageler J substantially agreed with the reasoning of Kiefel CJ and Gleeson J and their Honours' reliance on *Crookes v Newton*, particularly on the basis that consistency across the common law world when dealing with new technologies is desirable.[43] However, his Honour expressly qualified Kiefel CJ and Gleeson J's reasoning by noting that there are several circumstances in which a hyperlink may amount to publication. His Honour invoked the 19th century decision of the English Court of Appeal in *Hird v Wood*,[44] which his Honour viewed as standing for the principle that drawing attention to defamatory matter in an enticing or encouraging manner may constitute publication.[45] Nevertheless, Gageler J found that the hyperlinked search result here was produced 'organic[ally]'[46] in response to a user-designed and initiated query and that it lacked any enticing or encouraging feature.[47] His Honour further held that the aims and purposes of an alleged publisher's conduct, commercial or otherwise, are irrelevant to the question of publication — it is the bilateral act of communication that is key.[48]

In their Honours' concurring judgment, Edelman and Steward JJ agreed with the conclusion of non-publication reached by the other Justices of the majority, albeit

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36 Ibid 776 [25].
37 *Webb v Bloch* (n 5).
38 *Voller* (n 4).
39 *Defteros* (n 2) 776–7 [31] (Kiefel CJ and Gleeson J).
40 Ibid 777 [35].
41 Ibid 778 [43], quoting *Crookes v Newton* (n 3) 286 [30] (Abella J).
42 Ibid 780 [51].
43 Ibid 782 [65].
44 *Hird v Wood* (1894) 38 SJ 234.
45 *Defteros* (n 2) 782 [66].
46 Ibid 783 [70], quoting *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 447–8 [21]–[22] (French CJ, Crennan and Kiefel JJ).
47 Ibid 783 [71].
48 Ibid 783–4 [73]–[74].

through decidedly different reasoning. Notably, their Honours imposed a quadripartite taxonomy on the methods of publication previously unarticulated in the Australian law of defamation. These are: (i) performing the act of communication; (ii) authorising the act of communication; (iii) procuring, provoking or conducing the act of communication; and (iv) ratifying or adopting the communication.[49] According to their Honours, for publication to be proved under the latter three categories, a common intention to publish must be established between the alleged secondary publisher (the defendant) who performs the conduct described in the category and the primary publisher who actually performs the act of communication, such as to make the defendant a joint tortfeasor. Here, unlike the other majority judgments, Edelman and Steward JJ found that Google's conduct in providing a hyperlinked search result constituted facilitating access to the Underworld article, rather than 'mere referencing'.[50] Nevertheless, their Honours held that 'merely facilitating' the communication of defamatory matter does not evince a common intention, and therefore does not amount to publication.[51] Like Gageler J, their Honours expressly reserved the question of whether the provision of enticing or sponsored hyperlinked search results would constitute publication.[52]

In Gordon J's dissenting judgment, her Honour directly contradicted Edelman and Steward JJ in finding that *The Age* and Google both intended to 'facilitate access to news articles', a finding confirmed by Google's 'commercial interest in providing … responsive search results'.[53] Her Honour also rejected the relevance of *Crookes v Newton* to Australian defamation law for two reasons. First, the United Kingdom, United States and Canadian decisions upon which it relies are inconsistent with the strict publication rule due to their reasoning turning on concepts foreign to Australian law.[54] Second, the characterisation of hyperlinks as 'references' which do not communicate content is 'inconsistent with the application of the strict publication rule to publication by reference'.[55] Her Honour then went on to consider and reject the defences raised by Google for reasons which this case note does not consider.

Keane J penned a relatively brief dissenting judgment in which his Honour also distinguished *Defteros* from *Crookes v Newton* on the basis that Google intentionally brought its search engine users and the Underworld article together, unlike the defendant in *Crookes v Newton* who was indifferent as to whether readers would click on his hyperlinked footnote.[56] Keane J also rejected any concerns relating to the flow of information online and freedom of expression, noting that liability for publication has always been expansive in Australia so as to ensure redress for all persons injured.[57]

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49 Ibid 811 [200].
50 Ibid 814 [216].
51 Ibid 813 [212].
52 Ibid 815 [222].
53 Ibid 790–791 [110]–[111], quoting *Defteros Trial* (n 31) [187] (Richards J).
54 Ibid 798 [142].
55 Ibid.
56 Ibid 787 [99].
57 Ibid 788 [102].

III What is the Ratio in *Defteros*?

Although the majority's decision in *Defteros* has been applauded by some in the legal profession as a 'common sense' outcome,[58] the competing characterisations of Google's conduct and the nature of hyperlinks in the different judgments calls into question whether any clear and principled ratio can be discerned.

What is clear from the joint judgment of Kiefel CJ and Gleeson J is that the strict publication rule, although broad, has its limits. In *Defteros*, the High Court has declared that one such limit is that a search engine operator will not attract liability for the publication of defamatory matter by returning an 'organic' search result which contains a hyperlink to the matter. As discussed in Part II(3), the word 'organic', as used by Gageler J, refers in this context to a search result generated in response to a user-initiated query which does not entice or encourage the user itself. As these many qualifications demonstrate, this does not create a bright-line principle that a person who provides a hyperlink to defamatory matter is immune from liability in all circumstances. On the contrary, the majority explicitly reserved the question of liability for sponsored links and hyperlinked search results which somehow entice or encourage users to read the content to which they are linked.

In discussing the latter category of hyperlinked search result, both Gageler J and Edelman and Steward JJ confined *Duffy* to its facts — specifically, that the snippet of the search result in that case contained defamatory matter.[59] This should be taken to strongly suggest that if a hyperlinked search result somehow encourages or entices the reader to click on the hyperlink in any way — a matter to be determined on a case-by-case basis[60] — then such conduct will likely constitute publication. Notably, this framing of the *Duffy* decision by Gageler J and Edelman and Steward JJ was most recently affirmed by the Supreme Court of South Australia itself in the second round of litigation brought against Google by Dr Duffy. In *Duffy v Google LLC*,[61] Tilmouth AUJ held that Google was liable as a secondary publisher of hyperlinked search results on the basis that the 'intriguing' snippets that its search engine produced 'did more than describe a story about a person'; they contained inflammatory words suggestive of the plaintiff's wrongdoing, language which 'consisted of more than a reference or subject matter heading'.[62] Tilmouth AUJ thus distinguished *Defteros* from *Duffy v Google LLC* in finding that the hyperlinked search result in the former 'merely "assisted" persons searching the Web to find and access information', while those in the latter 'were likely to entice the user to select the … hyperlink'.[63] The decision in *Duffy v Google LLC* thus stands as lower court authority supportive of the dicta in *Defteros* that enticing hyperlinks will likely still amount to publication.

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58 Jerome Doraisamy, 'What *Google v Defteros* Means for Defamation Law', *Lawyers Weekly* (online, 18 August 2022) <https://www.lawyersweekly.com.au/wig-chamber/35254-what-google-v-defteros-means-for-defamation-law>.

59 *Defteros* (n 2) 782–3 [67]–[68] (Gageler J), 810 [199], 816 [229] (Edelman and Steward JJ).

60 Ibid 782 [66] (Gageler J), quoting Clement Gatley, *Gatley on Libel and Slander*, eds Richard Parkes and Godwin Busuttil (Sweet & Maxwell, 13th ed, 2022) 253–4.

61 *Duffy v Google LLC* [2023] SASC 13.

62 Ibid [96].

63 Ibid [91], [96].

The problem with this limitation on the strict publication rule and the qualifications to it is that the differing reasons of the judgments make it difficult to identify a precise juridical basis on which it is founded. On one view, the judgments of Kiefel CJ and Gleeson and Gageler JJ, in following *Crookes v Newton*, suggest that the principled basis on which *Defteros* was decided is the characterisation of the provision of a hyperlink simpliciter as mere referencing — conduct which their Honours viewed as falling short of the bilateral act of communication. By contrast, Edelman and Steward JJ accepted that Google's conduct here amounted to facilitating access to the Underworld article — more than mere referencing — but nonetheless held that it did not constitute publication. The basis for this, their Honours held, was that liability for third-party comments can only be imposed if a common intention with the primary publisher is established such as to make the secondary author a joint tortfeasor.

With respect to the reasoning of Kiefel CJ and Gleeson and Gageler JJ, a question arises as to the extent of *Defteros*'s applicability. Specifically, it remains unsettled whether the provision of a hyperlink alone will fail in all circumstances to amount to publication. At the outset of Kiefel CJ and Gleeson J's judgment, their Honours formulate the question which the Court has been called on to answer as

> whether providing search results which, in response to an enquiry, direct the attention of a person to the webpage of another and assist them in accessing it amounts to an act of participation in the communication of defamatory matter.[64]

This framing suggests that the ratio in *Defteros* could be applied to future cases in which the defendant has provided a hyperlink (absent enticement or a common intention with the primary publisher), regardless of whether the defendant is a search engine operator. Further, no argument was run by either party as to whether Google, as a search engine operator, is categorically a publisher. The potential for *Defteros* to apply to future cases of hyperlinking generally is supported by Gageler J's consideration of *Crookes v Newton*, a case which involved a natural person providing a hyperlink on his own website, rather than a search engine generating one in response to a user-initiated query. His Honour was more willing to adopt the reasoning of Abella J on the basis that the Canadian Supreme Court had reached a conclusion on liability for hyperlinking using identical common law principles of publication, which remains good law in that country; these factors, his Honour posited, make it desirable that Australia synchronises this point of defamation law with the law of other common law jurisdictions.[65]

A further complication that arises from the several judgments in *Defteros* is the role which intent and purpose play in determining liability for publication, if any. Central to this issue is certain conflict in the reasoning in the decisions in *Voller* and *Defteros*. In *Voller*, the majority of the Court found that the defendants had published the defamatory comments left on their Facebook posts by third parties. Gageler and Gordon JJ, who were in the majority in *Voller*, reached this conclusion using the

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64 *Defteros* (n 2) 775–6 [24].
65 Ibid 782 [64]–[65].

'commercial purpose' of the defendants as a key plank in the reasoning.[66] By contrast, there are several express statements in the majority judgments in *Defteros* which discount the relevance of the defendant's intention,[67] including by Gageler J, who explicitly rejected the Supreme Court of Victoria's reasoning that Google's commercial interests are in any way dispositive of the question of publication.[68] By contrast, Gordon J, in dissent, maintained her line of reasoning from *Voller*, finding that Google's conduct being motivated by an attempt to 'obtain a commercial benefit' precluded it from denying publication.[69] With respect, the view of the majority in *Defteros* on this point is to be preferred. This is because the tort of defamation is one of strict liability, as is the element of publication; it is incorrect to '[treat] the particular defendant's purpose in participating in the communication as relevant to whether the defendant is responsible for the publication'.[70] As such, the focus of the analysis should be directed towards the 'fact of communication', rather than any motive that Google might have in conducting its business the way it does.[71]

IV Problems with the Approach in *Crookes v Newton*

As stated in Part III above, the majority in *Defteros* were heavily influenced in their reasoning by Abella J's judgment in *Crookes v Newton*. This may be problematic in that *Crookes v Newton* is a Canadian case decided overtly on policy grounds that lack Australian equivalents.

In *Crookes v Newton*, the defendant, Mr Newton, published an article on his personally owned and operated website concerning the defendant, Mr Crookes.[72] Although the content of the article itself did not contain defamatory matter, Mr Crookes brought defamation proceedings against Mr Newton for two hyperlinked references in the article, which, when clicked, directed the reader to articles which contained matter defamatory of Mr Crookes. He argued that this hyperlinking to the defamatory matter constituted publication of the matter itself.[73]

In Abella J's majority judgment, her Honour, much like Kiefel CJ and Gleeson J in their Honours' judgment, recognised the breadth and strictness of the common law publication rule — that it captures '*any act* [which] convey[s] defamatory meaning' regardless of the form and manner of the act.[74] Her Honour did so by surveying the leading English and Canadian authorities on publication — many of which, such as *Hird v Wood*, were cited in *Defteros* — and finding that acts of reference such as pointing to defamatory matter or expressing approval of it have been held to amount to publication.[75] However, her Honour ultimately distinguished

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66 *Voller* (n 4) 787 [101], quoting *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766, [224] (Rothman J).
67 See, eg, *Defteros* (n 2) 780 [54] (Kiefel CJ and Gleeson J), 816 [226] (Edelman and Steward JJ).
68 Ibid 783 [73].
69 Ibid 791 [112].
70 David Rolph, 'Before the High Court: Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*' (2021) 43(2) *Sydney Law Review* 225, 238.
71 Ibid 240.
72 *Crookes v Newton* (n 3) 278 [5].
73 Ibid [6].
74 Ibid 281 [16] (emphasis in original).
75 Ibid 281–3 [18]–[19].

the act of hyperlinking alone from the range of conduct captured by the strict publication rule, finding that a hyperlink, as a mere 'content-neutral' reference to a source which the person who provided the hyperlink does not control, does not constitute publication.[76] Abella J's reasoning is thus clearly echoed in the reasoning of Kiefel CJ and Gleeson J. In both judgments, there is an acceptance of the strict publication rule, the range of conduct that it captures and that there must be some limitations to it. However, Abella J's judgment ultimately diverges from the common law principles common to the defamation law of both Canada and Australia in traversing a host of policy concerns, which Fischer and Lazier note serve as a more '[persuasive]' basis for her Honour's judgment.[77] In particular, Abella J expressed concern at various points in her judgment that to apply the strict publication rule to hyperlinks — '[central] [to] … facilitating access to information on the Internet'[78] — would create 'an untenable situation'.[79] Unlike the judgments in *Defteros*, which demonstrate a reticence to alter the fundamental principles of publication for new technologies,[80] Abella J expressly names the detrimental effect on the functioning of the Internet that the application of the strict publication rule to hyperlinks would have as a key plank in her Honour's reasoning:

> The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential 'chill' in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.[81]

The above excerpt demonstrates what is most problematic for the adoption in Australia of the reasoning in *Crookes v Newton* in *Defteros*: that the policy concerns in the former are ultimately based on freedom of expression, a right guaranteed by the *Canadian Charter of Rights and Freedoms*.[82] Fischer and Lazier observe that in 2008, the Supreme Court of Canada embarked on the 'constitutionalization' of Canadian defamation law so as to align it with the right to freedom of expression.[83] They argue that Abella J's decision is not so much a principled common law approach to the issue of hyperlinks in defamation law, but 'a recognition that freedom of expression must be protected pragmatically'.[84] Indeed, her Honour noted that '[p]re-*Charter* approaches to defamation law in Canada largely leaned towards protecting reputation', a jurisprudence which has evolved to 'achiev[e] a proper balance between protecting an individual's reputation and the foundational role of

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76 Ibid 285–6 [26]–[30].
77 Iris Fischer and Adam Lazier, '*Crookes v Newton*: The Supreme Court of Canada Brings Libel Law into the Internet Age' (2012) 50(1) *Alberta Law Review* 205, 207.
78 *Crookes v Newton* (n 3) 288 [35].
79 Ibid 285 [25].
80 *Defteros* (n 2) 788 [102] (Keane J), 802 [155] (Gordon J),
81 *Crookes v Newton* (n 3) 288–9 [36].
82 *Canada Act 1982* (UK) c 11, sch B pt I cl 2(b) ('*Canadian Charter of Rights and Freedoms*').
83 Fischer and Lazier (n 77) 205.
84 Ibid 215.

freedom of expression'.[85] *Crookes v Newton*, then, may be understood as 'a nuanced and pragmatic approach to balancing freedom of expression and the protection of reputation'.[86]

Somewhat notoriously, Australia lacks a bill of rights and a true analogue to the Canadian right to freedom of expression. While the High Court has recognised that Australian defamation law also 'seeks to strike a balance between … society's interest in freedom of speech and the free exchange of information and … an individual's interest in maintaining his or her reputation',[87] it has also recognised that the Australian '*Constitution* contains no express right of freedom of communication or expression'.[88] Many have argued that this has had the consequence of skewing the balance in favour of protecting reputation at the expense of freedom of expression, leading to Australia becoming 'the defamation capital of the world'.[89] Kiefel CJ and Gleeson J, whose joint judgment is the most accepting of and reliant on Abella J's reasoning, were acutely aware of this dilemma, as was Gordon J in her dissent (which partly turned on *Crookes v Newton* being so alien to Australian defamation law that it should not be followed).[90]

What ultimately separated the two judgments was that Kiefel CJ and Gleeson J believed there to be common law reasoning capable of being extracted from the Canadian constitutionalism and applied to the facts in question. Their Honours stated at the outset of their examination of Abella J's reasoning that the policy concerns in *Crookes v Newton* cannot and should not be followed, and that they were merely superfluous to the 'essential reasoning' of Abella J's judgment that can and should be followed.[91] With respect, this conclusion is far from incontrovertible, especially given Canadian commentary on *Crookes v Newton*, such as that by Fischer and Lazier, which views the decision as the Supreme Court of Canada reorienting its nation's defamation law in harmony with a constitutionally guaranteed right, of which there is no Australian analogue. Perhaps more telling of *Crookes v Newton* being a questionable juridical basis for an ostensibly analogous Australian case is that the preponderance of Australian authority on internet publication cases, analysed in Part II, clearly favours preserving the strict publication rule and applying it in its entirety to search engine operators, rather than attenuating it. Whether *Defteros* signifies a shift towards a more liberal and pragmatic Australian defamation jurisprudence — and a moderated publication rule — in response to evolving technologies, or a simple carve-out in this very factually specific case remains to be seen.

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85 *Crookes v Newton* (n 3) 287 [32].
86 Fischer and Lazier (n 77) 216.
87 *Gutnick* (n 6) 599 (Gleeson CJ, McHugh, Gummow and Hayne JJ).
88 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.
89 See, eg, Matt Collins, 'Nothing to Write Home about: Australia the Defamation Capital of the World' (Speech, National Press Club, Canberra, 4 September 2019).
90 *Defteros* (n 2) 798 [142] (Gordon J).
91 Ibid 778 [41] (Kiefel CJ and Gleeson J).

V *Defteros* in the Context of the Stage 2 Review of the Model Defamation Provisions

A particularly noteworthy aspect of *Defteros* is its timing. Specifically, the High Court handed down its decision amid the Stage 2 Review of the Model Defamation Provisions ('Stage 2 Review') and only five days after the release of the draft Part A Model Defamation Amendment Provisions[92] ('MDAPs') and accompanying Background Paper[93] by the Meeting of Attorneys-General. Begun in 2021, the Stage 2 Review is the second part of the evaluation of the national uniform defamation laws led by the Defamation Working Party, a body convened by the Council of Attorneys-General in 2018 with the remit of assessing the effectiveness of current defamation laws.[94] The national uniform defamation laws were enacted as separate statutes by all Australian states and territories at the beginning of 2006 following consensus by all state and territory attorneys-general on the laws in 2004.[95] The national uniform defamation laws were introduced to harmonise the previously fragmented defamation laws of each Australian jurisdiction. This fragmentation had, until 2006, led to considerable uncertainty and incoherence in dealing with the increasing volume of defamation claims involving internet publication across multiple jurisdictions and resulting choice of law issues.[96]

Part A of the Stage 2 Review focuses specifically on the liability of internet intermediaries (including search engine operators such as Google) for publication of third-party content online, and possible avenues for ameliorating the problems associated with applying the strict and broad publication rule in its entirety to these intermediaries.[97] Part A consists of seven recommendations. Of particular significance to the issues in *Defteros* is Recommendation 2, which is the provision of '[a] conditional, statutory exemption from liability in defamation law for standard search engine functions'.[98] Recommendation 2 is contained in the MDAPs 2022 under sch 1 cl 9A(3)–(5). Interestingly, the drafting of these model provisions and the rationale provided for them in the Background Paper align broadly with the ratio and reasoning in *Defteros*. Clause 9A(3) provides:

> A search engine provider for a search engine is not liable for defamation for the publication of digital matter if the provider proves: (a) the matter is limited to search results generated using the search engine from search terms inputted by the user of the engine rather than terms automatically suggested by the engine, and (b) the provider's role was limited to providing an automated process for the user to generate the search results.[99]

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92 *Model Defamation Amendment Provisions 2022* (Parliamentary Counsel's Committee) ('MDAPs').

93 Meeting of Attorneys-General, Parliament of New South Wales, *Stage 2 Review of the Model Defamation Provisions Part A: Liability of Internet Intermediaries for Third-Party Content* (Background Paper, August 2022) ('Background Paper').

94 Owen Griffiths, 'Reform of Defamation Law' (Brief, Parliamentary Library, Parliament of Australia, 2020).

95 David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16(3) *Torts Law Journal* 207, 207–8.

96 Ibid 209–10.

97 Background Paper (n 93) 4.

98 Ibid 5.

99 MDAPs (n 92) sch 1 cl 9A(3).

This drafting accords almost entirely with the High Court's formulation in *Defteros* of an exception to the strict publication rule for 'organic' hyperlinks generated in response to third-party queries, or, as the Background Paper states in discussing the Victorian Court of Appeal's decision in *Defteros v Google LLC*[100] and *Crookes v Newton*, 'the mere hyperlink principle'.[101] That cl 9A(3)(a) explicitly excludes 'terms automatically suggested by the engine' strongly suggests that the Defamation Working Party agrees with and wishes to preserve the correctness of previous lower court authority such as *Trkulja*, which held that it was 'strongly arguable' that Google had published autocomplete search predictions.[102]

The search engine exception in the MDAPs 2022 also deals explicitly with sponsored links,[103] one of the two key types of hyperlinked search results reserved by the Court in dicta in *Defteros* as likely still amounting to publication of its linked content. Clause 9A(4) provides that the search engine exception 'does not apply in relation to search results to the extent they are promoted or prioritised by the search engine provider because of a payment or other benefit given to the provider by or on behalf of a third party'. However, the MDAPs 2022 are silent as to liability for the other category of hyperlinked search results that the Court intimated would still constitute publication after *Defteros*: those that entice or encourage the user to click on them and access the content to which they link. Nevertheless, it is still highly likely that the generation of these types of hyperlinked search results will attract liability for publication; as discussed in Part III, the Court strongly suggested that these hyperlinks evince an intention to communicate the contents to which they link, rather than the mere provision of the hyperlink itself, and it was careful to preserve authorities such as *Duffy* which, Gageler J reasoned, must be properly understood as having been decided on this basis.[104] It should also be noted that cl 9A(5) provides that the exception 'appl[ies] regardless of whether the digital intermediary or search engine provider knew, or ought reasonably to have known, the digital matter was defamatory'. Accordingly, any notice of defamatory matter in 'organic' hyperlinked search results given to a search engine operator, whether it be in a concerns notice or, as occurred in *Defteros*, a request form lodged with the operator's legal department, will be immaterial to its liability for publication.

It is interesting to note that the rationale for the search engine exception given in the Background Paper also aligns with several key planks of the majority's reasoning in *Defteros*. Like Gageler J's attempt to harmonise the approach of Australian defamation law to liability for hyperlinking with that of other common law jurisdictions, the Background Paper notes that the High Court's previous characterisation of search engines as publishers when performing this routine function is undesirable on the basis that it had 'diverge[d] from other comparable jurisdictions'.[105] Similarly, the Background Paper supports the following of *Crookes v Newton* (and therefore aligns with Kiefel CJ and Gleeson J's reasoning) in stating that 'search engines simply use an automated process to provide access to third-party

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100 *Defteros v Google LLC* (n 33).
101 Background Paper (n 93) 19, citing *Crookes v Newton* (n 3) (Abella J).
102 *Trkulja* (n 1) 163 [38] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
103 MDAPs (n 92) sch 1 cl 9A(4).
104 *Defteros* (n 2) 782–3 [68].
105 Background Paper (n 93) 5, 28.

content'[106] — that is, the provision of hyperlinked search results alone is merely an act of referencing. The rationale also expressly contradicts the dissenting opinions of Gordon and Keane JJ on the point of the commercial purpose of search engine operators. As discussed in Part III, their Honours found that the 'commercial interest' of Google in providing the search results to users was redolent of publication; by contrast, the Background Paper expressly states 'that in performing their standard functions, search engines have no interest in the content'.[107] However, this aspect of the rationale is still somewhat problematic as a matter of principle, as it too focuses unduly on the intent of the purported publisher, when, as stated in Part III above, publication is an element of strict liability. Like its openness to following an otherwise alien and highly constitutionalised Canadian decision, that the majority of the High Court in *Defteros* reached an almost identical conclusion to the forthcoming MDAPs via a highly similar analysis may suggest that the High Court is more open to taking a pragmatic rather than strictly principled approach to defamation law in the evolving digital age.

VI Conclusion

Defteros stands as a somewhat curious decision of the High Court, not the least because it bucked the prevailing trend in lower courts by finding Google not liable for publication. Although the implementation of the Part A MDAPs would provide a statutory answer to most of the points of defamation law that were at issue in *Defteros*, it is important that the Court continue to refine and clarify its approach to internet publication more generally so that clear principles may be distilled and applied to the various other issues not addressed by the reforms or the Court's decision. Although the Court expressed a certain openness to following a Canadian decision that was somewhat alien to the Australian principles of publication, only time will tell whether this portends a shift towards a similarly pragmatic defamation jurisprudence, or the mere accumulation of further common law principles to an already vexed area of law.

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[106] Ibid 5.
[107] Ibid.