

volume 45 number 2

june 2023

the sydney law review

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The *Sydney Law Review* is a refereed journal.

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ISSN 0082–0512 (PRINT)

ISSN 1444–9528 (ONLINE)

Liability for Workplace Psychiatric Injury in Australia: New Coherence and Unresolved Tensions

Kylie Burns*

Abstract

Workplace psychiatric injury is a significant health, economic and social problem. Multiple recent inquiries and reports have drawn attention to the failure of Australian law, including workplace health and safety ('WHS') regulation and compensation laws, to adequately respond to workplace psychiatric injury. This article considers how Australian negligence law has responded to workplace psychiatric injury since the High Court took a restrictive approach in 2005 in *Koehler v Cerebos (Australia) Ltd*. It considers the role of workplace psychosocial hazards in psychiatric injury and the changing Australian WHS landscape, including the evolution of Australian principles of negligence following *Koehler*. The 2022 High Court decision in *Kozarov v Victoria* which concerned injury from vicarious trauma is analysed and the tensions and unresolved issues post *Kozarov* are considered. The article argues that while Australian negligence law has experienced some change of direction post *Kozarov*, the failure of the High Court to overrule *Koehler* means it may remain difficult for some injured employees to recover for their workplace psychiatric injuries. Further development of negligence law is required in a way which promotes coherence with the Australian legislative regulatory landscape, and which adequately recognises the nature of workplace psychosocial hazards.

Please cite this article as:

Kylie Burns, 'Liability for Workplace Psychiatric Injury in Australia: New Coherence and Unresolved Tensions' (2023) 45(2) *Sydney Law Review* 157.



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I am grateful to the anonymous referees for their helpful suggestions.

I Introduction

Workplace psychiatric injury is a significant health, economic and social problem. The cost to the Australian economy of poor psychosocial workplace climates is approximately \$6 billion per annum.¹ A 2014 study by Beyond Blue found that only about half of Australian employees considered their workplace was mentally healthy.² On average, there are around 10,000 accepted workers compensation claims for psychiatric injury or illness each year, the majority of which involve extended periods of absence from the workplace.³ While the number and overall cost of all ‘serious injury’ workers compensation claims⁴ have fallen over the past decade,⁵ the number and costs of mental injury claims have grown exponentially.⁶ Serious mental health-related claims rose 73% between 2000 and 2020.⁷ Median time lost in working weeks for mental health conditions ‘rose 175%, from 11.2 working weeks in 2000–01 to 30.8 weeks in 2019–20’.⁸ Median compensation for mental health conditions rose 288% from \$14,300 in 2000–01 to \$55,300 in 2019–20.⁹ Mental stress claims had the highest median compensation amount of all injuries — ‘more than three times the median compensation amount for all serious claims’.¹⁰

Many people who suffer psychiatric injury in the workplace remain uncompensated. Psychiatric injury claims are treated differently from physical injury claims.¹¹ State and territory workers compensation schemes reject 24–60% of psychiatric injury claims, compared to 6–10% of physical injury and disease claims.¹² Workplace psychiatric injury is suffered at a disproportionately higher rate by women, particularly in sub-categories of mental stress such as work-related harassment, workplace violence, bullying and work pressure where women suffer

¹ Harry Becher and Maureen Dollard, *Psychosocial Safety Climate and Better Productivity in Australian Workplaces: Costs, Productivity, Presenteeism, Absenteeism* (Report, November 2016) 5.

² Beyond Blue, *State of Workplace Mental Health in Australia* (Report, 2014) 1.

³ Safe Work Australia, *Taking Action: A Best Practice Framework for the Management of Psychological Claims in the Australian Workers’ Compensation Sector* (2017) 9.

⁴ Claims that resulted in at least one week’s absence from work.

⁵ The frequency of serious claims declined overall by 17% between 2010–11 and 2019–20: see Safe Work Australia, *Key Work and Safety Statistics, Australia 2022* (Report, January 2023) 6.

⁶ The number of accepted mental health condition serious claims for 2020–21 was 12,155, representing 9% of all serious claims overall. This was made up of 6,899 female claims (14% of all female serious claims) and 5,244 male claims (7% of all male serious claims): Safe Work Australia *ibid* 10. See also Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces: Indicators from Accepted Workers’ Compensation Claims* (Annual Statement, 2021) 1 (Figure 1) which notes some decline in claims frequency between 2002 and 2014, but with claims rising again between 2016 and 2019.

⁷ Safe Work Australia, *Australian Workers’ Compensation Statistics 2020–21* (Report, December 2022) 37.

⁸ *Ibid* 51.

⁹ *Ibid* 52.

¹⁰ *Ibid* 54 (Table 40).

¹¹ Productivity Commission, *Mental Health: Inquiry Report* (Report No 95, June 2020) vol 2, 310. See discussion of how workers compensation schemes restrict compensation recovery for psychiatric injury claims: at 312–14. See also Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand: 2021* (Report, August 2022) 204–8 (Table 4.18).

¹² Productivity Commission (n 11) 310.

injuries at more than twice the rate of men.¹³ Rates of workplace psychiatric injury and claims differ widely between different industries.¹⁴ The average overall incident rates of serious accepted claims over five years for injuries caused by mental stress are highest in public administration and safety services (including police, fire fighters, emergency services personnel, corrections officers, border control officers); health care and social assistance professionals; and education and training professionals.¹⁵ Occupations with very high rates of work-related harassment and bullying include clerical and administrative workers; defence force members, police and fire fighters; and labourers.¹⁶

There is increasing awareness that workplace psychiatric injury in Australia requires an urgent response. The risk of psychiatric injury in the workplace due to employer-controlled psychosocial hazards¹⁷ has been known for many years.¹⁸ However, multiple recent government inquiries and reports have drawn attention to the failure of Australian law, including workplace health and safety ('WHS') regulation and compensation laws, to adequately recognise, respond to and compensate workplace psychiatric injury. These include the 2019 report by the Senate Education and Employment References Committee on the mental health and suicides of first responders;¹⁹ the 2020 report by the Productivity Commission on mental health;²⁰ the 2021 report of the Royal Commission into Victoria's Mental Health System;²¹ the 2018 review of the model WHS laws ('Boland Review');²² the 2020 report of the Australian Human Rights Commission ('AHRC') on the inquiry into sexual harassment in Australian workplaces ('*Respect@Work*');²³ the 2022 AHRC report on the independent review into Commonwealth parliamentary

¹³ Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 2. See also Australian Human Rights Commission ('AHRC'), *Everyone's Business: Fourth National Survey on Sexual Harassment in Australia Workplaces* (Report, September 2018) 8 (which showed disparity between sexes in sexual harassment in the workforce).

¹⁴ Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 3 (Figures 3, 4).

¹⁵ Productivity Commission (n 11) 312 (Figure 7.6).

¹⁶ Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 3 (Figures 3, 4).

¹⁷ Psychosocial hazards are hazards that arise from 'the design or management of work, the working environment, plant ... or workplace interactions and behaviours' which 'may cause psychological and physical harm': Safe Work Australia, *Managing Psychosocial Hazards at Work: Code of Practice* (July 2022) cl 1.1.

¹⁸ Kylie Burns, 'Employers Behaving Badly? Negligence Claims for Work-Related Psychological Health' (2006) 77 *Precedent* 10, 10–11 nn 2–13.

¹⁹ Senate Education and Employment References Committee, Parliament of Australia, *The People behind 000: Mental Health of Our First Responders* (Report, 2018).

²⁰ Productivity Commission (n 11).

²¹ Penny Armytage AM, Allan Fels AO, Alex Cockram and Bernadette McSherry, *Royal Commission into Victoria's Mental Health System* (Final Report, February 2021) vol 2, 49–71.

²² Marie Boland, *Review of the Model Work Health and Safety Laws* (Final Report, December 2018) 34 ('*Boland Review Report*').

²³ AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 441–616.

workplaces;²⁴ and the 2022 Western Australian Legislative Assembly Report on sexual harassment in the fly-in fly-out mining industry.²⁵

This article considers how Australian negligence law has responded to workplace psychiatric injury since the High Court took a restrictive approach to liability in 2005 in *Koehler v Cerebos (Australia) Ltd*.²⁶ Part II considers, as background, the role of workplace psychosocial hazards in psychiatric injury and the changing WHS regulatory landscape in Australia. Part III discusses the principles of negligence following *Koehler*. It suggests that the restriction of employer liability for injury by courts has been problematic. Factors contributing to the restriction of liability have included: the construction of workplace psychiatric injury as predominantly caused by individual employee factors rather than workplace psychosocial hazards; the principle of the coherence of negligence law with other areas of law, particularly contract; and legal policy factors including privacy and individual autonomy.²⁷ Part IV analyses the 2022 High Court decision in *Kozarov v Victoria*²⁸ concerning vicarious trauma — that is, trauma suffered by exposure to the trauma and suffering of others. Part V considers tensions and unresolved issues in negligence law post *Kozarov*. The article argues that while Australian negligence law has changed direction post *Kozarov*, the failure of the High Court to overrule *Koehler* means it may remain difficult for some injured employees to recover for their workplace psychiatric injuries. Further development of negligence law in a way which promotes coherence with the Australian legislative regulatory landscape, and which adequately recognises the nature of workplace psychosocial hazards, is required.

II Psychosocial Hazards and Australia's Changing Regulatory Landscape

A Psychosocial Hazards and Workplace Psychiatric Injury

The recent history of negligence cases involving workplace psychiatric injury in the United Kingdom and in Australia reveals a focus on factors particular to an injured employee, including individual vulnerability, as the dominant cause of workplace psychiatric injury.²⁹ There has been far less focus by courts on workplace psychosocial risk factors or hazards controlled by the employer.³⁰ Two decades ago,

²⁴ AHRC, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, November 2021) 257–69.

²⁵ Community Development and Justice Standing Committee, Parliament of Western Australia, *'Enough is Enough': Sexual Harassment against Women in the FIFO Mining Industry* (Report No 2, June 2022).

²⁶ *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 ('*Koehler*').

²⁷ Leeming JA referred in *New South Wales v Briggs* (2016) 95 NSWLR 467, 519 to human dignity, privacy and autonomy as 'enduring values within the legal system' (at [225]) which are reflected in negligence law as part of the task of 'achieving coherence in the law' (at [227]).

²⁸ *Kozarov v Victoria* (2022) 273 CLR 115 ('*Kozarov*').

²⁹ For discussion of the United Kingdom context, see Anne Davies, 'Stress at Work: Individuals or Structures?' (2021) 51(2) *Industrial Law Journal* 403, 427.

³⁰ *Ibid.*

in her influential judgment in *Hatton v Sutherland*,³¹ Hale LJ viewed workplace stress as primarily related to the individual employee's characteristics or responses. This encompassed 'situations where people feel powerless or trapped' and mismatches between job pressures and a person's ability to meet those pressures.³² The role of employers, their knowledge of the risks of workplace psychological harm, and their ability to respond to potential harm were minimised.³³ Hale LJ suggested that an individual experiencing harmful levels of 'stress' had 'to make some decisions about how to respond'³⁴ and that the 'employer's room to manoeuvre may' be limited.³⁵ Psychological pressures were seen as 'inevitable in all jobs' and it was difficult to identify which jobs were so stressful as to cause harm, and to which employees.³⁶ Foreseeability of the specific risk of injury to an individual was held to depend both on the nature and extent of the work being done *and* on signs from the individual employee of harm to their health.³⁷

This understanding of workplace psychiatric injury — as predominantly caused by an individual's own characteristics or failure to cope with work pressures — has been reflected in case law in the United Kingdom and in Australia since the *Hatton* case.³⁸ However, it is not congruent with decades of research in organisational psychology, health and occupational health and safety ('OH&S') that finds that workplace psychiatric injury is caused by the complex interaction of organisational, environmental and individual factors.³⁹ By the early 2000s, WHS regulatory bodies in the United Kingdom and Australia had extensive material on their websites, and in guidelines for employers, notifying employers about organisational and workplace risk factors that impact employee psychiatric health.⁴⁰ Employers were notified of their obligation to assess and respond to those risk factors as part of their duties under WHS legislation.⁴¹

Psychosocial hazards within employer control which significantly impact the risk of workplace psychiatric injury include the nature of the work, workplace support, environmental and organisational factors.⁴² 'Common psychosocial hazards' include: 'high job demands' (for example high workloads, excessive work hours, high emotional load, unpleasant or hazardous work conditions, high work intensity, shiftwork and fatigue); 'low job demands'; 'low job control' or poor role clarity; poor workplace support; 'poor workplace relationships' (for example

³¹ *Hatton v Sutherland* [2002] 2 All ER 1 ('*Hatton*'), subsequently adopted by the House of Lords in *Barber v Somerset County Council* [2004] 1 WLR 1089.

³² *Hatton* (n 31) 9 [10].

³³ *Ibid* 9 [11].

³³ *Ibid* 9 [10].

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ *Ibid* 10 [12]. Hale LJ rejected an argument that stress was so prevalent in some occupations that all employers should have a system in place: at 10 [16].

³⁷ *Ibid* 14 [26]–[27] (Hale LJ).

³⁸ See discussion in Davies (n 29). See also *Koehler* (n 26) 54–5 [24] (McHugh, Gummow, Hayne and Heydon JJ).

³⁹ Burns, 'Employers Behaving Badly?' (n 18). See also Davies (n 29) 406–12.

⁴⁰ Burns, 'Employers Behaving Badly?' (n 18).

⁴¹ *Ibid*.

⁴² Productivity Commission (n 11) 298–9.

bullying, aggression, harassment, conflict, lack of fairness, lack of organisational justice); ‘poor organisational change management’; lack of positive feedback and reward; ‘poor environmental conditions’ (for example poor air quality, excessive noise, unsafe temperatures); remote work or isolation (for example fly-in fly-out (‘FIFO’) work); and exposure to violence or trauma.⁴³ There are a range of factors which may make a particular employee more susceptible to workplace psychiatric injury, including: being a new or young worker; having an existing disability or illness; exposure to racism, discrimination, gender inequality or harassment; previous exposure to a traumatic event; and individual personal characteristics or personal difficulties.⁴⁴ Employees in particular industries (for example healthcare, social assistance and aged care workers, first responders,⁴⁵ correctional officers and education staff) are at higher risk of injury.⁴⁶ Frequency and intensity of exposure to workplace stress and pressure, and to psychosocial hazards, are also relevant to the risk of injury,⁴⁷ and varying psychosocial hazards ‘interact with each other’.⁴⁸ The ‘combination of high job demands, low control, and low support increases the likelihood and severity of physical or psychological harm’.⁴⁹

B *Australia’s Changing WHS Regulatory Landscape*

Despite existing WHS legislation governing risks to both the psychological and physical health of employees, recent Australian inquiries have found a failure by employers to adequately identify, assess and respond to psychosocial workplace hazards. This has led to more explicit regulation of psychosocial hazards and greater focus on employer responsibility for employee psychological health. The Productivity Commission found in 2020 that psychological health and safety did not ‘receive the same focus’ in workplaces as ‘physical health and safety’.⁵⁰ The Commission recommended that more ‘specific reference’ including in new WHS regulations was warranted, as well as ‘up front’ reference to psychological health and safety in the objectives of WHS legislation.⁵¹ Psychological health and safety should, it suggested, be treated in the legislation in a similar way to physical safety.⁵²

⁴³ Safe Work Australia, *Work-Related Psychological Health and Safety: A Systematic Approach to Meeting Your Duties* (National Guidance Material, January 2019) 9–12.

⁴⁴ See Armytage et al (n 21) vol 2, 51–3 (Figures 11.7, 11.8); Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43) 15. See also Productivity Commission (n 11) 299.

⁴⁵ Senate Education and Employment References Committee (n 19).

⁴⁶ Productivity Commission (n 11) 312 (Figure 7.6); Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 3 (Figures 3, 4). See also *Boland Review Report* (n 22) 32 (discussion of workers who may be at particular risk, including geographically isolated workers, FIFO workers, home-based disability support workers, migrant workers, and women prior to and on return from maternity leave).

⁴⁷ Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43) 16. See also the discussion of the impact of repeated trauma, work intensity and shiftwork on first responders in Senate Education and Employment References Committee (n 19) 8–13 [2.16]–[2.30].

⁴⁸ Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43) 16.

⁴⁹ *Ibid.*

⁵⁰ Productivity Commission (n 11) 300.

⁵¹ *Ibid* 303.

⁵² *Ibid* 304 (Action 7.1).

The Commission also supported the development of codes of practice by WHS authorities to assist employers to meet their duty of care.⁵³

The 2018 Boland Review of Australia's model WHS laws⁵⁴ also considered how the model WHS laws⁵⁵ regulated workplace psychological health. The original model WHS legislation defined 'health' to include psychological health such that the duty to ensure 'so far as is reasonably practicable' that workers were not exposed to health risks extended to psychological health.⁵⁶ At that time, however, there were no model WHS regulations or codes specifically focused on psychological health or psychosocial risks, although Safe Work Australia and state and territory WHS regulators had released guidance material.⁵⁷ The Boland Review found that, despite existing WHS obligations which extended to psychological health, there was 'a widespread view that psychological health' was 'neglected in the model WHS Regulations and Code'.⁵⁸ The Review recommended that duty holders needed clearer legislative guidance concerning their legal obligations to manage psychosocial hazards, through new model WHS regulations on identifying and managing risks associated with psychiatric injury.⁵⁹

Since the Boland Review, there has been significant strengthening of WHS regulation across Australia to ensure employers are clear they have an equal responsibility for both the physical and psychological health of their employees, to emphasise the role of workplace psychosocial hazards in workplace psychiatric injury, and to prevent workplace psychiatric injury. New model regulations concerning psychosocial risks were released in April 2022,⁶⁰ and a model code was released in July 2022.⁶¹ Many jurisdictions have since amended their WHS regulations in accordance with the model regulations.⁶² New codes which guide employers about their WHS obligations to identify, assess, eliminate or manage

⁵³ Ibid 307 (Action 7.2). See also 308–31 for a discussion of the need for improvement in workers' compensation arrangements for workplace psychological injury (at 308–30), and a discussion of the role employers could play (at 331–44).

⁵⁴ See *Boland Review Report* (n 22).

⁵⁵ The model WHS legislation has been implemented in local legislation in all Australian jurisdictions except Victoria, with some local variation between jurisdictions: see 'Legislation', *Safe Work Australia* (Web Page, 2023) <<https://www.safeworkaustralia.gov.au/law-and-regulation/legislation>>.

⁵⁶ *Boland Review Report* (n 22) 30.

⁵⁷ Ibid. For an example of guidance released, see Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43).

⁵⁸ *Boland Review Report* (n 22) 33.

⁵⁹ Ibid 35 (Recommendation 2). These recommendations have been accepted by Ministers responsible for WHS: see 'Implementation of WHS Ministers' Agreed Response to the Review of the Model WHS Laws', *Safe Work Australia* (Web Page, 2023) <<https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws>>.

⁶⁰ Safe Work Australia, *Model Work Health and Safety Regulations* (14 April 2022) ch 3 pt 3.2 div 11.

⁶¹ Safe Work Australia, *Managing Psychosocial Hazards at Work: Code of Practice* (n 17).

⁶² *Work Health and Safety Regulations 2011* (Cth) ch 2 pt 3.2 div 11; *Work Health and Safety Regulation 2017* (NSW) pt 3.2 div 11; *Work Health and Safety (National Uniform Legislation) Regulations 2011* (NT) ch 3 pt 3.2 div 11 (from 1 July 2023); *Work, Health and Safety Regulation 2011* (Qld) pt 3.2 div 11; *Work Health and Safety Regulation 2022* (Tas) ch 3 pt 3.2 div 11; *Work Health and Safety (General) Regulations 2022* (WA) ch 3 pt 3.2 div 11.

psychosocial risks have been implemented in many Australian jurisdictions.⁶³ Western Australia has introduced codes relating to both general psychosocial hazards and particular risks such as FIFO work.⁶⁴ Victoria has released draft regulations expected to be introduced in 2023 and is in the process of developing a psychological health compliance code.⁶⁵ Workplace health and safety authorities also provide extensive guidance about how employers can fulfil their WHS legal obligations regarding psychosocial hazards.⁶⁶ Other legislation, including industrial and antidiscrimination legislation, addresses employer responsibility for particular psychosocial hazards such as bullying and sexual harassment.⁶⁷ In December 2022 the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) came into effect. It implements the recommendations of the *Respect@Work* report by providing for a positive duty on employers to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, hostile workplace environments and victimisation.⁶⁸

Employees with psychiatric injury experience significant barriers to claiming workers compensation. There are various restrictions in the Commonwealth, state and territory schemes; an ‘adversarial process’; and difficult return-to-work processes.⁶⁹ Nevertheless, recent reforms demonstrate increased recognition of workplace psychiatric injury. For example, reforms in some jurisdictions have introduced presumptions of liability or simplified compensation pathways where a first responder suffers harm such as post-traumatic stress disorder (‘PTSD’),⁷⁰ and

⁶³ See, eg, SafeWork NSW, *Code of Practice — Managing Psychosocial Hazards at Work* (2022); WorkSafe Qld, *Managing the Risk of Psychosocial Hazards at Work — Code of Practice* (2022). Tasmania and the Northern Territory have adopted the model code.

⁶⁴ See Department of Mines, Industry Regulation and Safety, ‘Mentally Healthy Workplaces Codes of Practice’ (Web Page, 2023) <<https://www.commerce.wa.gov.au/worksafe/mentally-healthy-workplaces-codes-practice>>.

⁶⁵ ‘Occupational Health and Safety Amendment (Psychological Health) Regulations’, *Work Safe Victoria* (Web Page, May 2023) <<https://www.worksafe.vic.gov.au/mental-health>>. See also Work Safe Victoria, *Mental Health Strategy 2021–2024* (2021).

⁶⁶ See, eg, ‘Mentally Healthy Workplaces Toolkit’, *WorkSafe Qld* (Web Page, 2023) <<https://www.worksafe.qld.gov.au/safety-and-prevention/mental-health>>; ‘Psychological Hazards and Work-Related Stress’, *SafeWork SA* (Web Page, 2023) <<https://www.safework.sa.gov.au/workers/health-and-wellbeing/psychological-hazards>>; ‘Work Health and Safety Includes Mental Health’, *NT WorkSafe* (Web Page, 2023) <<https://worksafe.nt.gov.au/safety-and-prevention/workplace-mental-health>>; ‘Supporting Mentally Healthy Workplaces’, *Comcare* (Web Page, 2023) <<https://www.comcare.gov.au/safe-healthy-work/mentally-healthy-workplaces>>; ‘Mental Health’, *WorkSafe ACT* (Web Page, 2023) <<https://www.worksafe.act.gov.au/health-and-safety-portal/safety-topics/mental-health>>; ‘Mentally Healthy Workplaces’, *WorkSafe Tasmania* (Web Page, 2023) <<https://worksafe.tas.gov.au/topics/Health-and-Safety/health-and-wellbeing>>.

⁶⁷ See, eg, *Fair Work Act 2009* (Cth) pt 6-4B (which provides for a worker to apply for an order to stop bullying or sexual harassment), s 340 (which provides protection against adverse action by an employer due to the exercise by the employee of a workplace right), s 545 (which provides for compensation). For a recent case which awarded compensation for psychiatric injury suffered following ‘adverse action’, see *Leggett v Hawkesbury Race Club Ltd* [No 3] (2021) 317 IR 1.

⁶⁸ See, eg, *Sex Discrimination Act 1984* (Cth) s 47C.

⁶⁹ See Productivity Commission (n 11) 312–30. For example, psychological injury caused by ‘reasonable management action’ is typically excluded and higher thresholds to claim such as the need for the work to be a ‘significant contributing factor’ or meet a threshold of impairment may apply.

⁷⁰ See, eg, *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ss 36EA–36ED.

provisional liability to allow the provision of early mental health support to injured employees.⁷¹ A national best practice framework for the management of psychiatric injury compensation claims has been released⁷² and a National Return to Work Strategy 2020–2030 has been developed by Safe Work Australia and endorsed by WHS Ministers to support workers to recover from their psychiatric injuries and return to work.⁷³

III Negligence Liability post *Koehler v Cerebos (Australia) Ltd*

Employers owe their employees a non-delegable duty of care in negligence which includes the provision, maintenance and enforcement of a safe system of work.⁷⁴ After at least *Mt Isa Mines Ltd v Pusey*,⁷⁵ in 1970, it was accepted in Australian law that employees could recover for psychiatric injury where an employer had not taken reasonable steps in response to a foreseeable risk of psychiatric injury.⁷⁶ However, in 2005 in *Koehler*,⁷⁷ the High Court of Australia placed additional constraints on whether and when an employee could recover in negligence for workplace psychiatric injury. Following *Koehler*, injured employees faced increased barriers to recovery in negligence.⁷⁸ Negligence law in Australia from 2005 developed with a focus on the vulnerability of individual employees to psychiatric injury as the predominant factor in foreseeability and causation of injury. Courts inadequately recognised the role of employer-controlled psychosocial hazards. Courts were also heavily influenced by the growing focus in Australian negligence law on the necessity for the principles of negligence law to be coherent with other areas of law, such as contract and legislation.⁷⁹ Despite this focus on ‘coherence’, there was a surprising lack of judicial interest in the development of negligence law principles coherent with WHS obligations.⁸⁰ Courts were also eager to reflect concerns of individualist ‘legal policy’ — such as autonomy, individual dignity and individual responsibility — rather than notions of accident prevention.⁸¹

⁷¹ See, eg, *ibid* ch 4 pt 5A.

⁷² Safe Work Australia, *Taking Action* (n 3).

⁷³ See Safe Work Australia, *National Return to Work Strategy 2020–2030* (2019).

⁷⁴ *Czatyrrko v Edith Cowan University* (2005) 214 ALR 349.

⁷⁵ *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

⁷⁶ For discussion of early Australian cases on ‘work stress’ see Peter Handford, ‘Liability for Work Stress: *Koehler* Ten Years On’ (2015) 39(2) *University of Western Australia Law Review* 150, 152–8.

⁷⁷ *Koehler* (n 26). For discussion of the case see Burns, ‘Employers Behaving Badly?’ (n 18).

⁷⁸ See discussion in Handford (n 76).

⁷⁹ See Andrew Fell, ‘The Concept of Coherence in Australian Private Law’ (2018) 41(3) *Melbourne University Law Review* 1160.

⁸⁰ For a discussion of the limitations on a direct private right to damages as result of breach of statutory WHS duties, see Harold Luntz et al, *Luntz and Hamby’s Torts: Cases, Legislation and Commentary* (LexisNexis, 9th ed, 2021) 682–6.

⁸¹ For a critique of the High Court’s shift away from communitarian values and accident prevention in negligence, see *New South Wales v Fahy* (2007) 232 CLR 486, 539–40 [172] (Kirby J).

A Koehler v Cerebos (Australia) Ltd

Koehler involved a part-time employee who suffered a psychiatric injury following excess workload and work intensity. At trial it was held reasonably foreseeable that the excessive workload could increase the risk of psychiatric injury, and the Court found a failure to have a safe system of work in response.⁸² On appeal, it was found not foreseeable to the employer that the employee could suffer a psychiatric injury in the circumstances.⁸³ While *Koehler* was decided on appeal and argued in the High Court on the basis of breach of duty only, the High Court considered that an initial focus on breach in workplace psychiatric injury cases had invited error.⁸⁴ Focusing on the ‘well-established proposition that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work’ and ‘discarding any asserted distinction between psychiatric and physical injury’ was not the correct approach.⁸⁵ The High Court introduced new hurdles to liability including a focus on whether the content of the duty of care extended to psychiatric harm, and the need for foreseeability of psychiatric harm to the individual employee.⁸⁶ The Court also held that the content of the duty of care must take account of ‘fundamental aspects of the relationship between the parties’⁸⁷ and could not be considered

without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions.⁸⁸

This would require ‘exploration of the contractual position’ against ‘the relevant statutory framework’ to determine whether the performance of the duties was subject to qualification or limitation.⁸⁹ This included consideration of whether the scope of duty extended to requiring modification of the employee’s work.⁹⁰ The High Court did not, however, decide *Koehler* on the basis that the contractual agreement to perform duties was fatal, as that would have required much ‘closer attention to the content of the contractual relationship’ than had been canvassed in the evidence or arguments at trial or appeal.⁹¹

The High Court ultimately refused the appeal on the basis that the Court of Appeal was correct to hold that the injury was not foreseeable.⁹² The agreement to perform duties which caused the injury was held to run counter to an appreciation by the employer that there was a risk to the employee’s health.⁹³ The High Court

⁸² *Koehler v Cerebos (Aust) Ltd* (2002) 30 SR (WA) 258.

⁸³ *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322.

⁸⁴ *Koehler* (n 26) 53 [19] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁵ *Ibid.*

⁸⁶ *Ibid* 53–5 [21]–[25] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁷ *Ibid* 53 [19] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁸ *Ibid* 53 [21] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁹ *Ibid* 58 [38] (McHugh, Gummow, Hayne and Heydon JJ).

⁹⁰ *Ibid* 53–4 [21]–[22] (McHugh, Gummow, Hayne and Heydon JJ) (eg, through reduction of the employee’s workload, engagement of additional workers, reduction of pay or dismissal of the employee).

⁹¹ *Ibid* 58–9 [40] (McHugh, Gummow, Hayne and Heydon JJ).

⁹² *Ibid* 53 [20] (McHugh, Gummow, Hayne and Heydon JJ). See also at 64 [55] (Callinan J).

⁹³ *Ibid* 56 [28] (McHugh, Gummow, Hayne and Heydon JJ).

acknowledged that this had ‘limited significance’ in *Koehler*’s case; however, in other cases an agreement to perform contractual duties may have ‘greater significance’.⁹⁴ Liability could not arise where the ‘psychiatric injury to an employee’ was ‘brought about by the employee’s performance of the duties originally stipulated in the contract of employment’.⁹⁵ The High Court also held that the employer had no reason to suspect the risk of psychiatric injury,⁹⁶ and it was ‘too large a step’ to recognise ‘that all employees are at risk of psychiatric injury from stress at work’.⁹⁷ The duty of care was ‘engaged if psychiatric injury to the particular employee is reasonably foreseeable’ which requires attention to the ‘nature and extent of the work being done and signs given by the employee concerned’.⁹⁸ In *Koehler*, the High Court held there ‘was no indication (explicit or implicit)’ that the employee was vulnerable to injury; the employee’s complaints about work overload did not indicate that their psychiatric health was at risk; and when they did go on sick leave, both the employee and their doctor ‘thought the illness was physical, not psychiatric’.⁹⁹ *Koehler* did not clarify where, conceptually, the inquiry about the foreseeability of psychiatric injury was relevant as only breach was ultimately in issue. However, it appears that the Court considered foreseeability of psychiatric harm to the particular employee as critical both to breach and to whether the scope of the employer’s duty extended to psychiatric injury as a type of harm.¹⁰⁰

B *Restrictive Judicial Approaches post Koehler v Cerebos (Australia) Ltd*

The *Koehler* decision was critiqued as unduly restrictive.¹⁰¹ It marked a departure from the previous protective approach taken by the High Court to injured employees.¹⁰² The decision showed inadequate appreciation of psychosocial hazards within employer control.¹⁰³ Following *Koehler*, Australian courts treated foreseeability of psychiatric harm to the particular employee as being necessary before the duty of care arose or the scope of duty extended to psychiatric injury.¹⁰⁴ General employer knowledge about risks of psychiatric injury to employees was generally insufficient to ‘engage’ a duty of care in the absence of explicit or implicit signs of danger to the psychiatric health of an individual employee.¹⁰⁵ A common difficulty in post-*Koehler* cases was the struggle by the parties and judiciary to

⁹⁴ Ibid 56 [29] (McHugh, Gummow, Hayne and Heydon JJ).

⁹⁵ Ibid 56 [29]–[31]. McHugh, Gummow, Hayne and Heydon JJ suggested in such cases that ‘over-work’ or ‘excessive work’ have meaning only by appeal to external standards, but the parties have by agreement departed from the standard.

⁹⁶ Ibid 55 [27] (McHugh, Gummow, Hayne and Heydon JJ).

⁹⁷ Ibid 57 [34]. See also at 64–5 [55]–[56] (Callinan J).

⁹⁸ Ibid 57 [35] (McHugh, Gummow, Hayne and Heydon JJ), citing *Hatton* (n 31).

⁹⁹ Ibid 59 [41] (McHugh, Gummow, Hayne and Heydon JJ). See also at 64–5 [54]–[56] (Callinan J).

¹⁰⁰ For later discussion see *Robertson v Queensland* [2021] QCA 92, [114] (Henry J).

¹⁰¹ See, eg, Handford (n 76); Rima Hor, ‘Psychiatric Illness in the Workplace: The Implications of *Koehler v Cerebos*’ (2005) 27(3) *Sydney Law Review* 557; Burns, ‘Employers Behaving Badly?’ (n 18).

¹⁰² Handford (n 76) 163.

¹⁰³ Burns, ‘Employers Behaving Badly?’ (n 18).

¹⁰⁴ See, eg, *Robertson v Queensland* (n 100) [115]–[125] (Henry J).

¹⁰⁵ The requirement for there to be ‘signs’ that an individual employee was at particular risk was inconsistent with the nature of psychiatric illness: see Hor (n 101) 557.

articulate when there were evident implicit or explicit ‘signs’ that an employee was at risk of psychiatric injury.¹⁰⁶ Many cases concerned workplaces where there were pre-existing, known risks of psychiatric injury to all employees due to the nature of the work. Even in these cases, courts applied the *Koehler* principles in determining that a duty of care was not engaged until the individual employee showed signs of injury.¹⁰⁷

Post-*Koehler* a focus on contractual obligations became a ‘pillar of the orthodox Australian approach to work stress cases’.¹⁰⁸ The strong focus in *Koehler* and later cases¹⁰⁹ on the importance of the employment contract in determining and restricting the scope of duty was troubling. There was failure to recognise inequalities of bargaining power and potential employee exploitation; potential incompatibility with WHS legislation; and incompatibility with the approach taken to physical injury.¹¹⁰ The spectre of the defence of voluntary assumption of risk (long abandoned in work injury cases) was raised, simply for agreeing to carry out work duties.¹¹¹

The *Koehler* principles may initially have been considered applicable only to work intensity and overwork cases.¹¹² Most cases of this kind were unsuccessful following *Koehler*.¹¹³ Since *Koehler*, the principles have been applied in all case categories¹¹⁴ including vicarious trauma,¹¹⁵ work with known risks of psychiatric

¹⁰⁶ See, eg, *The Age Company Ltd v YZ* (2019) 60 VR 189, 213 [118], 215 [129], 222 [167]–[171] (Niall JA, T Forrest JA and Emerton J).

¹⁰⁷ See, eg, *The Age Co Ltd v YZ* *ibid* (crime journalist); *Pateras v Victoria* [2017] VSCA 31 (teacher); *Doulis v Victoria* [2014] Aust Torts Reports ¶82-177 (teacher); *Taylor v Haileybury* [2013] VSC 58 (teacher). In other cases, the existence of the duty of care was recognised by the defendant/court due to the traumatic nature of first responder work (eg, police, ambulance, fire services). However, even in those cases many plaintiffs did not succeed based on failure to prove breach or causation: see, eg, *New South Wales v Briggs* (n 27); *James v Queensland* [2018] QSC 188; *Hegarty v Queensland Ambulance Service* [2007] Aust Torts Reports ¶81-919 (‘Hegarty’); *New South Wales v Fahy* (n 81); *Giles v Queensland* [2021] QCA 206. For successful cases see *Sills v New South Wales* (2019) 285 IR 198 (Court of Appeal) (police officer); *S v New South Wales* [2009] NSWCA 164 (undercover police operative).

¹⁰⁸ Handford (n 76) 175.

¹⁰⁹ See, eg, *Shearer v iSelect Pty Ltd* (2021) 312 IR 296, 309 [48] (Victorian Court of Appeal).

¹¹⁰ Carolyn Sappideen, Paul O’Grady and Joellen Riley, Thomson Reuters, *Macken’s Law of Employment* (online at 25 October 2022) [6.540].

¹¹¹ For discussion of the history of the *volenti non fit injuria* defence and its abolition, see *Brisbane Youth Service Inc v Beven* [2018] 2 Qd R 291, 326–7 [134]–[137] (Sofronoff P).

¹¹² Handford (n 76) 166.

¹¹³ *Ibid* 173–4. Handford noted that 10 years after *Koehler* there had been no known successful Australian case based on injury caused by excessive work. For the rare example of a successful case, see *Roussety v Castricum Brothers Pty Ltd* (2016) 264 IR 237 (Victorian Supreme Court). For recent examples of unsuccessful cases, see *Shearer v iSelect Pty Ltd* (n 109); *Larner v George Weston Foods Ltd* [2014] VSCA 62.

¹¹⁴ Handford (n 76) 166. Handford argued in 2015 that there appeared to be some awareness by courts that ‘not all work stress cases are the same’ with the influence of *Koehler* strongest in overwork cases, and with bullying/harassment and trauma cases (particularly those involving first responders) more likely to be successful: at 176–7.

¹¹⁵ See, eg, *The Age Co Ltd v YZ* (n 106).

injury,¹¹⁶ and bullying/harassment cases.¹¹⁷ The requirements for evident signs that an employee was at risk of psychiatric injury before a duty arose and limitations by employment contracts on scope of duty have been particularly problematic in these categories.¹¹⁸ A proactive employer duty of care owed from the commencement of employment to take preventative steps regarding risks of psychiatric injury (for example by having and enforcing a safe system of work concerning psychosocial hazards) has generally not been recognised.¹¹⁹ Successful negligence cases have typically involved a reactive duty of care arising during the course of employment when plaintiffs have been exposed to egregious behaviour or significant psychosocial hazards explicitly brought to the attention of employers, who then failed to act to prevent further harm.¹²⁰

Following *Koehler*, further barriers emerged. In *Hegarty v Queensland Ambulance Service* ('*Hegarty*'), Keane JA held that the content of any duty of care should not extend to requiring employers to take proactive steps to reach out to employees and suggest psychological assessment and treatment due to considerations of privacy, human dignity and autonomy.¹²¹ This rested on social fact assumptions about employer and employee views on mental health stigma,¹²² potentially litigious responses by employees to employer 'intrusion',¹²³ and potential industrial relations issues.¹²⁴ In addition, a number of state appellate cases, including *Govier v Uniting Church in Australia Property Trust (Q)*, held that an employer's duty of care did not extend to psychiatric injury suffered during workplace investigations or as part of disciplinary processes.¹²⁵ The basis for the rejection of duty in these cases rested on coherency arguments — that is, that such a duty would be incoherent with other areas of law including industrial law and contract.¹²⁶ The

¹¹⁶ See, eg, *Pateras v Victoria* (n 107); *Doulis v Victoria* (n 107); *Taylor v Haileybury* (n 107) (teachers). See also *Brisbane Youth Service Inc v Beven* (n 111) (social worker).

¹¹⁷ See, eg, *Lloyd v Healthscope Operations Pty Ltd* [2021] VSCA 327; *Swan v Monash Law Book Co-operative* (2013) 235 IR 63; *Brown v Maurice Blackburn Cashman* (2013) 45 VR 22.

¹¹⁸ See, eg, *Brisbane Youth Service Inc v Beven* (n 111) 331–2 [159]–[161] (Sofronoff P) (discussion of the difficulties if professional employees engaged in risky work are assumed to contractually accept all risks of that work, as opposed to employers guarding against those risks).

¹¹⁹ There does appear to have been acceptance by employers and by courts of a more general proactive duty of care in first responder cases, where there is a known risk of significant vicarious trauma to all employees. See discussion in Sappideen, O'Grady and Riley (n 110) [6.550]. However, as discussed at n 107, some cases in this category have still failed on breach and causation grounds. See also *Wolters v University of the Sunshine Coast* [2014] 1 Qd R 571 where the trial judge's finding of a proactive duty of care owed to female employees (including the plaintiff) as a result of prior aggressive and abusive behaviour by a male manager known to the employer, was not challenged.

¹²⁰ See, eg, *The Age Co Ltd v YZ* (n 106); *Swan v Monash Law Book Co-operative* (n 117); *Sills v New South Wales* (n 107); *Roussety v Castricum Brothers Pty Ltd* (n 113); *Eaton v Tricare (Country) Pty Ltd* [2016] QCA 139.

¹²¹ *Hegarty* (n 107) [44]–[47]. For later application of these principles of 'privacy', 'autonomy' and 'dignity', see *New South Wales v Briggs* (n 27) 497–9 [124]–[131], 519 [225]–[227] (Leeming JA). *Ibid* [45]–[46].

¹²² *Ibid* [46].

¹²³ *Ibid*.

¹²⁴ *Govier v Uniting Church in Australia Property Trust (Q)* [2017] QCA 12 ('*Govier*'), applying *New South Wales v Paige* (2002) 60 NSWLR 371. For discussion of the existing Australian case law see Adriana Orifici, 'Unsystematic and Unsettled: A Map of the Legal Dimensions of Workplace Investigations in Australia' (2019) 42(3) *UNSW Law Journal* 1075, 1080–2.

¹²⁵ *Ibid* [68]–[78].

High Court initially gave special leave to the plaintiff to appeal in *Govier*;¹²⁷ however, it withdrew special leave during the appeal hearing on the basis that the contract of employment had never been introduced into evidence.¹²⁸

IV New Directions in the High Court? *Kozarov v Victoria*

The 2022 case of *Kozarov*¹²⁹ is the most significant case on negligence liability for workplace psychiatric harm since *Koehler*. While the High Court did not overrule *Koehler*, there are promising signs that a less restrictive approach to employer liability for workplace psychiatric injury is emerging. *Kozarov* involved an appeal by a solicitor formerly employed by the Victorian Office of Public Prosecutions ('OPP') in the Specialist Sexual Offences Unit ('SSOU'). She suffered psychiatric injuries including PTSD because of workplace vicarious trauma. During the course of employment from June 2009 to April 2012, she was exposed to highly distressing and traumatic material related to child sexual abuse (including images, videos and audio of rapes, assaults and child pornography), preparation of children for evidence/cross-examination, and suicidal child complainants.¹³⁰ There was extensive evidence that the OPP was aware of the serious risk of psychiatric injury to all SSOU employees from vicarious trauma¹³¹ including a Vicarious Trauma Policy ('VT Policy') published in 2008.¹³²

Key events following Kozarov's appointment included her attendance and contributions at a staff meeting; a staff memorandum to management and training workshops where she expressed significant concerns about the impact of the SSOU work on staff including herself;¹³³ her communication with management about her workload;¹³⁴ exposure to traumatic events;¹³⁵ and sick leave. Finally, there was an alleged 'sentinel event' which culminated in distressed emails she sent to her manager following a workplace internal dispute in late August 2011.¹³⁶ The OPP was held liable in negligence for Kozarov's injuries at trial.¹³⁷ Jane Dixon J found that the OPP was 'placed on notice of a risk' to its employee's mental health by the end of August 2011, and had failed to take reasonable steps in response to that risk

¹²⁷ Transcript of Proceedings, *Govier v Unitingcare Community* [2017] HCATrans 183.

¹²⁸ Transcript of Proceedings, *Govier v Uniting Church in Australia Property Trust (Q)* [2018] HCATrans 65.

¹²⁹ *Kozarov* (n 28). This was an appeal from *Victoria v Kozarov* (2020) 301 IR 446 ('*Kozarov (VSCA)*') which had allowed an appeal by Victoria against the decision in *Kozarov v Victoria* (2020) 294 IR 1 ('*Kozarov (VSC)*'). For a discussion of the history of the case and the grounds of the High Court appeal see Kylie Burns, 'Liability for Workplace Psychiatric Injury and Vicarious Trauma: *Kozarov v Victoria*' (2021) 43(4) *Sydney Law Review* 575.

¹³⁰ *Kozarov* (n 28) 129–32 [31]–[44] (Gageler and Gleeson JJ); 590 [74]–[78] (Gordon and Steward JJ).

¹³¹ *Ibid* 141–2 [69]–[73] (Gordon and Steward JJ).

¹³² *Kozarov (VSCA)* (n 129) 451 [12]. Management options in response to vicarious trauma outlined in the policy included rotations within OPP, counselling, debriefing, relocation of files, 'time-outs' and other provision of assistance.

¹³³ *Kozarov* (n 28) 142 [75]–[77] (Gordon and Steward JJ).

¹³⁴ *Ibid* 142–3 [78].

¹³⁵ *Ibid* 136 [53] (Gageler and Gleeson JJ).

¹³⁶ *Ibid* 143 [79]–[80] (Gordon and Steward JJ).

¹³⁷ *Kozarov (VSC)* (n 129).

which included offering a rotation to another area of the OPP.¹³⁸ Jane Dixon J was satisfied this breach of duty caused Kozarov's injury, and that, if an offer of rotation had been offered, Kozarov would have accepted that offer and would have avoided severe psychological injury.¹³⁹

The Court of Appeal of Victoria (Beach and Kaye JJ and Macaulay A-JA) agreed the OPP was on notice of risk to Kozarov by the end of August 2011 and had breached its duty of care.¹⁴⁰ However, the Court of Appeal allowed the appeal by the OPP on causation, overturning the trial judge's factual inference that Kozarov would have accepted an offer to rotate to reduce her exposure to trauma.¹⁴¹ Kozarov's grounds of appeal in the High Court were two-fold: that the Court of Appeal erred in rejecting the trial judge's factual inference concerning causation; and that the causation finding did not sufficiently consider the nature and content of Victoria's duty of care which included a duty to maintain and enforce a safe system of work.¹⁴² By notice of contention, the OPP disputed that it was on notice of risk of psychiatric harm to Kozarov by August 2011.¹⁴³ The High Court unanimously upheld the appeal, holding that the OPP had breached its duty of care, causing Kozarov's injuries.¹⁴⁴

A *Duty of Care and 'Evident' Signs*

1 *Are Evident Signs Always Required to Enliven a Duty of Care?*

Given the wide application of the *Koehler* principles by courts, it was unsurprising that in *Kozarov* the *Koehler* principles were applied at the pre-High Court stages. In *Kozarov*, the parties at both trial and appeal¹⁴⁵ and both the trial and appellate judgments proceeded on the assumption that evident signs of psychiatric injury to Kozarov were required to enliven a duty. Neither Kozarov nor the OPP challenged this interpretation of the legal requirements of the existence and content of an employer's duty in the High Court.¹⁴⁶ Rather, there was a factual dispute about when 'evident' signs of the risk of psychiatric injury to Kozarov were present.¹⁴⁷ However, the High Court found that it was not necessary in all cases for evident signs of psychiatric injury to an individual employee to be present. The employer's duty concerning psychiatric injury may arise, as it does for physical injury, from the inception of the employment relationship. Kiefel CJ and Keane J criticised the formulation and presentation of Kozarov's case as 'unduly complicated' and as

¹³⁸ *Kozarov* (n 28) 128 [23] (Gageler and Gleeson JJ). For further discussion of the trial judgment see Burns, 'Liability for Workplace Psychiatric Injury and Vicarious Trauma' (n 129).

¹³⁹ *Kozarov* (n 28) 128 [23] (Gageler and Gleeson JJ).

¹⁴⁰ *Kozarov* (VSCA) (n 129).

¹⁴¹ *Ibid* 478–9 [106]–[110].

¹⁴² *Kozarov* (n 28) 140 [66] (Gordon and Steward JJ). This argument raised the applicability of *McLean v Tedman* (1984) 155 CLR 306, 313.

¹⁴³ *Kozarov* (n 28) 140 [66] (Gordon and Steward JJ).

¹⁴⁴ Gageler and Gleeson JJ gave the lead judgment, with Kiefel CJ and Keane J; Gordon and Steward JJ; and Edelman J agreeing with the proposed orders.

¹⁴⁵ *Kozarov* (n 28) 122–3 [1]–[2] (Kiefel CJ and Keane J).

¹⁴⁶ Burns, 'Liability for Workplace Psychiatric Injury and Vicarious Trauma' (n 129) 580.

¹⁴⁷ *Ibid* 580–1.

misunderstanding the effect of *Koehler*.¹⁴⁸ They distinguished *Koehler* as concerning ‘exigencies of the employee’s work’¹⁴⁹ — something not in issue in *Kozarov*.¹⁵⁰ Kiefel CJ and Keane J held that

the circumstances of a particular type of employment may be such that the work to be performed by the employee is inherently and obviously dangerous to the psychiatric health of the employee (just as other kinds of work are inherently and obviously dangerous to the physical health of the employee).¹⁵¹

In such a case, including Kozarov’s, a proactive duty of care arose from the time of employment to enable ‘work to be performed safely’.¹⁵² Evidence in the case, including the VT Policy, demonstrated the OPP’s awareness of the serious risk to Kozarov’s mental health without the necessity for ‘further warning signs’.¹⁵³ Gageler and Gleeson JJ recognised that Kozarov’s case had been ‘put at every stage’ based on the failure of the OPP to respond to ‘evident signs’ of her PTSD.¹⁵⁴ This was based upon the plurality’s assumption in *Koehler* that employers were generally entitled to assume in the absence of ‘evident signs’ that the employee considered they were able to do the job.¹⁵⁵ Gageler and Gleeson JJ considered, however, that Kozarov had assumed an ‘unnecessary evidential burden’¹⁵⁶ given ‘unchallenged findings by the trial judge’ of the obvious risk of injury from the ‘nature and intensity of SSOU’s work’, including as reflected in the VT Policy.¹⁵⁷ Gageler and Gleeson JJ held that the assumption in *Koehler*

should not be taken to detract from the obligation of an employer, in the performance of a tortious duty to maintain a safe system of work, to exercise reasonable care to avoid a foreseeable risk of psychiatric injury to a class of employees.¹⁵⁸

Gordon and Steward JJ held that the OPP had a ‘duty to take all reasonable steps to provide’ Kozarov with a safe system of work.¹⁵⁹ This was not disputed; had been established at trial and not challenged in the Court of Appeal or High Court;¹⁶⁰ and included a duty to ‘establish, maintain and enforce such a system’.¹⁶¹ This duty of care required the OPP to implement a safe system of work from the inception of the employment relationship in June 2009.¹⁶² Aspects of that duty, including a failure to have an adequate OH&S framework and vicarious trauma training, were breached

¹⁴⁸ *Kozarov* (n 28) 122–3 [1]–[2], 124 [6], 125–6 [11].

¹⁴⁹ ‘Exigencies’ refers to the ‘demands or difficulties’ of a job: see ‘Definition of “Exigencies”’, *Collins English Dictionary* (Web Page, 2023) <<https://www.collinsdictionary.com/dictionary/english/exigencies>>.

¹⁵⁰ *Kozarov* (n 28) 123 [2]. This was not strictly correct as the trial judge had made findings of breach of contract due to overwork and work intensity. These were held to be ‘highly relevant to the negligence claim’: see *Kozarov (VSC)* (n 129) 168 [760]–[767].

¹⁵¹ *Kozarov* (n 28) 124 [6].

¹⁵² *Ibid.*

¹⁵³ *Ibid* 124 [7] (Kiefel CJ and Keane J).

¹⁵⁴ *Ibid* 128–9 [26].

¹⁵⁵ *Ibid* citing *Koehler* (n 26) 57–8 [36].

¹⁵⁶ *Kozarov* (n 28) 129 [29].

¹⁵⁷ *Ibid* 129 [27].

¹⁵⁸ *Ibid* 129 [28].

¹⁵⁹ *Ibid* 144 [82].

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* 144 [83].

¹⁶² *Ibid* 145 [87]–[88] (Gordon and Steward JJ).

throughout Kozarov's employment.¹⁶³ However, it was not until late August 2011 following the distressed emails that there was a failure to intervene by making a welfare inquiry and offering occupational screening that ultimately led to injury.¹⁶⁴ Edelman J held that employers have a duty of care imposed by law 'to ensure the "[p]rotection of mental integrity from the unreasonable infliction of serious harm"'¹⁶⁵ which is 'no different from the employer's duty to protect an employee's physical integrity from unreasonable infliction of harm'.¹⁶⁶ This 'imposed duty' is only 'engaged' when there 'is a reasonably foreseeable risk of psychiatric injury to the employee of the general kind that occurred'.¹⁶⁷ Edelman J noted (citing *Koehler*) that the assessment of reasonable foreseeability depends on the nature and extent of the work and 'signs given by the employee concerned'.¹⁶⁸ However, he did not treat *Koehler* as requiring that both elements be present in all cases, holding that the duty arose in Kozarov's case as a consequence of the reasonably foreseeable risk of injury to each and every employee of the SSOU (including Kozarov) from the 'very nature and extent of the work of the SSOU'.¹⁶⁹

2 Were There Evident Signs of Psychiatric Injury?

The majority of the High Court held that, although evident signs were not required to enliven a duty, there were such signs of injury to Kozarov by the end of August 2011. Gageler and Gleeson JJ¹⁷⁰ held that the OPP had failed to 'establish error or injustice of any kind' either by the trial judge or Court of Appeal to warrant disturbing the findings of fact that there were evident signs of psychiatric injury present by the end of August 2011.¹⁷¹ The 'evident signs ... signified more than merely the inevitable and universal experience of vicarious trauma' in the SSOU workplace.¹⁷² Gordon and Steward JJ, treating the issue as one of breach, also held that the trial judge and Court of Appeal had correctly found the OPP was on notice of risk of harm to Kozarov by no later than 29 August 2011.¹⁷³ This was the result of cumulative events viewed against the background of the 'inherently difficult nature of the work'.¹⁷⁴ Edelman J also treated the issue of whether there had been 'evident signs' of injury as a breach issue.¹⁷⁵ He was satisfied that by the end of August 2011 the foreseeable risks of causing or exacerbating psychiatric injury were so great that precautions should have included a welfare enquiry and, potentially, compulsory rotation.¹⁷⁶

¹⁶³ Ibid 145 [88].

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 148–9 [103] quoting *Tame v New South Wales* (2002) 211 CLR 317, 379 [185].

¹⁶⁶ Ibid 148–9 [103].

¹⁶⁷ Ibid 149 [104].

¹⁶⁸ Ibid citing *Koehler* (n 26) 57 [35].

¹⁶⁹ *Kozarov* (n 28) 150 [107].

¹⁷⁰ Gageler and Gleeson JJ considered the issue on the basis that the case was to be determined on the issues 'joined between the parties': ibid 129 [29] citing *Coulton v Holcombe* (1986) 162 CLR 1, 7–8.

¹⁷¹ Ibid 134 [49].

¹⁷² Ibid 136 [53] (Gageler and Gleeson JJ).

¹⁷³ Ibid 140 [67], 143 [80].

¹⁷⁴ Ibid 143 [80] (Gordon and Steward JJ).

¹⁷⁵ Ibid 149 [105], 150 [108].

¹⁷⁶ Ibid 151 [110]–[111].

Kiefel CJ and Keane J held that, given a proactive duty of care arose from the time of employment and was breached from the time of employment, there was no need for Kozarov's case to be formulated on the precise time a later sentinel event or evident sign arose in respect of either breach or causation.¹⁷⁷ Although not required in *Kozarov* to satisfy the requirements of duty, their Honours would have reached a different view to the Court of Appeal (and the other High Court Justices) on whether the evidence accepted at trial gave rise to any further notice of risk to Kozarov's health than the VT Policy.¹⁷⁸ They held that complaints of overwork or excessive workload are not generally to be taken by an employer as an indication of risk to psychiatric health.¹⁷⁹ Angry, righteous emails in the context of employment dealings may also not be indicative of a risk to psychiatric health.¹⁸⁰

B Breach of Duty and Enforcement of Safe Systems of Work

The High Court held that the duty of care owed to Kozarov was breached from the inception of employment.¹⁸¹ Employers may have to take early, proactive actions to avoid breaching their duty of care, such as having an appropriate OH&S framework which responds to the risk of psychiatric injury. In addition, an employer is required to maintain and enforce such a system. Kiefel CJ and Keane J held that 'none of the protective measures identified in the VT Policy' nor 'any other reasonably available preventative or protective measures were implemented' within the SSOU.¹⁸² Gordon and Steward JJ also found that the trial judge's unchallenged findings were that the OPP had breached 'each aspect of the duty of care' from the start of employment including a 'woefully inadequate' OH&S framework, inadequate training of SSOU staff and management about vicarious trauma and PTSD, failure to offer a welfare enquiry and occupational screening to Kozarov, and no system to respond to the outcome of screening.¹⁸³ However, on the basis of the trial judge's findings,¹⁸⁴ while aspects of the duty were breached prior to August 2011 (such as the OH&S framework and training) it was not until the failure to offer a welfare enquiry and offer occupational screening in late August 2011 that the breach 'could be said to have caused' Kozarov's injury.¹⁸⁵ Gordon and Steward JJ found, accepting Kozarov's submissions on appeal, that the duty of care extended not merely to establishing a safe system of work but also to enforcing it, and this would include using the employer's power to 'prescribe, warn, command and enforce obedience'

¹⁷⁷ Ibid 125–6 [10]–[11].

¹⁷⁸ Ibid 126–7 [12]–[16].

¹⁷⁹ Ibid 126–7 [14]–[17].

¹⁸⁰ Ibid 127 [18]. Cf Gageler and Gleeson JJ at 136 [54].

¹⁸¹ Gageler and Gleeson JJ's judgment focused only on the findings of fact concerning evident signs of injury and the issue of rotation: see *ibid* 129 [29].

¹⁸² Ibid 125 [8]–[10], 127 [19]. See also Gageler and Gleeson JJ who referred to a duty to maintain a safe system of work due to nature and intensity of the SSOU work: at 129 [27]–[28].

¹⁸³ Ibid 145 [86].

¹⁸⁴ Ibid 145 [87]. Gordon and Steward JJ also noted the acknowledgment by senior counsel for Victoria during oral argument that there was a requirement to implement a safe system of work from the beginning of employment.

¹⁸⁵ Ibid 145 [88]. Gordon and Steward JJ noted that both parties (subject to the notice of contention) were content to argue this was the critical 'breach' date.

by the employee.¹⁸⁶ They noted that senior counsel for Victoria conceded during oral argument that the ‘duty required Victoria to do “almost everything” it could “short of forcing rotation” to protect Ms Kozarov from the risk of psychiatric injury’.¹⁸⁷

Edelman J also held that the nature of SSOU work required ‘immediate precautions concerning every employee in the unit’.¹⁸⁸ Unlike the trial judge and Gordon and Steward JJ, Edelman J suggested that it was possible these early measures might ‘in combination ... have prevented’ Kozarov’s psychiatric injury.¹⁸⁹ As more evident signs of serious psychiatric injury were present, the OPP should have put in place increased precautions and response including a welfare enquiry.¹⁹⁰ Edelman J significantly found that it may have been that by the end of August 2011 reasonable precautions would have included ‘compulsory rotation’¹⁹¹ and that an employer cannot comply with their duty to provide a safe place of work by ‘acquiescing in the refusal of an employee to be rotated’ from a position which presents a ‘high risk of serious physical injury’, noting further that ‘[p]sychiatric injury is no different’.¹⁹²

C Causation and Factual Inferences

The trial judge and the Court of Appeal assumed that, in order to prove causation, Kozarov was required to prove the counterfactual that if offered rotation to another area of the OPP in August 2011, she would have accepted rotation.¹⁹³ The trial judge found this burden to be discharged. However, the Court of Appeal concluded that Kozarov had not proved she would have accepted rotation.¹⁹⁴ The Court relied on Kozarov’s statements in emails to her manager after the August 2011 dispute about her dedication to her work and her decision to apply for promotion.¹⁹⁵ The High Court held that Kozarov had demonstrated she would have accepted rotation if offered, and the Court of Appeal was in error.

¹⁸⁶ Ibid 144 [83] citing *McLean v Tedman* (n 142) which had been argued by Kozarov in the appellant’s submissions in the High Court: see Zagi Kozarov, ‘Appellant’s Submissions’, Submission in *Kozarov v Victoria*, Case No M36/2021, 9 July 2021 [43]–[48].

¹⁸⁷ *Kozarov* (n 28) 144 [83] quoting senior counsel for Victoria. For discussion of the requirement for an employer to enforce a safe system of work which extends to prevention of bullying and harassment even in ‘robust’ workplaces, see *Stevens v DP World Melbourne Ltd* [2022] VSCA 285 [62].

¹⁸⁸ Ibid 150–1 [109]. This included the earlier measures referred to by Gordon and Steward JJ in their judgment including an adequate OH&S framework and more intensive training for managers and staff: at 144 [82].

¹⁸⁹ Ibid 150–1 [109]. Edelman J noted that this was not the way Kozarov’s case was run on either a ‘primary or alternative’ basis but rather focused on later, greater precautions necessary by late August 2011. However, it appears Kozarov did argue at trial that precautions, culminating in rotation, should have occurred earlier: see *Kozarov (VSC)* (n 129) 161 [727]–[728].

¹⁹⁰ *Kozarov* (n 28) 151 [110] (Edelman J).

¹⁹¹ Ibid 151 [111]. Ultimately, Edelman J found (at 151 [112]) it was unnecessary to decide this issue due to his view that Kozarov would have agreed to rotation.

¹⁹² Ibid 151 [111].

¹⁹³ Ibid 137 [57] (Gordon and Steward JJ). Gordon and Steward JJ noted that the Court of Appeal ‘observed that there was no suggestion that’ Kozarov could have been compelled to accept rotation. For a different view, see Burns, ‘Liability for Workplace Psychiatric Injury and Vicarious Trauma’ (n 129) 586.

¹⁹⁴ Ibid 137 [58].

¹⁹⁵ Ibid 137–8 [58].

Kiefel CJ and Keane J found that, had Kozarov's case been properly formulated concerning the duty of care and breach arising from the commencement of employment, there would have been no need to consider the counterfactual causation issue of whether she would have been willing to accept rotation after the end of August 2011.¹⁹⁶ Gageler and Gleeson JJ found that Kozarov's cooperative conduct seeking rotation in February 2012 when she became aware of her PTSD, and the expert evidence accepted at trial that the majority of reasonable people would heed medical advice about the means to ameliorate their illness, supported a finding of causation.¹⁹⁷

Gordon and Steward JJ found that a 'real review of the evidence' supported a finding that Kozarov would have cooperated to reduce her exposure to trauma.¹⁹⁸ There was an undisputed finding that she would have accepted an offer for welfare enquiry and screening, which also supported a finding that she would have agreed to a reduction of exposure to trauma.¹⁹⁹ In the counterfactual where the OPP had not breached its duty to Kozarov, she would have received training on vicarious trauma, been diagnosed earlier with PTSD, and been offered earlier methods of reducing her trauma exposure.²⁰⁰ Given these things did not occur, 'very little (if any) weight should be given' to her application for promotion or her statements in the email following the dispute with her manager.²⁰¹ No reason had been given by the OPP or the Court of Appeal as to why Kozarov's response would have been different to the 'response of the very significant majority of people'.²⁰² Gordon and Steward JJ found that the contract of employment was no barrier to causation, given the trial judge's finding that Kozarov would have cooperated, and no good reasons were given by the OPP for why she could not have been rotated.²⁰³ There was therefore no necessity to consider whether she could have been compelled to rotate.²⁰⁴

Edelman J agreed with Gageler and Gleeson JJ and Gordon and Steward JJ, that the better view of counterfactual causation on the evidence was that Kozarov would have accepted an offer to have screening and would have agreed to rotation.²⁰⁵ As indicated above, Edelman J suggested the risk of psychiatric injury was so great it may be that reasonable precautions would have included compulsory rotation.²⁰⁶

¹⁹⁶ Ibid 125 [10].

¹⁹⁷ Ibid 138 [59]. Gageler and Gleeson JJ noted (at 139 [61]–[62]) there was a body of material tending against the 'rotation finding', however this should be given little weight.

¹⁹⁸ Ibid 146 [92]–[93].

¹⁹⁹ Ibid 146 [94].

²⁰⁰ Ibid 147 [95] (Gordon and Steward JJ).

²⁰¹ Ibid.

²⁰² Ibid 147 [96].

²⁰³ Ibid 147 [97].

²⁰⁴ Ibid.

²⁰⁵ Ibid 151 [112].

²⁰⁶ Ibid 151 [111].

V New Coherence and Unresolved Tensions in Liability for Workplace Psychiatric Injury

Andrew Fell has argued in the broader context of Australian private law that while the High Court has stressed the fundamental importance of the concept of coherence, it has neither defined coherence nor explained why it is important.²⁰⁷ This is particularly salient in workplace psychiatric injury negligence cases. Despite some clarification of the law in *Kozarov*, several matters remain unresolved, particularly as the High Court did not explicitly overrule *Koehler*. These include whether evident signs of psychiatric injury from an employee will ever be required to ‘engage’ a duty of care or whether the employer’s duty of care concerning physical and psychiatric injury is now merged; the relevance of coherence with contract and legislative obligations in determining the content or scope of the duty; whether cases concerning excessive work or work overload should be distinguished from cases like *Kozarov* involving inherent risk of vicarious trauma to all employees; the role of legal policy concerns such as privacy and autonomy; and whether concerns of coherence prevent a duty of care in cases where psychiatric injury is suffered as a result of performance management and workplace disciplinary investigations.

A Is There a Continuing Role for the ‘Evident Signs’ Test? Has the Employment Duty for Physical and Psychiatric Injury Merged?

Following *Kozarov*, it is clear that the test of whether an employer’s duty of care extends to psychiatric injury is one of ‘reasonable foreseeability’; however, this test can be satisfied in numerous ways.²⁰⁸ Signs of psychiatric injury to a particular employee are not required *in all cases*. Where there is evidence that an employer has actual knowledge of the risk of psychiatric injury to each and every employee, there will be no need for an employee to also show signs of risk of injury to themselves individually at the duty stage.²⁰⁹ The nature and intensity of the work will also be a key factor. Where there is a known risk of vicarious trauma to all employees due to the inherently traumatic nature of the work, a proactive and reactive duty of care may arise from the inception of the employment relationship.²¹⁰

²⁰⁷ Fell (n 79) 1162.

²⁰⁸ See, eg, *Bersee v Victoria* [2022] VSCA 231 [87]–[106]. Cf *Potter v Gympie Regional Council* [2022] QCA 255 [37]–[49] where the Queensland Court of Appeal upheld the trial judge’s application of the *Koehler* test requiring apparent signs of illness from the employee as the basis for reasonable foreseeability. The judgment does not cite or consider the implications of the more recent High Court decision in *Kozarov* (n 28).

²⁰⁹ See, eg, *Stevens v DP World Melbourne Ltd* (n 187) [58]–[59].

²¹⁰ See, eg, *Bell v Nexus Primary Health* [2022] VSC 605 (where a domestic violence service was held to have a proactive and reactive duty of care to a domestic violence worker to have, and enforce, a safe system of work); *New South Wales v Skinner* [2022] NSWCA 9 (where a proactive and reactive duty owed to a police officer was held to have been breached by failure to refer for appropriate psychiatric assessment).

Where there is not an immediately obvious risk of psychiatric injury to all or a particular employee, courts will need to focus on the evidence to determine reasonable foreseeability. As discussed above, in *Koehler* the High Court controversially held in 2005 that employers could not be expected to recognise, as a matter of general knowledge, the risk of psychiatric injury to all employees from stress at work.²¹¹ The High Court did nevertheless leave open the possibility that there may be other matters, beyond general knowledge, that might make the risk of psychiatric injury foreseeable.²¹² The High Court in *Kozarov* did not have to consider whether by 2022 the risks of psychiatric injury to employees should have been known by the OPP as a matter of general knowledge, as there was clear evidence of actual employer knowledge of the risks of vicarious trauma and the nature of the work was inherently dangerous. However, as discussed in Part II, all employers are now required by WHS legislation to assess psychosocial risks and hazards in the workplace and to have and implement a WHS framework to respond to those risks. Psychosocial hazards are present in all workplaces in varying degrees. As a matter of coherence in the law, it should be increasingly difficult for an employer to maintain that it could not reasonably foresee the potential risks of psychiatric injury to employees. This should leave little ambit for a requirement that an employee additionally show explicit or implicit signs of risk of injury to them individually to trigger a duty of care. The existence of explicit or implicit signs of injury to an employee will still be relevant at the time of determining breach and the reasonableness of precautions. For example, it may only be reasonable to require an employer to take substantial precautions, such as employee screening and intervention in an employee's work, when the employee is exhibiting signs of distress or the work duties are inherently traumatic.

One of the unfortunate legacies of *Koehler* was to effectively require no preventative steps in response to general risks of psychiatric injury to all employees as a result of psychosocial hazards. An employer's duty was only triggered when an injury had almost certainly been suffered by an individual employee. Any action required of an employer was likely too late and may not, as a matter of causation, have prevented the injury. A number of the judges in *Kozarov* suggested that the employer's duty to provide and enforce a safe system of work applies equally to physical and psychiatric injury. The foreseeable risk of psychiatric injury (as opposed to physical injury) should not necessarily be treated differently based on some higher test or standard. It is not clear post *Kozarov* that there should be a need to consider the additional requirement of whether the scope or content of the employer's duty extends to psychiatric injury. This moves negligence law in Australia closer to the point where a proactive and reactive duty of care owed by

²¹¹ *Koehler* (n 26) 57 [34].

²¹² *Ibid* 54 [24]. See, however, *Hayes v Queensland* [2017] 1 Qd R 337, 348 [12] (McMurdo P) ('The reasonable employer in the position of the respondent in 2009, although not expected to have medical expertise, could reasonably be expected to have known that prolonged workplace stress could detrimentally affect the physical and mental health of employees performing work like the appellants').

employers concerning physical and psychiatric injury become fused.²¹³ A proactive and reactive negligence duty of care owed by an employer to all employees from inception of employment would also be coherent with the WHS legislative obligations discussed in Part II.

B Coherence and Employment Contracts

The role of employment contracts in determining the content or scope of the duty of care was not directly at issue in *Kozarov*. An alternative contractual claim had been considered at trial and Jane Dixon J had found contractual breaches including unreasonable workload and failure to provide a safe workplace.²¹⁴ The employment contract had extensive provisions concerning WHS matters including reasonable workload. Unlike in *Koehler*, the contract was held to strengthen Kozarov's case and was 'highly relevant' to the negligence claim.²¹⁵ As part of the causation argument in the Court of Appeal and High Court, the OPP argued that the contract of employment prohibited rotation and that Kozarov's contract of employment required her to be employed only in the SSOU and not in other parts of the OPP.²¹⁶ As discussed above, the Court of Appeal also held, without any significant exploration of the contract of employment, that the contract prohibited rotation. The High Court accepted neither the OPP's submissions nor the Court of Appeal findings.²¹⁷

In *Koehler*, the High Court left open the question of the interaction between contract and negligence for future cases, suggesting this would require 'much closer attention' than was necessary in *Koehler*.²¹⁸ Nevertheless, *Koehler* strongly suggested that employment contracts could constrain the existence or scope of an employer's duty of care, and impact on determinations of whether psychiatric injury was foreseeable. Later cases have interpreted *Koehler* as indicating the primary and fundamental role of contract in constraining the limits of any duty of care.²¹⁹ The High Court in *Kozarov* provides some clues that in the future courts may be less likely to hold that an employment contract restrains an employer's duty of care. It is clear from *Kozarov* that an employee's contractual agreement to carry out employment duties in what was an inherently 'dangerous' occupation, did not negate a duty of care to provide and enforce a safe system of work concerning mental health.²²⁰ *Kozarov* suggests that an employment contract can reinforce or even broaden the scope of a duty of care. Edelman J suggested, by way of obiter, that the duty of care of employers can arise in two separate categories — 'those that arise by

²¹³ Cf *Bersee v Victoria* (n 208) [91]–[105] where the Victorian Court of Appeal rejected the applicant's submission that a duty of care in relation to psychiatric injury from overwork was owed from the start of employment as a consequence solely of the employment relationship.

²¹⁴ *Kozarov (VSC)* (n 129) 169 [765].

²¹⁵ *Ibid* 169 [767].

²¹⁶ Victoria, 'Submissions of the Respondent', Submission in *Kozarov v Victoria*, Case No M36/2021, 6 August 2021, [47]–[49] ('Victoria's Submissions').

²¹⁷ *Kozarov* (n 28) 147 [97] (Gordon and Steward JJ).

²¹⁸ *Koehler* (n 26) 58 [40] (McHugh, Gummow, Hayne and Heydon JJ).

²¹⁹ See, eg, *Shearer v iSelect Services Pty Ltd* (n 109) [48].

²²⁰ See also *Matinca v Coalroc [No 5]* [2022] NSWSC 844 [107] (Campbell J) (noting that while employees have rights to bargain away their individual freedoms, these rights are not 'absolute' and are not a 'bar' to their employer exercising its power to 'prescribe, warn, command and enforce obedience to its commands' concerning safety).

“a voluntary undertaking independent of contract” based upon “an assumption of responsibility” and those ‘imposed, independently of any undertaking, by a statutory or common law rule’.²²¹ He considered that the duty in *Kozarov* concerned the second category, imposed duty.²²² It was only in cases concerning the first category of duty that he considered a full exploration of the contractual position was required to determine the existence and content of the duty, given ‘affinity between tort and contract here is strong’.²²³ It is not clear what kind of workplace cases would fall into the first category of duty assumed through voluntary undertaking,²²⁴ with most (if not all) employer duties being imposed duties.

Neither *Koehler* nor *Kozarov* addressed some fundamental questions about coherence and the relevance of employment contracts in determining the existence and scope of a duty of care. Great care should be taken in assuming that terms of a private employment contract can override or limit an employer’s duty of care in negligence concerning psychiatric injury as a matter of coherence. Private employment contracts in Australia do not fully govern the workplace obligations and rights of employers and employees. Provisions of employment contracts may be unenforceable or void where they conflict with an employer’s legislative obligations. Australian employment contracts are impacted by a complex array of legislation and regulation including industrial legislation;²²⁵ employment awards and enterprise agreements; National Employment Standards, which mandate minimum employment standards which cannot be displaced;²²⁶ WHS legislation, regulations and codes;²²⁷ public service administration legislation governing public sector employment;²²⁸ workers compensation legislation; and discrimination and human rights legislation.²²⁹ This legislative framework may affect many aspects of an employment contract including reasonable hours of work,²³⁰ workplace safety conditions, and how an employer can deal with an injured or disabled employee including when termination of employment can lawfully occur.²³¹ It is highly unlikely that an employee’s agreement, in an employment contract, to effectively waive the employer’s legislative WHS obligation to provide a safe working

²²¹ *Kozarov* (n 28) 148 [100] quoting *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 528–9.

²²² *Ibid* 148 [102].

²²³ *Ibid* 148 [101].

²²⁴ *Ibid* (Edelman J noting that such a duty may be ‘more or less extensive’ than the duty of care imposed by law).

²²⁵ See, eg, *Fair Work Act 2009* (Cth).

²²⁶ *Fair Work Act 2009* (Cth) pt 2-2.

²²⁷ See, eg, the instruments listed at nn 60–64.

²²⁸ For example, the Victorian Public Service Agreement 2006 (2009 Extended and Varied Version) and the *Public Service Administration Act 2004* (Vic) formed part of *Kozarov*’s contract of employment: see *Kozarov* (*VSC*) (n 129) 166 [754].

²²⁹ See, eg, *Sex Discrimination Act 1984* (Cth) s 47C.

²³⁰ *Fair Work Act 2009* (Cth) s 62 (which provides an employee cannot be required to work greater than 38 hours a week unless the additional hours are reasonable).

²³¹ See, eg, *Fair Work Act 2009* (Cth) ss 351, 352; *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ch 4 pt 6.

environment would be enforceable, due to its lack of coherence with WHS legislation.²³²

C *Excessive Hours and Overwork*

As discussed in Part III, since *Koehler* claims by plaintiffs injured due to excessive working hours or work intensity have generally been unsuccessful. Australian courts applying the *Koehler* principles have not recognised a proactive duty of employers to provide reasonable workloads or reasonable workhours. This has typically been justified on the bases that employees have autonomy to contract to work excessive hours or incur unreasonable workloads; that excessive hours of work or work intensity are better dealt with as an industrial issue or by industrial legislation; and that it is not appropriate, or is too difficult, for courts to determine reasonable standards of work hours. In addition, courts have held that psychiatric injury as a result of excessive work is not generally foreseeable by an employer in the absence of very specific complaints or overwhelming signs or a high risk of psychiatric injury.²³³ Despite this, at trial in *Kozarov*, Jane Dixon J found on the evidence that the OPP had breached the employment contract concerning excessive hours and the intense workload allocated to Ms Kozarov.²³⁴ This overwork was held ‘highly relevant to the negligence claim’ as it increased the risk of harm to her.²³⁵ The trial judge’s findings concerning overwork were not appealed in the Court of Appeal or the High Court.

The High Court should, in an appropriate case, revisit whether the *Koehler* principles requiring signs of injury before a duty of care is engaged continue to apply in cases of overwork or excessive work. *Koehler* was underpinned by outdated assumptions about employer knowledge of the consequences of overwork on employee psychological health. The High Court failed to recognise excessive work as a psychosocial hazard which creates a risk of injury. In *Kozarov*, the High Court seems to have preserved the *Koehler* principles as applicable to pure excessive work or overwork cases for the time being.²³⁶ Kiefel and Keane JJ took a particularly

²³² WHS model legislation has provisions which preclude an employer’s obligation to contract out of or delegate their WHS duties: see, eg, *Work Health and Safety Act 2011* (Qld) s 272. Whether at common law there is even a possibility that an employee can waive their rights to a safe place of work appears unresolved: see *Kozarov* (n 28) 151 [111] (Edelman J). Such a common law right to waive would likely be incoherent with WHS and other legislation which is protective of employee’s safety: see also *Brisbane Youth Service Inc v Beven* (n 111) [168] (Sofronoff J).

²³³ See, eg, *Ackers v Cairns Regional Council* (2021) 311 IR 378, 381 [5] (Henry J) (*‘Ackers’*) (which held that very long ‘extremely demanding’ hours were not alone sufficient to make a psychiatric injury foreseeable, although when combined with ‘signs’ of psychological distress by an employee they may be sufficient).

²³⁴ *Kozarov (VSC)* (n 129) 168–9 [761]–[767]. See also at 126 [563]–[564], 128 [573] (where the unacceptably high workload pressure was held to be a compounding factor to the danger to the plaintiff when combined with trauma exposure).

²³⁵ *Ibid* 169 [767].

²³⁶ For recent cases which applied *Koehler* to this type of case, see *Shearer v iSelect Services Pty Ltd* (n 109); *Ackers* (n 233). For a recent overwork case where the Victorian Court of Appeal attempted to reconcile both *Koehler* and *Kozarov* as ‘opposite ends of a single spectrum’, see *Bersee v Victoria* (n 208) [88]–[89]. The Court held that evident signs of illness or distress are not a precondition of reasonable foreseeability but may still be relevant to determining reasonable foreseeability. In the circumstances, the Court held a duty was owed, but was not breached.

stringent approach in *Kozarov* rejecting the contention that employee complaints of overwork ‘in an ordinary workplace’ should be treated as an indication of risk to the psychiatric health of the employee or that they should be responded to by an employer as a WHS matter.²³⁷ Such matters, they suggested, should usually be treated as an industrial matter²³⁸ rather than a risk of psychiatric harm as ‘the employer may decide that such a prospect might be best avoided by terminating’ the employee’s employment.²³⁹

The principle that negligence law should be coherent with legislative obligations suggests a different approach. As discussed in Part II, there are legislative WHS obligations which require employers to identify, manage and ameliorate psychosocial hazards which include excessive work hours and excessive work intensity. Additionally, the National Employment Standards,²⁴⁰ which apply to most Australian workers and cannot be excluded, set a notional maximum number of 38 work hours per week with only reasonable hours above that maximum lawful.²⁴¹ The reasonableness of excess hours is judged by a range of matters including health risks, family obligations, whether the extra hours are remunerated, the overall salary and the seniority of the role.²⁴² The focus in the *Koehler* and *Kozarov* judgments on the freedom of parties to contract for excessive workload is outdated to the extent that contracts requiring unreasonable excessive work would be unlawful under current industrial legislation. As discussed above, some of the judgments in *Koehler* and *Kozarov* rejected a duty which extended to excessive work on the basis that employers may respond to employee complaints by sacking them or engaging in discrimination or other adverse actions.²⁴³ These social fact policy arguments should be rejected.²⁴⁴ Employers who acted in that manner in response to employee complaints would likely be engaging in unlawful conduct. Industrial legislation prohibits taking adverse action against an employee for raising matters such as breach of minimum work standards including excess work hours.²⁴⁵ In addition, there are restrictions on termination of employees suffering work injury.²⁴⁶ Remedies for that unlawful conduct are available under the relevant legislation. The possibility of unlawful employer conduct should not be treated as a policy reason against imposing a duty of care. The better approach would be to assume that the employer’s duty of care to provide a safe system of work extends to psychosocial hazards including excessive work hours, and to determine at the breach and

²³⁷ *Kozarov* (n 28) 126–7 [13]–[16].

²³⁸ *Ibid* 126 [14].

²³⁹ *Ibid* 127 [16].

²⁴⁰ The National Employment Standards post-date the decision in *Koehler* (n 26).

²⁴¹ *Fair Work Act 2009* (Cth) s 62.

²⁴² *Ibid*.

²⁴³ *Kozarov* (VSC) (n 129) 169 [767]; *Koehler* (n 26) 53–4 [21] (McHugh, Gummow, Hayne and Heydon JJ).

²⁴⁴ For discussion of risks in judicial use of commonsense social facts, see Kylie Burns, ‘It’s Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases’ (2013) 21(2) *Torts Law Journal* 73; Kylie Burns, ‘Judges, “Common Sense” and Judicial Cognition’ (2016) 25(3) *Griffith Law Review* 319.

²⁴⁵ *Fair Work Act 2009* (Cth) s 340.

²⁴⁶ See, eg, *Fair Work Act 2009* (Cth) ss 351, 352; *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ch 4 pt 6.

causation stage whether (on the facts) the employer has acted unreasonably concerning expected work hours and work intensity.

D *Role of Employee Privacy and Autonomy*

As discussed in Part III, Keane JA's judgment in *Hegarty v Queensland Ambulance Service*²⁴⁷ suggested that a scope of duty which extended to requiring employers to follow up and intervene in response to possible signs of employee deterioration may impinge on the dignity of individuals and intrude on their private life, autonomy and privacy. In *Kozarov*, the OPP argued on appeal in the High Court that it was impermissible to formulate a 'duty to intrude into an employee's mental well-being'.²⁴⁸ The trial judge in *Kozarov* found, however, that employers were not immune from making proper inquiries about staff welfare where it was warranted, particularly in high-risk environments; that a system of work which offered welfare enquiries would uphold, rather than detract from, employee dignity; and that such a system would be consistent with the VT Policy and the OPP's obligation as a public sector employer.²⁴⁹

The relevance of autonomy and privacy in determining the scope of an employer's duty of care remained unresolved in *Kozarov*, as it was ultimately unnecessary for the High Court to determine this given the findings on duty and breach.²⁵⁰ Kiefel CJ and Keane J, however, suggested that employees who seek career advancement 'have a strong and legitimate interest in preserving their privacy so far as their ability to cope with the personal challenges of the work is concerned'.²⁵¹ They held that *Kozarov*'s managers, for reasons of 'personal autonomy and privacy', were not duty bound to seek further information from her about her mental health, by reason only of her participation in 'collective complaints by the staff of the SSOU about being overworked and stressed as a result'.²⁵² Gageler and Gleeson JJ and Gordon and Steward JJ appeared to take a different view, finding that part of the context and complexion of whether the OPP was on notice of a risk of harm to Ms *Kozarov* 'included 'the staff memorandum, signed by the appellant' which 'was a plain indication that she might be suffering one or more of the adverse symptoms of vicarious trauma identified in the memorandum'.²⁵³

As McColl JA argued in *New South Wales v Briggs*, '[c]are must be taken to ensure that solicitude for an employee's privacy does not overwhelm those other considerations that give rise to a meaningful duty of care to avoid injury'.²⁵⁴ There are dangers in judges relying on assumptions about employer and employee beliefs,

²⁴⁷ *Hegarty* (n 107).

²⁴⁸ Victoria's Submissions (n 216) [24], [55], [56]. This was not an issue considered by the Court of Appeal.

²⁴⁹ *Kozarov* (VSC) (n 129) 151–2 [676]–[680].

²⁵⁰ *Kozarov* (n 28) 144 [84] (Gordon and Steward JJ). Note the previous refusal of the High Court to grant special leave to appeal *Hegarty* (n 107): see Transcript of Proceedings, *Hegarty v Queensland Ambulance Service* [2008] HCATrans 121.

²⁵¹ *Kozarov* (n 28) 127 [17].

²⁵² *Ibid.*

²⁵³ *Ibid* 136 [53] (Gageler and Gleeson JJ), 139 [64] (Gordon and Steward JJ).

²⁵⁴ *New South Wales v Briggs* (n 27) 476 [28] (McColl JA). Cf at 497–500 [126]–[131] (Leeming JA).

wishes and behaviour in the absence of appropriate evidence.²⁵⁵ Early intervention approaches to identifying and treating workplace psychiatric injury are evidence-based, best practice approaches, which are embedded into WHS requirements.²⁵⁶ Coherence of negligence principles with relevant legislative WHS principles would favour a proactive and reactive duty of care of employers to identify that an employee is at risk of psychiatric injury and intervene early to respond (where appropriate) in a sensitive, supportive and confidential manner. This would also be consistent with modern workplace management and limit the reinforcement of ‘stigma about mental illness, which increases rates and effects of injury’.²⁵⁷

E *Unresolved Areas: Workplace Investigations, Management and Termination*

The High Court has not yet decided a case where psychiatric injury resulted from performance management, a disciplinary or investigative process, or suspension or termination of employment.²⁵⁸ It is in these cases that arguments about coherence have the most salience. This is an area ripe for further consideration.²⁵⁹ As discussed in Part III, state courts have refused to hold that an employer has a duty of care to exercise a contractual or legislative right concerning disciplinary investigations, performance management or termination in a way which considers the risk of psychiatric injury.²⁶⁰

A duty of care may not, however, always be incoherent with either the employment contract or relevant legislation. Much will depend on the facts, context, employment contract and legislative framework applicable to each case. There may be cases where an employer has acted in a way which was so unreasonable and inconsistent with the employment contract or industrial legislation — for example, failing to provide procedural justice, acting in a discriminatory manner, acting in bad faith, or acting where there is no evidence of grounds for action — that a duty of care would be entirely consistent and coherent with other areas of law.²⁶¹ A duty of care was recognised in a recent Queensland case arising from a failure to provide adequate support during an investigation when psychiatric injury arose from a

²⁵⁵ Ibid 477 [30] (McColl JA).

²⁵⁶ See, eg, *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ss 36EA–36ED, ch 4 pt 5A.

²⁵⁷ Tristan W Casey, Xiaowen Hu, Qian Yi Lee and Clarissa Carden, *Stigma towards Injured or Ill Employees: Research on the Causes and Impact of Stigma in Workplaces, and Approaches to Creating Positive Workplace Cultures that Support Return to Work* (Report for Safe Work Australia, June 2021).

²⁵⁸ See the text accompanying n 128 in relation to the withdrawal of special leave by the High Court in the *Govier* case.

²⁵⁹ Adriana Orifici describes the area of the legal dimensions of workplace investigations, including negligence law, as ‘complex, fragmented and unsettled’: Orifici (n 125) 1075.

²⁶⁰ For discussion of the state cases, see Sappideen, O’Grady and Riley (n 110) [6.580]. See also *Potter v Gympie Regional Council* (n 208).

²⁶¹ See, eg, *Ackers* (n 233) 430 [241] (Henry J) (‘There is no logical incompatibility between the existence of the right to require competent job performance and liability in negligence for a breach of the duty of care to avoid foreseeable risk of psychiatric injury, if the breach involves a process of purported correction of job performance which is carried out in bad faith or contrary to the employer’s own processes and procedures’). See also Sappideen, O’Grady and Riley (n 110) [6.580].

hostile workplace environment.²⁶² Recently, the Federal Court held an employer responsible for injury suffered following inappropriate conduct by a manager against an employee which was considered by the manager to be in the nature of performance management.²⁶³ There was held to be both a breach of a duty of care in negligence and an entitlement to compensation under the *Fair Work Act 2009* (Cth) due to the employer taking unlawful adverse action against the employee which caused her injury.²⁶⁴ The better view is that a duty of care owed to an employee concerning the risk of psychiatric injury in cases of performance management, investigation and disciplinary action may not always be inconsistent or incoherent with an employment contract or other areas of law.

VI Conclusion

The economic, social and individual costs of workplace psychiatric injury in Australia are high. Multiple government reports and inquiries have recognised that Australian law has failed to properly regulate and respond to psychosocial workplace hazards and to prevent workplace psychiatric injury. This recognition has resulted in reform of WHS legislative frameworks and closer attention by WHS regulators to ensure employers fulfil their obligations to identify, manage and ameliorate psychosocial workplace hazards. Australian negligence law has not kept pace with these developments. Following *Koehler*, the High Court took a restrictive approach to employer liability. This was caused by lack of judicial focus on the critical role of psychosocial workplace hazards in employee psychiatric injury; an approach to the cohesiveness of negligence principles with other areas of law (particularly contract law) which limited rather than expanded liability; and a focus by courts on ‘legal policy’ concerns such as individual responsibility, autonomy and privacy.

The recent High Court decision in *Kozarov* heralds some promising signs of change. The High Court recognised that a proactive and reactive duty of care may arise from the inception of an employment contract and may extend to both physical and psychiatric injury. This is particularly so when evidence exists that psychosocial hazards inherent in the very nature of the work presented a risk to the psychiatric health of all employees and the employer was aware of this risk. Merely contracting to perform a ‘risky’ job is not inconsistent with a duty of care. Evident signs that an employee is at individual risk of injury will not be required in all cases to engage a duty of care. Signs or indications of pending injury to an employee after employment may, of course, remain relevant to determining whether an employer has breached its duty by failing to take further precautions or failing to implement its WHS system.

Many questions remain. It is unclear whether categories of injury outside vicarious trauma (for example, excessive work cases such as *Koehler*) will be treated differently following *Kozarov*. Does *Kozarov* signal judicial acceptance more

²⁶² *Hayes v Queensland* (n 212). The Queensland Court of Appeal ultimately held (Dalton and Mullin JJ, Margaret McMurdo P dissenting) that causation was not proven. Cf *Potter v Gympie Regional Council* (n 208) [33]–[36] which distinguished *Hayes*.

²⁶³ *Leggett v Hawkesbury Race Club Limited [No 3]* (n 67).

²⁶⁴ *Ibid.*

generally of the role of psychosocial workplace hazards in workplace psychiatric injury, and a shift away from inaccurate judicial understandings of individual susceptibility to injury as the sole or main risk factor? The High Court in *Kozarov* did not fully consider the relevance of contracts of employment in determining the content or scope of duty of care. If courts continue to stress the importance of coherence, it must be asked: what law and what legal policy concerns should negligence principles be coherent with, and how should coherence conflicts be resolved? A proper consideration of coherence in negligence cases requires consideration of the legislative framework which supplements, and sometimes restricts, contractual employment obligations.

This article suggests that negligence law should develop in ways which are consistent and coherent with WHS regulation. The role of legal policy concerns such as privacy and autonomy in determining the content of a duty of care should be restricted to the extent such considerations conflict with WHS or industrial legislative obligations or do not represent best practice WHS approaches such as early intervention. While Australian negligence law has experienced some change of direction post *Kozarov*, the failure of the High Court to overrule the *Koehler* decision and to clarify the role of ‘coherence’ means it may remain difficult for some injured employees to recover in negligence for their psychiatric injuries. Further development of negligence law which brings it into coherence with the Australian legislative regulatory landscape, and which adequately recognises the nature of workplace psychosocial hazards, is required. This should result in a recognition that all employers owe a proactive and reactive duty of care to their employees to provide psychologically safe workplaces. Whether an employer is legally responsible for an employee’s workplace psychiatric injury should be determined as physical injury cases are — ultimately by determining whether, on the evidence in each case, that duty has been breached causing the employee’s injury.

Strangers in Sea Country: The Early History of the Northern Territory's Legislation Recognising Aboriginal Peoples' Relationships to the Sea

Lauren Butterly*

Abstract

This article uses a reconciling sovereignties frame to analyse the initial debates in the 1970s about recognising Aboriginal peoples' relationships to sea country in the Northern Territory ('NT') which culminated in declaring 'sea closures' in the 1980s. Sea closures were unique to the NT and were the first substantive legal mechanism in Australia that recognised a form of Indigenous rights over the sea. Sea closures are still the law 'on the books' in the NT, but they can be seen as a legal and policy failure given that only two were ever declared. However, the history of sea closures reveals assertions of sovereignty made by both Aboriginal peoples and the settler state in legal, sociological and empirical ways. The reconciling sovereignties methodology seeks to analyse interactions between assertions of sovereignty, across time, to identify what was fundamentally at stake during this important part of Australian legal history.

Please cite this article as:

Lauren Butterly, 'Strangers in Sea Country: The Early History of the Northern Territory's Legislation Recognising Aboriginal Peoples' Relationships to the Sea' (2023) 45(2) *Sydney Law Review* 187.



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This article is based on part of the author's PhD thesis, 'Reconciling Indigenous and Settler-State Assertions of Sovereignty over Sea Country in Australia's Northern Territory' (2020). The thesis is currently being adapted into a book that will be published by Federation Press.

I Introduction

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*') was at its commencement, and today remains, the most comprehensive Indigenous¹ land rights legislation in Australia. One element of the *ALRA* which has not been closely examined is how discussion about legislation relating to sea country rights emerged at the same time. It appears that the first time Indigenous sea country relationships were raised in a formal settler-state² context was during the Aboriginal Land Rights Commission ('Woodward Commission') of 1973–74. The Woodward Commission recommended that all seas within two kilometres of Aboriginal land be 'closed' to non-Indigenous people automatically and without an application being required. Given that 85% of the coastline of the Northern Territory ('NT') is now Aboriginal land,³ if such a recommendation had been legislated in the *ALRA*, the contemporary situation in the NT would have been significantly different: Traditional Owners would have had priority access to large areas of sea country and there would have been limits on non-Indigenous people accessing the sea.

However, this recommendation of Justice Woodward was not taken up by the Commonwealth legislature. Instead, controversially, the *ALRA* provided the NT legislature with the power to enact reciprocal legislation in relation to access to sea country.⁴ The *Aboriginal Land Act 1978* (NT) ('*AL Act*') provided that an application could be made to close seas adjacent to Aboriginal land.⁵ These became known as 'sea closures' and they were the first substantive legal mechanism to recognise a form of Indigenous rights to the sea in Australia. However, there were several high-level exemptions to sea closures in the *AL Act*, such as the exemption for licensed commercial fishers, that meant that this statutory mechanism did not provide for exclusive use by Traditional Owners.⁶

In this respect, the NT legislature prioritised what it labelled as the 'existing rights' of commercial fishers, reflecting the settler state's concern with continuing to control the economic exploitation of the seas. Given the commercial fishing

¹ The author acknowledges that use of appropriate terminology with respect to Aboriginal and Torres Strait Islander peoples is important. This is particularly so in the context of a legacy of research where such considerations were not made. Where possible, specific communities have been identified as this is most respectful. Where such specificity is not possible, this article has used the term 'Indigenous' when referring generally to both Aboriginal and Torres Strait Islander peoples, and the term 'Aboriginal peoples' when referring to the NT context.

² For the purposes of this article, the settler state is a 'collection of institutions and bureaucracies whose authority is constructed or maintained' by the parliaments of the NT and the Commonwealth: Douglas Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (University of Toronto Press, 2001) 5. This includes both the executive and the legislative roles. More broadly, courts and judges are also part of the settler state. There is a strong separation of powers in Australia, but courts are clearly settler-state institutions that operate within the paradigm of settler-state sovereignty.

³ Transcript of Proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* [2007] HCATrans 324, 40–5 (DF Jackson).

⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 73(1)(d) ('*ALRA*'). See also *Risk v Northern Territory* (2002) 210 CLR 392, 406 [35]; Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2789 (Les Johnson).

⁵ *Aboriginal Land Act 1978* (NT) s 12 ('*AL Act*').

⁶ *Ibid* ss 16–20.

exemptions, the sea closure mechanism only provided Traditional Owners with a very limited ability to control who entered those seas. Only two sea closure applications were pursued by Traditional Owners to declaration.⁷ Notwithstanding, sea closures are still provided for in the legislation and, in theory, could be applied for today.

This history reveals assertions of sovereignty made by both Traditional Owners and the settler state over the sea. Traditional Owners have asserted sovereignty through spiritual authority, relationship and obligation; use rights (both subsistence and trade); and the ability to control who enters sea country and to make decisions for sea country.⁸ The settler state asserted sovereignty through governmental authority over the sea; obligations to provide ‘open access’ for public rights; and control over economic exploitation.⁹ Using a reconciling sovereignties frame, this article analyses the initial debates about recognising Aboriginal peoples’ relationships to sea country in the NT, through to the declaration of the first sea closure (after an inquiry by the Aboriginal Land Commissioner) in 1983.

Much has happened in this legal space since 1983. Specifically in the NT context, sea country native title was recognised initially in *Yarmirr v Northern Territory*,¹⁰ and affirmed in *Commonwealth v Yarmirr*¹¹ in 2001. In 2008 the determination was made in the *Blue Mud Bay Case*¹² that, pursuant to the *ALRA*, land in the intertidal zone (the area between high- and low-water marks) in the NT could be claimed and recognised as ‘Aboriginal land’. This decision sparked the Blue Mud Bay negotiations between relevant Aboriginal land councils and the NT government (with some third-party involvement) that are, to some degree, still ongoing as at March 2023.¹³ The analysis presented in this article is part of a larger project that considered assertions of sea country and marine sovereignties that have been made right up until the present day.¹⁴ In particular, the larger project used a historical frame to examine why the contemporary negotiations around the *Blue Mud Bay Case* have stretched on for so many years after the decision. However, the least known part of this history relates to these initial debates about sea closures in the 1970s and early 1980s, hence the focus of this article.

⁷ One sea closure was in the Milingimbi, Crocodile Islands and Glyde River area, and the other was in the adjacent Howard Island and Castlereagh Bay area: Commonwealth, Office of the Aboriginal Land Commissioner, *Report for the Year Ended 30 June 2005* (Annual Report, 21 September 2005) 42 (*‘Land Commissioner Annual Report 2005’*); Anthony Bergin, ‘Aboriginal Sea Claims in the Northern Territory of Australia’ (1991) 15(3) *Ocean and Shoreline Management* 171, 177.

⁸ Lauren Butterly, ‘Reconciling Indigenous and Settler-State Assertions of Sovereignty over Sea Country in Australia’s Northern Territory’ (PhD Thesis, The University of New South Wales, 2020) 44–7 (*‘Reconciling Indigenous and Settler-State Assertions’*).

⁹ *Ibid* 49–55.

¹⁰ *Yarmirr v Northern Territory* (1998) 82 FCR 533 (*‘Yarmirr FC’*).

¹¹ *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*‘Yarmirr HCA’*).

¹² *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 (*‘Blue Mud Bay Case’*).

¹³ In December 2022, a new permit system was announced (commencing 1 January 2023) that may be seen as partially resolving some of these negotiations: Jano Gibson, ‘Northern Land Council to Introduce New Fishing Permit System 14 years after Blue Mud Bay Ruling’, *ABC News* (online, 9 December 2022) <<https://www.abc.net.au/news>>. However, not all areas have a finalised permit system, so negotiations are still formally ongoing. Further, whether a ‘once off’ resolution is possible, or if it evolves, will need to be examined over time.

¹⁴ Butterly, ‘Reconciling Indigenous and Settler-State Assertions’ (n 8) 44–7.

One methodological limitation associated with splitting up the larger project is that the research in the early 1970s and 1980s contains the fewest Indigenous voices due to the type of material that is available in the archives; whereas the remainder of the larger research project contains significant, and direct, Indigenous voices. The Indigenous voices presented in this article are most often mediated through paraphrasing in submissions, reports or parliamentary debates. In line with Indigenous research methodologies, this article examines texts within their broader context, particularly where they are produced by settler-state institutions or non-Indigenous authors.¹⁵

The article proceeds as follows. Part II briefly explains the reconciling sovereignties methodology. Part III considers the initial discussions and recommendations about sea country rights in the Woodward Commission. Part IV explores the drafting of, and parliamentary debates around, the first legislative provisions relating to sea country in the *ALRA*. Part V then examines how sea closures were eventually legislated in the reciprocal NT legislation and the application process, and practical reality, of the declaration of the first sea closure. Finally, Part VI draws together the assertions of sovereignty to identify what was fundamentally at stake during this important part of Australian legal history, and how that history plays out in the contemporary debates about Aboriginal rights to sea country in the NT.

II Reconciling Sovereignties

This article uses a reconciling sovereignties frame specifically developed for this research to examine the interaction between co-existing assertions of Indigenous and settler-state sovereignty over sea country. Revealing interactions between assertions of sovereignty across historical episodes requires a framework that allows comparison over a range of different contexts including royal commissions, the drafting and enactment of legislation, and litigation. Given the Indigenous-settler-state context, the frame must be capable of analysing assertions of sovereignty in a way that acknowledges the inherent colonial power imbalance, but simultaneously recognises Indigenous self-determination. Further, the frame has to reach beyond settler-state law in two ways: it must see Indigenous legal systems; and it must not be restricted to the formal instruments associated with doctrinal law (case law, statutes). In the latter context, it must be able to include consideration of governance mechanisms that come in a wide variety of forms.

¹⁵ See, eg, Karen Martin (Booran Mirraboopa), 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Research' (2003) 27(76) *Journal of Australian Studies* 203; Aileen Moreton-Robinson and Maggie Walter, 'Indigenous Methodologies in Social Research' in Maggie Walter (ed), *Social Research Methods* (Oxford University Press, 2nd ed, 2010) (online chapter 2009) 1; Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Zed Press, 2012); Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, 'Living Texts: A Perspective on Published Sources' (2013) 6(1) *Indigenous Research Methodologies and Indigenous Worldviews* 1, 9–10.

A *Reconciling*

The concept of ‘reconciling’, as used in this article, represents a continuing process. It is not being used to attempt to demonstrate a form of neat or finalised ‘reconciliation’ between the settler state and Indigenous peoples. Rather, it is used to trace the emerging threads of interaction between settler-state and Indigenous assertions of sovereignty. More broadly, the concept of reconciliation is highly contested. Carwyn Jones notes that reconciliation can be problematic for Indigenous peoples as it is ‘often deployed to encourage Indigenous peoples to “forgive and forget”’.¹⁶ State-sanctioned reconciliation processes are sometimes seen to be requiring Indigenous peoples to accept the assertion of settler-state sovereignty, but the state itself does not have to concede or give something up in return. John Borrows states: ‘Reconciliation should not be a front for assimilation.’¹⁷ As a result, reconciliation has become a ‘dirty word’ for many Indigenous peoples.¹⁸ Instead, there is a strong sense that settler-state institutions cannot ‘achieve a more satisfactory relationship with Indigenous people without some reconsideration of their claims’ to sovereignty.¹⁹

The reconciling sovereignties frame used in this article analyses the interactions between settler-state and Indigenous assertions of sovereignty to demonstrate how these assertions exist in a constant dialogue. In this context, the term ‘reconciling’ is used primarily in a descriptive sense. The historical analysis seeks to capture the configuration of the relationship between competing assertions of sovereignty over sea country based in rival sources of authority over time.

B *Sovereignties*

Assertions of sovereignty may be anchored in Indigenous laws, settler-state law or international law, or they may be expressed in ways that fit within contemporary inter-societal governance approaches. Sovereignty has been selected as the register to describe and analyse the issues at stake because it allows us to see the ways in which Indigenous peoples have asserted their power to ‘make decisions and have control over the decisions’ that affect their lives.²⁰ In this context, sovereignty goes beyond settler-state legal rights and reaches into both Indigenous laws and inter-societal experiences of governance.

¹⁶ Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (University of British Columbia Press, 2016) 57.

¹⁷ John Borrows, ‘Domesticating Doctrines: Aboriginal Peoples after the Royal Commission’ (2001) *McGill Law Journal* 615, 660–1.

¹⁸ Penelope Edwards, *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Palgrave Macmillan, 2016) 8.

¹⁹ Jeremy Webber, ‘We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty’ in Douglas Sanderson and Patrick Macklem (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2015) 69.

²⁰ Larissa Behrendt, ‘Aboriginal Sovereignty: A Practical Roadmap’ in Julie Evans, Ann Genovese, Alexander Reilly and Patrick Wolfe (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai‘i Press, 2013) 163, 164.

Sovereignty is not an Indigenous word or concept. It is a word that has roots in a Western philosophical context that is generally grounded in international law. The notion that Indigenous sovereignties survived colonisation, and now continue to co-exist with settler-state sovereignty, forms a separate body of predominantly Canadian literature that this frame is grounded in.²¹ This co-existence is also a practical reality in Australia; Indigenous sovereignty was never ceded.²²

Theories of legal pluralism form the base of the reconciling sovereignties frame. Broadly, theories of legal pluralism emphasise that different legal orders can co-exist.²³ This notion of co-existing legal orders can be challenging to apply in the Indigenous–settler-state context because of the dominant or, arguably, normative nature of settler-state legal orders in jurisdictions such as Australia.²⁴ However, there is a model of legal pluralism that sees Indigenous and settler-state legal orders as constantly negotiating with one another.²⁵ This displaces the assumption that there is one normative order.²⁶ Once it is accepted that Indigenous laws and settler-state laws continue to co-exist, this suggests that there are also co-existing assertions of sovereignty.

The frame of this article has been informed by Canadian legal scholarship. Despite the rich and rigorous discussions of Indigenous sovereignties that have challenged Australian settler-state political, legal and academic perspectives,²⁷ the legal scholarship on reconciling sovereignties has developed in a more explicit way in Canada. This is because some Canadian settler-state institutions have acknowledged that ‘Crown sovereignty does not have all of the attributes of lawful

²¹ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2007); Kent McNeil, ‘Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions’ in Julie Evans, Ann Genovese, Alexander Reilly and Patrick Wolfe (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai‘i Press, 2013) 37; Kent McNeil, ‘Indigenous Nations and the Legality of European Claims to Sovereignty over Canada’ in Sandra Tomsons and Lorraine Mayer (eds), *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press, 2013) 242; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) 107–31; Webber (n 19); Mark Walters, ‘“Looking for a Knot in the Bulrush”: Reflections on Law, Sovereignty, and Aboriginal Rights’ in Douglas Sanderson and Patrick Macklem (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2015) 35; Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (University of Saskatchewan Native Law Centre, 2012); Kim Stanton, ‘Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission’ (2017) 26 *Journal of Law and Social Policy* 20.

²² ‘The Uluru Statement from the Heart’, *The Uluru Statement* (Web Page, 2023) <<https://ulurustatement.org/the-statement/>>.

²³ Brian Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30(3) *Sydney Law Review* 375; Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 805.

²⁴ Jones (n 16) 45–7.

²⁵ Jeremy Webber, ‘Legal Pluralism and Human Agency’ (2006) 44 *Osgoode Hall Law Journal* 167, 189.

²⁶ *Ibid* 190.

²⁷ See, eg, Behrendt (n 20); Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) (particularly ch 6); Shaunnagh Dorsett, ‘Plural Legal Orders: Concept and Practice’ in Peter Cane, Lisa Ford and Mark McMillan, *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19; Kirsty Gover and Eddie Cubillo, ‘The Challenge of Indigenous Politics’ in Cane, Ford and McMillan (n 27) 227; Aileen Moreton-Robinson, ‘The Possessive Logic of Patriarchal White Sovereignty: The High Court and the *Yorta* Decision’ (2004) 3(2) *Borderlands e-Journal*.

authority'.²⁸ The Canadian Supreme Court explicitly uses the concept of reconciliation in its jurisprudence and has 'begun to qualify its references to Crown sovereignty' by speaking of 'asserted' and 'assumed' Crown sovereignty.²⁹ Although the Supreme Court of Canada has not formally recognised the existence of continuing Indigenous sovereignties,³⁰ by 'allowing doubt' about the primacy of Crown sovereignty 'to creep in where it was once excluded', the Canadian jurisprudence has led to new forms of analysis of sovereignties and reconciliation.³¹

Australian settler-state institutions have not exhibited the same doctrinal or normative tone in relation to settler-state sovereignty as the Canadian Supreme Court.³² It should be noted that Australia does not have an equivalent of s 35 of the *Constitution Act 1982*.³³ Section 35 'recognized and affirmed' the rights of 'the aboriginal peoples of Canada'.³⁴ However, the fact that Australia does not have an equivalent, in itself, does not diminish the value of the Canadian scholarship on reconciling sovereignties to the broader Australian context for at least two reasons: first, the Canadian scholarship reaches beyond the courts (in fact, Jeremy Webber has argued it is a 'great mistake' to think that such conversations are the 'exclusive province of the courts');³⁵ and second, even in the limited context of settler-state courts, all Indigenous rights cases are about reconciling Indigenous and non-Indigenous interests that have roots in co-existing assertions of sovereignty.

The methodology used in this article deliberately seeks to use Canadian scholarship to highlight new ways of seeing the relationship between Indigenous and settler-state assertions of sovereignty. In this context, this methodological frame 'skips over' the important questions, which are being carefully and rigorously analysed by other scholars, about why Australian settler-state institutions, particularly courts, have continued to skirt around the issue of plural sovereignties.³⁶ The reconciling sovereignties frame aims to use the Canadian scholarship as the base to see what happens when we choose to view both Indigenous and settler-state sovereignties in the Australian context.

C Defining Assertions of Sovereignty

Aboriginal peoples' conceptions of sea country sovereignty are not uniform, and they vary across different communities in the NT. However, broadly, Traditional Owners have asserted sovereignty through spiritual authority, relationship and obligation; use rights (both subsistence and trade); and the ability to control who

²⁸ Mark Walters, 'The Jurisprudence of Reconciliation: Aboriginal Rights in Canada' in Will Kymlicka and Bashir (eds), *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008) 165, 186.

²⁹ Webber (n 19) 71.

³⁰ Ibid. See also Doug Moodie, 'Thinking outside the 20th Century Box: Revisiting "Mitchell" — Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government' (2003–4) 35(1) *Ottawa Law Review* 1.

³¹ Webber (n 19) 71.

³² See, eg, Dorsett (n 27) 20; Gover and Cubillo (n 27) 228.

³³ *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*') s 35.

³⁴ Ibid.

³⁵ Webber (n 19) 65.

³⁶ See above n 32 and accompanying text.

enters sea country and to make decisions for sea country.³⁷ Aboriginal laws about sea country have been described as relating to caretaking, responsibility and custodianship, as well as knowledge, language, sharing and family.³⁸ Across many Traditional Owner groups in the NT, Aboriginal laws require non-Traditional Owners (Aboriginal people or non-Indigenous people) to seek permission to enter sea country.³⁹ Permission requirements are based on having cultural and environmental responsibilities that do not ‘easily translate into European property laws and institutions’.⁴⁰ These responsibilities involve the ability to make holistic decisions about the use of sea country including deciding who enters and what they can and cannot do in sea country.

Settler-state sovereign rights over territorial waters were asserted as part of the acquisition of sovereignty in the international law context of colonisation. The assertion of those sovereign rights gave overarching ownership to the settler state within the international law paradigm, but the sea was, unlike land, otherwise ‘unownable space’ and ‘open to everyone’.⁴¹ There were ‘public rights’ to fish and navigate, as well as the international law right of free passage, that required ‘protection’ by the settler state.⁴² The right of free passage was (and is) relatively uncontested,⁴³ whereas the public rights were far less certain.⁴⁴ As a result, the settler state’s assertions of public rights were often based on broader sociological interpretations.

Overall, the settler state’s asserted acquisition of sovereignty ignored and attempted to erase Indigenous sovereignties over sea country even though they continued to be exercised and asserted. The reconciling sovereignties frame seeks to bring the conversation between the co-existing sovereignties to the fore.

III First Settler-State Discussion of Sea Country ‘Rights’: Woodward Commission

In December 1972, the Whitlam Government was elected. One of its first acts was to appoint Justice Edward Woodward to undertake a judicial inquiry into Aboriginal land rights.⁴⁵ The Woodward Commission was tasked to consider the issue of

³⁷ Butterly, ‘Reconciling Indigenous and Settler-State Assertions’ (n 8) 44–7.

³⁸ Buku-Larrngay Mulka Centre, *Saltwater: Yirrkala Bark Paintings of Sea Country* (Buku-Larrngay Mulka Centre in association with Jennifer Isaacs Publishing, 1999) 9–12; *Yarmirr HCA* (n 11) 147 [332].

³⁹ See, eg, Stephen Davis, ‘Aboriginal Claims to Coastal Waters in North-Eastern Arnhem Land, Northern Australia’ (1984) 17 *Senri Ethnological Studies* 231, 239–43. For a detailed consideration of this issue, see Butterly, ‘Reconciling Indigenous and Settler-State Assertions’ (n 8) ch III(C)(3).

⁴⁰ John Cordell, *Managing Sea Country: Tenure and Sustainability of Aboriginal and Torres Strait Islander Marine Resources* (Report, Ecologically Sustainable Development Fisheries Working Group, 1991) 2.

⁴¹ Nonie Sharp, *Saltwater People: The Waves of Memory* (Allen and Unwin, 2002) 46.

⁴² *Ibid.*

⁴³ *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 17; *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) s 6.

⁴⁴ Butterly, ‘Reconciling Indigenous and Settler-State Assertions’ (n 8) 175–6.

⁴⁵ The Woodward Commission was prompted by *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (‘Gove Land Rights Case’).

Aboriginal relationships to land more broadly and make recommendations, which resulted in the *ALRA*. The Letters Patent establishing the Woodward Commission requested Justice Woodward to inquire into and report on:

The appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to *land*, and to satisfy in other ways the reasonable *aspirations* of the Aborigines to rights in or in relation to land ...⁴⁶

There was no mention of sea country in the Letters Patent. However, as will be discussed in this Part, Aboriginal people brought sea issues to the Woodward Commission.

Justice Woodward produced two reports. The *First Report* was to identify the issues and stimulate further submissions, and the *Second Report* was the final report that provided detailed drafting instructions for proposed Aboriginal land rights legislation.⁴⁷ Both reports included discussion on sea issues. Most of the discussion relating to the sea appeared under the heading 'Land Usage', and the subheading 'Fisheries'.⁴⁸ This speaks to a theme that becomes apparent, of seeing the sea as ancillary to the land rather than as important in its own right.

Anthropologists Nicolas Peterson and Bruce Rigsby, who published the first Australian book on Aboriginal 'customary marine tenure' in 1998,⁴⁹ suggest that the *First Report* was the 'first passing reference to sea estates' in a settler-state legal context in Australia.⁵⁰ However, Justice Woodward did not use the words 'tenure' or 'estate'; rather, he used the relationship to land as context:

It seems clear that Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the waters between the coastline and offshore islands belonging to the same clan.⁵¹

It seems Justice Woodward's attention was on the relationship of those waters to adjacent land, rather than seeing the relationship to the sea as something that could stand alone. Perhaps this was a way to stay within the terms of reference, while still ensuring that sea country was considered.

In discussing the Woodward Commission, it is important to start by exploring the Aboriginal 'claim' to sea country. The word 'claim' is used here because Justice Woodward stated in his *First Report* that there were no 'clear-cut claims' to sea country or fisheries.⁵² Although the Woodward Commission was an inquiry aimed at understanding Aboriginal rights and aspirations, and how they could be

⁴⁶ Commonwealth, Aboriginal Land Rights Commission, *First Report* (1973) iii (emphasis added) ('*Woodward Commission First Report*'); Commonwealth, Aboriginal Land Rights Commission, *Second Report* (1974) 1 (emphasis added) ('*Woodward Commission Second Report*').

⁴⁷ *Woodward Commission First Report* (n 46) 48; *Woodward Commission Second Report* (n 46) app D.

⁴⁸ *Woodward Commission First Report* (n 46) 33; *Woodward Commission Second Report* (n 46) 80.

⁴⁹ Nicolas Peterson and Bruce Rigsby (eds), *Customary Marine Tenure in Australia* (Sydney University Press, 1998).

⁵⁰ Nicolas Peterson and Bruce Rigsby, 'Introduction' in Peterson and Rigsby (eds), *Customary Marine Tenure in Australia* (n 49) 1, 2.

⁵¹ *Woodward Commission First Report* (n 46) 33.

⁵² *Ibid.*

recognised, it still functioned such that the legal representatives of the Traditional Owners were required to make a 'claim' in relation to sea country. Justice Woodward used the word 'claim' to describe the articulation of Aboriginal relationships to sea country that would assist his Honour in preparing the drafting instructions for the *ALRA*.

A What Was the 'Claim' to Sea Country?

The *First Report* contained only a short section relating to 'fisheries' that began by noting that a 'number of Aboriginal communities in the North have raised ... questions of fishing rights'.⁵³ Justice Woodward identified the question raised by Aboriginal communities as: 'whether their land rights will extend out to sea and, if so, how far'.⁵⁴ This emphasised that it was the Aboriginal communities that brought this issue to the Commissioner. Justice Woodward noted that the communities submitted that they relied on fish, turtles, shellfish, dugongs and other sea life for subsistence and traditional uses.⁵⁵ Further, some communities suggested that they were 'looking ahead' to developing commercial ventures.⁵⁶

The Northern Land Council ('NLC'), representing Traditional Owners,⁵⁷ made their submission after the *First Report* and before the *Second Report*, noting that Aboriginal reserves appeared to extend to the low-water mark, but stating: 'The Dreaming of some Aborigines lies beyond this limit and the Aborigines wish to be able to exclude others from an area which lies within a line drawn 12 miles from the coastline'.⁵⁸ Their submission further noted that the 'interest of Aborigines in the area within the 12 mile limit is in part religious, in part social, and in part economic'.⁵⁹ The social and economic aspects were explained briefly as relating to the social impact of non-Indigenous boat crews camping unlawfully, and the economic benefits of a potential Aboriginal fishing industry.⁶⁰ The NLC's submission contained a combination of the three assertions of sovereignty: spiritual authority, use rights, and control over who enters.

The explanation here for why the NLC claimed an area out to 12 miles was that 'Australia's jurisdiction with respect to fishing or movement within this area appears to be established internationally ... and there is no reason why Municipal legislation should not create a prohibition against entry into this area except with a permit'.⁶¹ The NLC claimed an area as far as the Commonwealth's asserted

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ The Northern Land Council ('NLC') represents Traditional Owners in relation to land and sea in the northern part of the NT: see 'NLC Regional Map', *Northern Land Council* (Web Page, 2023) <https://www.nlc.org.au/uploads/pdfs/NLC_Regions_2017.pdf>.

⁵⁸ Northern Land Council, Submission to Aboriginal Land Rights Commission (January 1974) 90.

⁵⁹ Ibid 129.

⁶⁰ Ibid.

⁶¹ Ibid 89–90. In 1968, the Commonwealth introduced into its fisheries legislation 'declared fishing zones' that extended to 12 nautical miles: *Fisheries Act 1967* (Cth) s 3; JG Starke, 'International Legal Notes' (1967) 41 *Australian Law Journal* 31, 31. It was not until 1990 that Australia formally

sovereign fisheries rights reached at the time. However, it seems that the NLC was claiming more than the sovereign rights over fisheries that the Commonwealth had claimed out to 12 miles. It appeared that the NLC also claimed the ability to exclude people generally (beyond just fishers).

The NLC's submission went on to note that 'if the 12 mile limit should prove to be too wide a boundary for the exclusive use of Aborigines, the three mile limit might be considered'.⁶² Further, because the 'States control waters within the three mile limit', 'it is reasonable to seek an exclusive right for Aborigines to enjoy a like area off the coast of the Reserves'.⁶³ The assertion that states, and the NT, controlled waters to the three-mile mark would go on to be challenged in the *Seas and Submerged Lands Case*,⁶⁴ and then negotiated through the 1979 Offshore Constitutional Settlement.⁶⁵ In this context, the Woodward Commission was taking place during a time of more general uncertainty as to governance arrangements of the marine area from the settler-state perspective.

Similarly to Justice Woodward's approach, the NLC's submission seemed to be about the sea's relationship to land. However, it was a broader suggestion that if, like a state or the NT, someone owns the land bordering the sea, they should have rights over that adjacent sea. It was a claim that Aboriginal ownership of land should be viewed equally to settler-state ownership of land. In line with this, the claim was advanced as an exclusive right with a permit system to allow for non-Indigenous entry, and an 'exemption in favour of putting to shore in cases of emergency'.⁶⁶ This proposed a system of requiring permission, by way of permit application, to enter sea country.

This concept of requiring permission had, by this time, been seen in much anthropological work,⁶⁷ and had been analysed as a legal concept in the first terrestrial Aboriginal land rights case: *Milirrpum v Nabalco Pty Ltd*.⁶⁸ As noted above, across many Traditional Owner groups in the NT, Aboriginal laws require non-Traditional Owners (whether Aboriginal people or non-Indigenous people) to seek permission to enter country including sea country. An important part of permission principles is explaining the requirements for 'strangers' to seek permission to enter sea country. Strangers are people who do not know the place: '[W]hen a person enters a territory for the first time, he is "someone who does not

extended its territorial sea to 12 nautical miles: Brian Opeskin and Donald Rothwell, 'Australia's Territorial Sea: International and Federal Implications of its Extension to 12 Miles' (1991) 22(4) *Ocean Development and International Law* 395, 395.

⁶² NLC, *Submission to Aboriginal Land Rights Commission* (n 58) 129.

⁶³ *Ibid.*

⁶⁴ *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*').

⁶⁵ The states and the Commonwealth negotiated what has become known as the Offshore Constitutional Settlement: 'Offshore Constitutional Settlement', *Attorney-General's Department* (Web Page, 2023) <<https://www.ag.gov.au/international-relations/international-law/offshore-constitutional-settlement>>.

The key provision was s 5 of the *Coastal Waters (State Powers) Act 1980* (Cth). This was extended to the NT through separate legislation: *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) (and coastal waters were defined as being three nautical miles out to sea: s 4(2)).

⁶⁶ NLC, *Submission to Aboriginal Land Rights Commission* (n 58) 129.

⁶⁷ Butterly, 'Reconciling Indigenous and Settler-State Assertions' (n 8) 70–3.

⁶⁸ *Gove Land Rights Case* (n 45) 181–2.

know”’.⁶⁹ Someone who is not familiar with country may find themselves in danger. As explained by Djambawa Marawili (and summarised by Marcus Barber): ‘if those spirits do not know people, then they may be hostile to them, and strangers are likely to get lost, injured, into trouble, or even die because of this unfamiliarity’.⁷⁰

Before examining Justice Woodward’s recommendations, it is useful to note that the NLC’s submission to the Woodward Commission contained fewer than 10 paragraphs on sea country over the 175 pages of the submission. This is not a criticism of the NLC, as the submission must be viewed in the wider context of the complexity and novelty of the issues the NLC was dealing with. However, this small amount of information was coupled with a submission for exclusive rights over an area of sea out to the 12-mile limit. This combination provided a particular challenge for Justice Woodward in making his recommendations.

B *Justice Woodward’s Recommendations on Sea Country: Buffer Zone*

Justice Woodward’s major recommendation about sea country was that land rights should be ‘extended’ out to sea to provide a buffer to protect Aboriginal land. The critical decision then was how far such a buffer would stretch. Justice Woodward recommended that a buffer zone of up to two kilometres (approximately one nautical mile) off Aboriginal land should be automatically closed.⁷¹ Notably, this did not stretch to the boundary of the three nautical mile mark of the territorial seas then controlled by the Commonwealth and later the NT. In explaining why two kilometres was chosen, his Honour stated that ‘some arbitrary figure [had] to be arrived at’,⁷² and that the ‘legitimate interests’ of Aboriginal people would be protected if

their traditional fishing rights are preserved and their right to the privacy of their land is clearly recognised by the establishment of a buffer zone of sea which cannot legally be entered by commercial fishermen or holiday makers. An exception would have to be made in cases of emergency.⁷³

The ‘privacy of ... land’ reasoning entrenched the idea that there was strong control and governance over land by Aboriginal people, and that this must be protected by the buffer zone. The sea that was included in this buffer was presented almost as a by-product of that land ownership. In terms of the distance, Justice Woodward noted that all fishing by Aboriginal people was done by using nets or handlines in ‘comparatively shallow water’ and, therefore, the two kilometres should ‘suffice’.⁷⁴ This method of picking a distance, without any previous reference being made to it, and not a number that had a particular meaning in the marine space, was curious. It

⁶⁹ Stephen Davis, ‘Aboriginal Claims to Coastal Waters in North-Eastern Arnhem Land, Northern Australia’ (n 39) 239.

⁷⁰ Marcus Barber, ‘Where the Clouds Stand: Australian Aboriginal Relationships to Water, Place, and the Marine Environment in Blue Mud Bay, Northern Territory’ (PhD Thesis, Australian National University, 2005) 151–2.

⁷¹ *Woodward Commission Second Report* (n 46) 23 (recommendation (vi)).

⁷² *Ibid* 81 [424].

⁷³ *Ibid* 80–1 [423].

⁷⁴ *Ibid* 81.

suggested a discomfort with and uncertainty around the legal issues. Nonetheless, this appears to be the first articulation of such a dialogue by a settler-state mechanism in relation to the marine space in Australia. It recognised Aboriginal peoples' assertions of being able to control who entered sea country to the detriment of settler-state assertions of governmental authority.

C *Conclusions on the Woodward Commission*

The NLC's submission used the word 'compromise': as in 'a compromise between the claims of the traditional owners and the holders of existing legal interests'.⁷⁵ Justice Woodward's recommendation of a buffer zone was a compromise. Although the two-kilometre buffer zone ultimately recommended was much smaller than the NLC's proposed 12 miles, it was still a strong articulation of Aboriginal control over entry to seas. In the context of discussions about mineral ownership, Justice Woodward noted that he felt limited in what he could recommend, because

the whole of Australian mining law is based on the assumption that minerals belong to the Crown. To provide otherwise in a particular case could well create problems and sorting these problems out could delay necessary legislation.⁷⁶

Taking this sentiment and applying it to sea country, although the legal assumptions are not so clear cut, one way to understand Justice Woodward's approach to limiting the buffer zone is as an act motivated by concern for how much time would be lost if 12 miles was put forward.⁷⁷ Such a large distance out to sea would have instantly raised a red flag to legislators concerned about fishing and mineral access and exploitation, and could have slowed down legislative recognition of Aboriginal land (and sea) rights.⁷⁸

IV The Drafting of and Debate around the *ALRA*

Initially, the Whitlam Government took up the recommendation of the two-kilometre buffer zone. However, the buffer zone was pared back after the Dismissal in 1975. As will be seen in this Part, the fact that even the two-kilometre buffer zone caused a high level of concern in the Commonwealth Parliament seems to bear out the sense that anything to the 12-mile limit could have had a more dramatic, unintended adverse impact on Aboriginal land and sea rights going forward.

A *The Whitlam Bill: 1975 Bill*

When the original Aboriginal Land (Northern Territory) Bill 1975 (Cth) ('1975 Bill') was introduced into the Commonwealth Parliament on 16 October 1975, it prescribed the two-kilometre buffer zone.⁷⁹ The Second Reading Speech did not

⁷⁵ NLC, *Submission to Aboriginal Land Rights Commission* (n 58) 50.

⁷⁶ *Woodward Commission Second Report* (n 46) 115.

⁷⁷ *Ibid* 80, 103.

⁷⁸ *Ibid*.

⁷⁹ Aboriginal Land (Northern Territory) Bill 1975 (Cth) cl 73–4 ('1975 Bill'); Northern Land Council, *Submission to Joint Select Committee on Aboriginal Land Rights in the Northern Territory* (1977) 1 ('*Submission to Joint Select Committee*').

provide detailed commentary on the sea country aspects of the Bill. It was simply stated by Les Johnson, Minister for Aboriginal Affairs, that: ‘The Bill gives Aboriginals control over entry onto their land and the 2 kilometres of sea adjoining it.’⁸⁰ This seems very understated given the Bill’s significance as the first legislative recognition of Aboriginal control of entry over an area of sea. However, the context of the *ALRA* must be kept in mind as terrestrial land rights were also significant.

On 11 November 1975, there was a sudden change of government when Gough Whitlam was controversially dismissed, and Malcolm Fraser became Prime Minister. The 1975 Bill consequently lapsed.⁸¹ In the month between the introduction of the 1975 Bill and the Dismissal, there was little time for debate on the sea country elements. The only mention of the sea country issues appearing in Hansard is by Bob Ellicott, then member of the Opposition who went on to become Attorney-General in the Fraser Government.⁸² Ellicott suggested that the two-kilometre buffer zone ‘could give rise to considerable concern’ in the wider community, as non-Indigenous people would be excluded from beaches and rivers to which they previously had access.⁸³ His comments were premised on the suggestion that if Aboriginal people were ‘entitled to be free from interference with their traditional fishing rights’ that should be enough, and there would be no need for the proposed larger scale exclusions.⁸⁴ This seemed to shift the focus of conversation away from Aboriginal peoples’ control of entry to sea country, and instead onto the narrower idea of protection of traditional fishing rights. However, as will be discussed in the next section, the Commonwealth would go on to leave the broader issue of regulating entry to the NT. Ellicott was focused on asserting governmental authority by protecting non-Indigenous public rights and this was reflected in the Aboriginal Land Rights (Northern Territory) Bill 1976 (‘1976 Bill’).

B *The Fraser Bill: 1976 Bill and the Passing of the ALRA*

The 1976 Bill did not provide the automatic two-kilometre buffer zone.⁸⁵ Instead, the legislation provided powers to the NT Legislative Assembly to make reciprocal laws. Clause 73(1)(d) of the 1976 Bill provided that the NT Legislative Assembly had the power to make

Ordinances regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, waters of the sea, including waters of the territorial sea of Australia, adjoining, and within 2 kilometres of, Aboriginal land ...

It was much later noted by the High Court (without a reference) in *Risk v Northern Territory*⁸⁶ — an unsuccessful native title claim to the seabed below the low-water

⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 October 1975, 2222 (Les Johnson, Minister for Aboriginal Affairs).

⁸¹ Leon Terrill, *Beyond Communal and Individual Ownership: Indigenous Land Reform in Australia* (Routledge, 2016) 73.

⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 4 November 1975, 2753 (Bob Ellicott).

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Blue Mud Bay Case* (n 12) 90 [133].

⁸⁶ *Risk v Northern Territory* (2002) 210 CLR 392.

mark surrounding Darwin — that attempts to amend the 1976 Bill to reintroduce the automatic buffer zone recommended by Justice Woodward were rejected.⁸⁷ In particular, Johnson, who was now an Opposition member, raised the issue of sea country on several occasions during the parliamentary debates.⁸⁸ He noted that the omission has ‘upset a large number of Aboriginal communities as it offers them no protection of their fishing and religious rights of their land’.⁸⁹ There were also about 70 standard form petitions presented to the Senate and the House of Representatives that stated, inter alia, that the NT Legislative Assembly should not be granted power to pass legislation about seas adjoining Aboriginal land and fishing rights of ‘non-Aborigines’ within two kilometres of Aboriginal land.⁹⁰ In passing the *ALRA*, the Commonwealth Parliament asserted its sovereignty through governmental authority to legislate, by prioritising provision of non-Indigenous public rights and by protecting economic exploitation.

The issues to do with sea country were still being ventilated in parliamentary debates right up until, and in fact beyond, when the *ALRA* was assented to on 16 December 1976. In mid-November 1976, Ian Viner (Commonwealth Minister for Aboriginal Affairs) announced the establishment of the Commonwealth Joint Select Committee on Aboriginal Land Rights in the NT to report no later than 31 May 1977.⁹¹ In relation to sea country, the Committee was tasked with making recommendations on the NT reciprocal legislation.

C *The Joint Select Committee on Aboriginal Land Rights*

The Committee was appointed to examine, inter alia, ‘the adequacy of provisions of the laws of the Northern Territory relating to ... entry to seas adjoining Aboriginal land’.⁹² The provisions of the Aboriginal Lands and Sacred Sites Bill 1977 (NT) (‘NT Aboriginal Lands Bill’) were used as a baseline for the Committee’s discussion.⁹³ Instead of an automatic sea closure (as proposed in the 1975 Bill), the NT Aboriginal Lands Bill put forward a process whereby Aboriginal communities could apply to have their seas closed for specified reasons: ‘Those reasons may be to prevent exploitation, to preserve the sanctity of places of particular meaning or significance to Aboriginals or to preserve the breeding ground of a particular food

⁸⁷ Ibid 406 [35].

⁸⁸ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2789 (Les Johnson); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 1976, 3081 (Les Johnson).

⁸⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2789 (Les Johnson).

⁹⁰ These petitions were presented between early October 1976 and early December 1976: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1976, 2839 (Norman Fry, Les Johnson and Les McMahon). Due to the way these petitions were recorded in Hansard (as being from a certain number of ‘citizens of Australia’), it is difficult to tell who the submissions were from, and whether they represented Aboriginal people. However, they do indicate that these sea country issues were noticed and commented on by the public.

⁹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1976, 2781 (Ian Viner).

⁹² Joint Select Committee on Aboriginal Land Rights in the Northern Territory, Parliament of Australia (Report, 1977) iv (‘*Report of Joint Select Committee*’).

⁹³ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 March 1977, 62 (Goff Letts, Majority Leader).

source.⁹⁴ This was quite a significant move away from Justice Woodward's focus on the sea as a buffer to protect Aboriginal land. In effect, this was recognition from the settler state that sea country, separate to its relationship to land, was important to Aboriginal people in relation to use rights and protection of places of significance. The reference to preventing exploitation suggested that Aboriginal people should be able to have some control over non-Indigenous fishing and use of their sea country. The corollary to this separation of land and sea was that there was no longer an automatic two-kilometre buffer, a mechanism that would have likely led to there being large areas of waters to which Aboriginal people could control entry. This created the need for another type of application process specific to the sea.

If an Aboriginal community wanted to apply to close their seas, they would apply to the Administrator⁹⁵ who could then refer the application to the Aboriginal Land Commissioner for investigation. After investigation by the Commissioner, the results would be given to the Administrator and 'discussed with [the] owners who made the request'.⁹⁶ As part of that process, the Aboriginal community would specify the 'type and degree of protection requested, from total closure to ... closure against a form of fishing'.⁹⁷ In making the decision, the Administrator could either totally close the waters, implement particular forms of exclusion, or reject the application altogether.⁹⁸ This provided recognition that Aboriginal communities would have different relationships to the sea that required varied types of closures. There was a clear sense that exclusion could go beyond just preventing fishing.

In putting the provisions about sea closures forward, the Majority Leader of the NT,⁹⁹ Goff Letts, used the language of compromise:

It is no secret that this [sea country issue] was the most difficult area in which we and the draftsmen had to attempt to do something ... What we finished up with is a type of compromise which will still *preserve* a good deal of the waters off the coastline available for use. ... It will provide for the *preservation* of both traditional and need rights for Aboriginals in the proximities of their communities.¹⁰⁰

The use of the sentiment of 'preserving' in two different ways here is relevant. Aboriginal 'traditional and need' rights would be preserved, and use of a 'good deal' of waters would also be preserved for non-Indigenous people. This latter use of the sentiment gives a normative sense that those waters were already open and should remain so; the status quo of the settler state's assertion of protecting open access should be preserved. In terms of Aboriginal use rights, while 'traditional rights' was a common phrase, 'need rights' was unusual. Perhaps it was meant to have a similar meaning to subsistence, which might imply that 'traditional' had a broader meaning akin to spiritual authority. The ability to apply for a 'full closure' suggests that there

⁹⁴ Ibid.

⁹⁵ A role similar to that of a state Governor.

⁹⁶ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 March 1977, 60 (Goff Letts, Majority Leader).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ The term used for the leader of the government prior to the NT gaining self-government.

¹⁰⁰ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 March 1977, 59 (Goff Letts, Majority Leader) (emphasis added).

was an understanding that in some areas total control by Aboriginal people of who could enter was appropriate and, therefore, that assertions of control by Traditional Owners, and requirements of permission, could sometimes have priority over the settler state's assertions of open access.

The NT Aboriginal Lands Bill continued to be debated in the NT Legislative Assembly alongside the Committee's work. The Committee noted in its final report that the witnesses who gave evidence to the Committee 'generally did not support the provisions' of the NT Aboriginal Lands Bill relating to sea country, but for vastly different reasons. Aboriginal witnesses strongly supported 'preserving' the automatic two-kilometre buffer that Justice Woodward had recommended,¹⁰¹ while another group of witnesses ('mainly non-Aboriginals') argued that the 'seas [should] remain open to all Australians'.¹⁰²

The NLC submitted that in Australia there was a 'generally held belief that all people have a free and unrestricted right to the use of the sea and inland waters'.¹⁰³ However, this statement was used as an anchor for the point that, in fact, the sea is 'not freely available to all Australians' — the government can place restrictions on commercial fishing and other recreational pursuits by exercising its assertion of sovereignty through governmental authority.¹⁰⁴ It seems likely that these submissions were made to answer specific arguments about the potential for 'racial tensions' if seas were closed.¹⁰⁵

Submissions were made, 'mainly by non-Aboriginals', that the seas should remain open to all because '[d]iscrimination in favour of one race is the basis for racial tension'.¹⁰⁶ The undertones of this 'racial tensions' argument were apparent throughout the Committee's report, including in references to the potential for 'ill-feeling between the communities'.¹⁰⁷ There is a certain type of race politics — one based on arguments of formal equality, that Aboriginal people and non-Indigenous people should have equal rights — that is part of a particular non-Indigenous NT cultural identity.¹⁰⁸ One way in which this narrative played out was in the view that Aboriginal land rights led to a 'lack of equality' for (non-Indigenous) 'Territorians'.¹⁰⁹ Aboriginal land rights divided the (imagined) community rather than uniting it.¹¹⁰ Advice was sought from the Attorney-General, who at that stage was Ellicott, about the impact of the *Racial Discrimination Act 1975* (Cth). Ellicott stated that there was 'no legal substance' in suggestions that any form of sea closure

¹⁰¹ The NLC also made this submission: NLC, *Submission to Joint Select Committee* (n 79) 30 (draft Aboriginal Land and Sacred Sites Ordinance 1977 cl 9(1)).

¹⁰² *Report of Joint Select Committee* (n 92) 55–7.

¹⁰³ NLC, *Submission to Joint Select Committee* (n 79) 18.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Report of Joint Select Committee* (n 92) 57.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* 60.

¹⁰⁸ Robyn Smith, 'Arcadian Populism: The Country Liberal Party and Self-Government in the Northern Territory' (PhD Thesis, Charles Darwin University, 2011) 201; David Carment, *Territorialism: Politics and Identity in Australia's Northern Territory 1987–2001* (Australian Scholarly Publishing, 2007) 8.

¹⁰⁹ Smith (n 108) 7.

¹¹⁰ *Ibid.* 10–1.

would be contrary to that Act.¹¹¹ Given that there were no legal issues here in relation to racial discrimination, these arguments could be interpreted as another way of expressing the choice of priorities.

On the other hand, international law threw up some substantive legal considerations. There were some suggestions that any ordinance made by the NT Legislative Assembly would be inconsistent with the provisions of the *Seas and Submerged Lands Act 1973* (Cth).¹¹² Ellicott advised that any ordinance made would be ‘merely a legislative exercise of [the] sovereignty’ declared by the Commonwealth over the territorial sea.¹¹³ However, Ellicott noted that a problem might arise in relation to Australia’s international obligations to provide a right of innocent passage to ships of all nations. Ellicott’s advice was that if regulations were made closing waters, then a regulation exempting vessels in transit should be made.¹¹⁴ Therefore, the settler state could give some control to Aboriginal people to determine who entered sea country, but limits were placed by international law on the settler state’s own assertions of sovereignty over the sea.

The final recommendation of the Committee was that sea closures were to be negotiated between the NT executive and the appropriate Aboriginal land council, and could be negotiated either for protection of waters or as a buffer zone to protect Aboriginal land.¹¹⁵ If there was an absence of agreement, then either party could apply to the Aboriginal Land Commissioner (the ‘Commissioner’); however, there was no detail about what authority any decision of the Commissioner had on such a dispute.¹¹⁶ Beyond that, all waters should be ‘open to the general community for recreational use, including non-commercial fishing’.¹¹⁷ These proposals were generally in line with the NT Aboriginal Lands Bill. However, in the Bill it was clear that the NT executive made the final decision after considering the Commissioner’s reasons. This gave a lot of power to the NT executive.

Overall, the final proposal of the Committee demonstrated the choice to use governmental authority to prioritise the settler state’s asserted obligations to provide public rights and promote economic exploitation.¹¹⁸ The application process for Aboriginal people to close the sea was uncertain and did not seem accessible and fair given that the NT executive wielded so much power. However, the Committee’s proposal did recognise Aboriginal assertions of sovereignty by providing the opportunity for Aboriginal people to apply to control, to some degree, entry to certain areas of sea country.

¹¹¹ *Report of Joint Select Committee* (n 92) 100.

¹¹² *Ibid* 99 app 6 (‘Letter from Attorney-General’).

¹¹³ *Ibid* 99–100.

¹¹⁴ *Ibid* 100.

¹¹⁵ *Ibid* xi.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ See also Ian Keen, ‘Aboriginal Tenure and Use of the Foreshore and Seas’ (1984) 5(3) *Anthropological Forum* 419, 426.

V First Sea Closure: Application, Process and Practical Reality

The reciprocal legislation that was enacted by the NT Legislative Assembly followed the general approach of the Committee's proposals. The *Aboriginal Land Ordinance 1978* (NT)¹¹⁹ — which became the *AL Act* after the NT gained self-government¹²⁰ — provided that an application could be made by Aboriginal people to close seas out to two kilometres adjacent to Aboriginal land. Although the term was not used in the legislation, these became known as 'sea closures'.¹²¹ The title of the relevant section in the legislation was 'Control of entry onto seas adjoining Aboriginal land'.¹²² This gave an overarching description of what 'control' meant: control over entry. In effect, this was a form of the requirement of permission. However, there were major limitations on whose entry Aboriginal people could control and on what enforcement mechanisms were available if someone entered the sea closure in circumstances where they should not have.

The *AL Act* prescribed an application process through which Aboriginal people could apply to close the seas up to two kilometres adjacent to Aboriginal land.¹²³ The legislation took the option that normatively favoured underlying settler-state control, with an opportunity for Aboriginal people to apply to close the seas. The final decision-maker on whether seas would be closed was the Administrator (effectively, the NT executive).¹²⁴ There was also a process by which the Administrator could, but was not required to, request the Commissioner to inquire into, and report on, certain matters.¹²⁵ As will be examined below, the legislative parameters for the Commissioner's inquiry put the concepts of 'Aboriginal tradition' and 'strangers' at the forefront.¹²⁶ The other element of the inquiry was consideration of whether anyone would be disadvantaged by the sea closure.¹²⁷ Given the Commissioner's role here (inquiring, not making a recommendation), there was no sense of how the disadvantage would be weighed up in the final decision.

Only two sea closures have ever been declared: one in the Milingimbi, Crocodile Island and Glyde River area; and the other in the adjacent Howard Island and Castlereagh Bay area. Both were referred to the Commissioner, and two respective inquiries were conducted and reports delivered to the NT executive.¹²⁸

¹¹⁹ The *Aboriginal Land Ordinance 1978* (NT) was assented to on 9 November 1978 and commenced on 1 February 1979.

¹²⁰ *Northern Territory (Self-Government) Act 1978* (Cth) s 73.

¹²¹ See, eg, Bergin (n 7) 172. See also Maggie Brady, 'Sea Rights — The Northern Territory "Sea Closure": A Weakened Law' (1985) 1(15) *Aboriginal Law Bulletin* 8.

¹²² *AL Act* (n 5) pt III.

¹²³ *Ibid* s 12.

¹²⁴ *Ibid* s 12(1).

¹²⁵ *Ibid* s 12(3).

¹²⁶ *Ibid* ss 12(3)(a)–(c).

¹²⁷ *Ibid* ss 12(3)(d)–(e).

¹²⁸ Commonwealth, Office of the Aboriginal Land Commissioner, *Final Report: Closure of Seas: Milingimbi, Crocodile Islands and Glyde River Area* (1981) 14 ('*Final Report: Milingimbi Sea Closure*'); Commonwealth, Office of the Aboriginal Land Commissioner, *Final Report: Closure of Seas: Castlereagh Bay/Howard Island Region of Arnhem Land* (1988) ('*Final Report: Castlereagh Bay Sea Closure*').

These sea closures were both affirmed by NT Country Liberal Party executives, led by different Chief Ministers, in 1983 and 1989 respectively.¹²⁹ The Commissioners' inquiries provided a space where discussions about Aboriginal relationships to sea country could take place, and the associated (publicly available) reports produced played an important role in documenting Aboriginal assertions of sovereignty over sea country. This Part will particularly focus on the Milingimbi, Crocodile Island and Glyde River sea closure as this was the first application.

Milingimbi is a Yolngu community in Arnhem Land. It is about 350 km east of Darwin and is itself an island. The Crocodile Islands are a group of islands to the north-east, about 50 km out to sea from Milingimbi. The Glyde River is to the south-east of Milingimbi on the mainland. This first sea closure application was, in many respects, an experiment for all the parties and the Commissioner. There was no requirement in the *AL Act* for a hearing, but it appears the approach was adopted from the *ALRA* land rights claims process.¹³⁰ Including preliminary matters, the first sea closure hearing took place over nine days in 1980 and 1981. Two of these days were on country at Milingimbi. The rest of the hearing was conducted by the Commissioner in the NT Supreme Court in Darwin. Justice Toohey stated in the introduction of his report that the 'inquiry was carried out in a fairly informal way'.¹³¹ Submissions were presented by the NLC (on behalf of the Milingimbi community), the Commonwealth, the NT, the Australian Fishing Industry Council, Amateur Anglers (representing recreational fishing), NT Police, and two individuals (including a non-Indigenous person, Roger Stigson, who had worked in Milingimbi). The hearing revealed issues that went beyond the restrictive legislative framework of sea closures, as well as some practical challenges of applying the legislation.

A The 'Claim' to Control and the Pre-History of the Milingimbi Sea Closure Application

The practice directions drafted for the inquiry required the parties to make their pre-hearing written submissions at the same time.¹³² As a result, Counsel Assisting the Commissioner had a role in identifying the issues that needed to be addressed at the hearing. On the first day of the substantive hearing, Counsel Assisting stated that, having read the 'claim book',¹³³ it seemed that the Yolngu 'applicants' were seeking

closure so as to give themselves control but they would not, after the closure was made, prevent commercial fishing; rather, they would seek to regulate it

¹²⁹ Successive Administrators referred sea closure applications to the Commissioner: Elizabeth Ganter, 'Indigenous Participation in Coastal Management in the Northern Territory, Australia: Issues and Options' (1996) 33(1-3) *Ocean and Coastal Management* 193, 200.

¹³⁰ There was a lack of guidance in the *AL Act* (n 5) about how the Commissioner would undertake the inquiry: *Final Report: Milingimbi Sea Closure* (n 128) 29. See also Graeme Neate, *Aboriginal Land Rights in the Northern Territory: Volume 1* (Alternative Publishing Co-Operative, 1989) 155.

¹³¹ *Final Report: Milingimbi Sea Closure* (n 128) 7.

¹³² Justice Toohey issued practice directions for the application: *Final Report: Milingimbi Sea Closure* (n 128) 28-9.

¹³³ It is evident from the transcript that there was discomfort around the term 'claim book' given sea closures were not heard as 'claims': Transcript of Proceedings, *Closure of Seas: Milingimbi, Crocodile Island and Glyde River Area* (Aboriginal Land Commissioner, Toohey J, 27 June 1980) 125 (M Maurice) ('*Milingimbi Sea Closure Hearing Transcript*').

in a way which they saw as being consistent with their own interests. What is proposed here is to give themselves some sort of bargaining power over the manner of the use of the seas in the areas very proximate to the places at which they live.¹³⁴

It seems that control was not about excluding all persons from the sea closure but about regulating who entered. In effect, it was about having decision-making authority to determine who entered the sea closure and for what purposes. The use of the term ‘bargaining power’ by Counsel Assisting also suggested that having such decision-making authority would enable the Yolngu community at Milingimbi to negotiate with non-Traditional Owners who sought to enter their sea closure about potential commercial benefits or opportunities. This sort of assertion of control went beyond what the sea closure framework could provide given the commercial fishing exemptions (discussed below). In a sense, this represented the mismatch between what the *AL Act* offered, in terms of a compromise between assertions of sovereignty, and the type of compromise that the Yolngu people wanted.

The application for the sea closure was only pursued after the Yolngu community at Milingimbi had made requests over several years for ‘some form of control over the seas’.¹³⁵ With respect to lodging the application, Yolngu witness Jacky Munyarrir stated:

What other way could we fight for our rights? We have fought and fought in the past six years, yet we don’t have any rights given by the government and you people. Is there any way we can control the sea?¹³⁶

Another Yolngu witness, John Weluk, noted that balanda¹³⁷ and Yolngu people now ‘have this one government’, but that it is ‘hard when Yolngu are not hearing anything from the government and balanda are giving pressure to the government and they are getting something back’.¹³⁸ This revealed a complex relationship between ‘government’ (including NT Police and NT Fisheries) and the Yolngu community at Milingimbi that was evident throughout the sea closure hearing. Reaching out to government bodies to negotiate control over sea country appeared to be both an assertion of Yolngu control and an acknowledgement of the co-existing power of settler-state governmental authority.

Prior to 1970, the Yolngu community at Milingimbi did not have ‘too many problems with balanda mob coming in and using this sea’, but commercial barramundi fishing licence numbers peaked in 1974.¹³⁹ In 1978, the Yolngu community at Galiwinku, another island about 100 km from Milingimbi, organised a fishing conference and issued invitations.¹⁴⁰ The conference was attended by members of the Yolngu communities, representatives from the NT government, and the Commonwealth departments of Aboriginal Affairs and Fisheries.¹⁴¹ Evidence was given during the inquiry that relevant representative bodies of commercial

¹³⁴ Ibid 126 (M Maurice).

¹³⁵ Ibid (18 February 1980) 32 (M Dreyfus).

¹³⁶ Ibid (20 October 1980) 142 (J Munyarrir).

¹³⁷ Yolngu word for whitefella.

¹³⁸ *Milingimbi Sea Closure Hearing Transcript* (n 133) 143 (J Weluk).

¹³⁹ Ibid 137 (D Parsons).

¹⁴⁰ Ibid (23 June 1981) 250 (R Stigson).

¹⁴¹ Ibid 249.

fishers had declined the invitation to the 1978 conference.¹⁴² However, there was also evidence given of other 'very positive' meetings with the Commercial Fishermen's Association ('CFA').¹⁴³ Part of the negotiations with commercial fishers included the Yolngu community proposing 'reserved' areas where no-one – Yolngu people or balanda – could commercially fish.¹⁴⁴ Richard Slack-Smith from NT Fisheries gave evidence that he attended a negotiation as an 'observer–adviser'.¹⁴⁵ He stated that the parties were attempting 'to come to some agreement on certain areas ... in the sea that the fishermen seemed to be relatively happy to avoid if they did not cut out all the fishing area'.¹⁴⁶ From Slack-Smith's perspective, if such an agreement had been made, he 'would be able to approach [his] department and the Minister and finally the Administrator in an attempt to implement the recommendations that would come out of such a meeting'.¹⁴⁷ This was an acknowledgement by a government official that agreements between Aboriginal people and commercial fishers could be put into action through settler state–based institutions.

This negotiation process concluded with a report, attaching a map with the proposed reserved areas, being sent by the Milingimbi Council to the CFA, with copies to the NLC and the Commonwealth Department of Aboriginal Affairs. The CFA's response to this report was that the 'claims lodged are not acceptable to this association and ... we do not feel that they are genuine and we are not satisfied that the true traditional owners are the people making the claims'.¹⁴⁸ Negotiations were then 'broken off' and the Yolngu community at Milingimbi applied for a sea closure.¹⁴⁹

This multi-party negotiating process that was instigated and led by Yolngu people appears to be an assertion of Yolngu decision-making authority. It also again articulated the type of control that the Yolngu community were seeking: the ability to negotiate who entered sea country and on what terms. These interactions demonstrated that governments and commercial fishers were at least ostensibly willing to negotiate and to recognise a level of authority in Aboriginal people. However, as in this case, the commercial fishers still had the power to walk away.

The negotiating process was only one part of the interactions between commercial fishers, government and the Yolngu community. The Yolngu community also reported and approached fishers that were causing problems to their community.¹⁵⁰ These attempts to exercise a level of control over non-Indigenous fishers not only appeared as an implicit assertion of Yolngu sovereignty but also revealed a complex relationship between Yolngu laws and settler-state laws in relation to fishing.

¹⁴² Ibid.

¹⁴³ Ibid 250.

¹⁴⁴ Ibid 252.

¹⁴⁵ Ibid (24 June 1981) 384 (R Slack-Smith).

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid (23 June 1981) 258 (R Stigson).

¹⁴⁹ Ibid.

¹⁵⁰ See, eg, *Milingimbi Sea Closure Hearing Transcript* (n 133) (21 October 1980) 151–2 (R Stigson), (23 June 1981) 248–9, 258–9 (R Stigson).

B *Aboriginal Tradition and Strangers*

Section 12(3)(b) of the *AL Act* required the Commissioner to inquire into whether the use of the seas by strangers was interfering with the ‘use of those seas in accordance with Aboriginal tradition’.¹⁵¹ Aboriginal tradition in the *AL Act* was defined as having the same meaning as in the *ALRA*.¹⁵² The *ALRA* defined it as ‘the body of traditions, observances, customs and beliefs of Aboriginals’, including ‘as applied in relation to particular persons, sites, areas of land, things or relationships’.¹⁵³ It was not restricted in the way that the phrase ‘traditional laws and customs’ has become in the context of native title law where the tradition must have continued to be observed uninterrupted from a time prior to European colonisation.¹⁵⁴ This meant that the way Aboriginal tradition was explored in the sea closure hearings related to both the historical context of tradition and how it was interpreted in the contemporary sense. There was no need to strictly prove how they related.

The use of the term ‘strangers’, and the notion of restricting them from accessing seas, was powerful given the legislative context. It strongly suggested that those strangers did not belong, whereas Traditional Owners did belong and had laws that entitled them to enter and use the seas, and to prevent others from entering certain areas of sea. The term ‘strangers’ was not given a technical definition in the legislation. It was an anthropological term that had become familiar in the land rights debates.¹⁵⁵ It was consistently stated that ‘strangers’ ‘carried its original significance of someone who does not belong to a place or someone unknown to those who live in a place’.¹⁵⁶

Evidence was presented of the many messages (telegrams, letters, phone calls) of Yolngu people reporting the actions of non-Indigenous fishers.¹⁵⁷ These messages were sent both between Yolngu communities as a warning and, separately to NT Fisheries, the NT Police or the CFA as complaints. There were also examples of both Yolngu people and non-Indigenous people who worked within the community approaching fishing boats to ask them to leave, putting signs up asking fishers not to fish in certain places and collecting evidence (such as photographs) of commercial fishers who were causing ‘problems’.¹⁵⁸ These assertions were not made without risk. There was evidence of the abuse that Yolngu people, and non-Indigenous people working within Yolngu communities, sometimes faced when they confronted commercial fishers.¹⁵⁹ Making such assertions despite, and in the face of, such abusive behaviour, demonstrates how important these actions were to the Yolngu community.

¹⁵¹ *AL Act* (n 5) s 12(3)(b).

¹⁵² *Ibid* s 3.

¹⁵³ *ALRA* (n 4) s 3. See also Justice Toohey’s discussion: *Final Report: Milingimbi Sea Closure* (n 128) 13.

¹⁵⁴ *Talbot v Malogorski* [2014] NTSC 54 [65].

¹⁵⁵ Butterly, ‘Reconciling Indigenous and Settler-State Assertions’ (n 8) 70–3.

¹⁵⁶ *Final Report: Milingimbi Sea Closure* (n 128) 14; *Final Report: Castlereagh Bay Sea Closure* (n 128) 4.

¹⁵⁷ See, eg, *Milingimbi Sea Closure Hearing Transcript* (n 133) (21 October 1980) 151–2 (R Stigson), (23 June 1981) 248–9, 258–9 (R Stigson).

¹⁵⁸ See, eg, *ibid* (21 October 1980) 155 (R Stigson), (22 June 1981) 205 (J Munyarirr).

¹⁵⁹ See, eg, *ibid* (24 June 1981) 336–7 (S Davis).

The types of actions and problems that might cause the community to report or approach commercial fishers did not appear to be based on settler-state law. There were references in the evidence to 'illegal fishing', but it was not apparent exactly what this meant.¹⁶⁰ The use of the term 'illegal' might be presumed to be related to the settler state-based legal context of not complying with fisheries legislation. Slack-Smith noted in his evidence that he had received several reports of 'illegal fishing' from the Milingimbi community.¹⁶¹ However, Slack-Smith stated that he found it difficult, at times, to determine 'what was a report of illegal fishing ... and what in fact was purely legal fishing under the *Fisheries Act*'.¹⁶² Counsel for the NLC put a direct question on this issue to Slack-Smith:

Mr Parsons: Correct me if I am wrong — You would have heard complaints of acts that may well have been quite legal, but you would have presumably heard when you went to Milingimbi people complaining about what in fact were legally proper things to do but which were concerning the community?

Mr Slack-Smith: That is true.¹⁶³

This exchange suggests that defining illegal fishing according to settler-state law was not the main issue for the Yolngu community at Milingimbi. Rather, the issue was whether it was concerning to the community, and whether the community did something about it, for example by trying to talk to the fishers or making a complaint to NT Fisheries. One interpretation here is that the term 'illegal' provides a notion of right or wrong derived from Aboriginal law, rather than settler-state law. Again, these discussions appear to reveal an implicit assertion of Yolngu sovereignty with respect to attempting to exercise a level of control over non-Indigenous fishers at the interface of Yolngu law and settler-state law.

Justice Toohey was satisfied that, in accordance with Aboriginal tradition, strangers were restricted in their right to enter the seas.¹⁶⁴ Further, his Honour was satisfied that the operations of commercial fishers were causing interference with the use of the seas in accordance with Aboriginal tradition.¹⁶⁵ With respect to the finding of causing interference, the Australian Fishing Industry Council submitted that the only requirement of Aboriginal tradition, in relation to entry of seas, was seeking permission.¹⁶⁶ There was an overtone to this submission that seeking permission was not a restriction of consequence. Justice Toohey interpreted this as an argument that permission was 'something of a formality'.¹⁶⁷ In addressing this argument, his Honour stated: '[T]here was an emphasis in the present inquiry on the need to ask permission, even though that requirement may have been relaxed from time to time in the case of particular persons or classes of persons'.¹⁶⁸ This indicates that from Justice Toohey's perspective, outside of the exemptions of the sea closure framework, permission requirements did apply to non-Indigenous fishers.

¹⁶⁰ See, eg, *ibid* (24 June 1981) 380 (R Slack-Smith).

¹⁶¹ *Ibid* (24 June 1981) 380 (R Slack-Smith).

¹⁶² *Ibid* 381.

¹⁶³ *Ibid*.

¹⁶⁴ *Final Report: Milingimbi Sea Closure* (n 128) 13–15, 26.

¹⁶⁵ *Ibid* 26. See also at 15–16.

¹⁶⁶ *Ibid* 14.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid*.

C *Identifying Disadvantage That Would Be Caused by a Sea Closure*

The Commissioner was also required to consider whether any person would be disadvantaged by a sea closure.¹⁶⁹ The *AL Act* provided an overarching offence provision that a person ‘shall not enter onto or remain on closed seas unless [the person] has been issued with a permit to do so’.¹⁷⁰ Permits to enter sea closures were to be granted by the relevant Aboriginal land council or by the Traditional Owners.¹⁷¹ Therefore, the power to give or deny permission to enter sea country was vested in Aboriginal people. This was recognition, through settler-state legislation, of the notion of permission under Aboriginal laws. However, a range of classes of people were exempted from requiring a permit.

The most significant of these exemptions related to commercial fishers who held licences at the time a sea closure was declared. This was also the exemption that demonstrated the clearest choice in the legislation to prioritise non-Indigenous use rights and settler state-sanctioned economic exploitation. The original provision in the Aboriginal Land Bill provided a two-step test to determine if a commercial fisher could continue to fish in a sea closure: first, the fisher had to be the holder of a licence issued under the *Fisheries Ordinance 1965* (NT); and second, they had to establish that prior to that sea closure they had ‘carried out fishing operations for a reasonable period of time within the area of closed seas’, and that their ‘livelihood may be placed at risk by the closure of those seas’.¹⁷² If these conditions were met, then the Administrator could grant a permit to allow the fisher to enter and fish in the closed seas.¹⁷³

The legislation as passed modified the test to require only that the fisher hold a pre-existing fishing licence.¹⁷⁴ Commercial fishers were not required to prove that they had fished within the area of that particular sea closure, or that their livelihood would be placed at risk. This was a stark legislative choice that symbolised a shift away from seeking to prevent disadvantage only to those who had previously fished in an area, to a much wider prioritisation of non-Indigenous commercial fishing interests. Further, the exemptions for commercial fishers were described in the legislation as ‘protecting existing rights’.¹⁷⁵ This harks back to the debate in Hansard in relation to the NT Aboriginal Lands Bill about preserving the so-called status quo of open access for non-Indigenous people.¹⁷⁶

¹⁶⁹ *AL Act* (n 122) ss 12(3)(d)–(e).

¹⁷⁰ *AL Act* (n 122) s 14.

¹⁷¹ *Ibid* s 15.

¹⁷² Aboriginal Land Bill 1978 (NT) cl 18. This Bill is not available on the *Northern Territory Legislation* website <<https://legislation.nt.gov.au/>>, but can be located at: Northern Territory Legislative Assembly, *Bills Introduced: 28 February to 9 March 1978*, Serial 31 <https://parliament.nt.gov.au/_data/assets/pdf_file/0019/367111/PR03-Bills-28-February-1978-9-March-1978.pdf>.

¹⁷³ Aboriginal Land Bill 1978 (NT) cl 18.

¹⁷⁴ *AL Act* (n 5) s 18. One issue that was not clear was how these provisions operated with renewal of fishing licences. Justice Toohey determined, on the basis of both legislative intention and statutory interpretation, that renewals were included: *Final Report: Milimimbi Sea Closure* (n 128) 19. However, if the licence was transferred, that was not a licence granted prior to the sea closure: at 19.

¹⁷⁵ *AL Act* (n 5) s 18.

¹⁷⁶ See text accompanying n 100.

The commercial fishing exemptions also functioned to potentially disincentivise commercial fishers from responding to Aboriginal peoples' concerns. For example, some of the major issues for Yolngu communities, as expressed in the sea closure applications, were things like fishers putting nets up across rivers that blocked access to certain places, leaving broken nets, throwing away large amounts of fish (which as well as being a waste¹⁷⁷ had the potential to attract sharks), taking particular fish in the 'wrong' season meaning that they would not get the chance to 'breed up', and catching animals that were totems which resulted in making 'some of the older people' sick in the community.¹⁷⁸ These issues did not relate to 'illegal' fishing (in the settler-state context), but instead related to a mixture of Aboriginal laws and the practical reality of co-existing. They required negotiation of sorts to be resolved. However, the exemption meant that commercial fishers did not have to engage with the communities. In effect, the commercial fishing exemptions entrenched the problems, and conflicts, that Yolngu communities had with commercial fishers and limited the 'capacity of the commercial fishing industry to respond to Aboriginal concerns'.¹⁷⁹

There were also general exemptions for transit and for entry of certain government and parliamentary personnel.¹⁸⁰ Section 20 of the *AL Act* provided an exemption for 'bona fide' transit of a 'vessel through seas which are otherwise open to that vessel'. In effect, this was the provision that was inserted to protect the international right of free passage as referenced by Ellicott (and discussed above).¹⁸¹ Although this might appear to be a pragmatic provision from the settler state's perspective, it undermines the sea closure significantly. Any vessel, at any time, and in any part of the sea closure, could transit through. Conversely, even though licensed commercial fishers were exempted, they were required to give notice to Traditional Owners. Such notice provisions, at least, gave Traditional Owners the ability to know who was in their sea closure (and perhaps would have made it easier to identify transgressors).

Justice Toohey's inquiry into who would be disadvantaged by a sea closure was restricted by the types of submissions that were presented. For example, Justice Toohey had no evidence before him of any disadvantage to recreational fishers. The only evidence given about recreational fishing was from the 'small number of Europeans living in the communities' who noted that they sought and received permission from Traditional Owners already.¹⁸² Therefore, they did not submit that they would be disadvantaged.¹⁸³ This was an example of the permission principle in action. It also represents the way in which the Yolngu community expressed their

¹⁷⁷ Dermot Smyth, *A Voice in All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone* (Report, Coastal Zone Inquiry, Revised Edition, November 1993) 62.

¹⁷⁸ *Milingimbi Sea Closure Hearing Transcript* (n 133) (22 June 1981) 200–10 (J Memawuy, J Mawunydjil, J Munyarirr, T Binalany, D Marpiyawuy, M Gaykamanu, A Djupandawuy, P Dhakuwarr and R Gatikatiwuy). See also (23 June 1981) 248–9 (R Stigson) (referring to a statement of R Gatikatiwuy).

¹⁷⁹ Ganter (n 129) 202.

¹⁸⁰ *AL Act* (n 5) ss 16–17.

¹⁸¹ See text accompanying n 114.

¹⁸² *Final Report: Milingimbi Sea Closure* (n 128) 21; *Final Report: Castlereagh Bay Sea Closure* (n 128) 11.

¹⁸³ *Ibid.*

assertion to control access to their sea country in the first sea closure application hearing.

The disadvantage that commercial fishers might face was discussed at length in Justice Toohey's first sea closure report.¹⁸⁴ However, Justice Toohey determined that there was not considerable disadvantage to commercial fishers in declaring a sea closure over this area. Justice Toohey also made some poignant broader reflections on fisheries policy. His Honour noted that the policy of government was 'in any event to preserve fishing resources through reduction of licences, restrictions on net lengths and seasonal closures' and that, more generally, the 'picture [was] one of ever-increasing control and restriction upon commercial fishing'.¹⁸⁵ This gave a sense that it was not unusual for commercial fishers to be restricted, and that, in fact, such restrictions would likely increase in the future. Justice Toohey's comments were general in nature, but they could broadly be read as suggesting that fishers should expect more restrictions, and that such restrictions could be made for a variety of reasons including prioritising Aboriginal fishing interests.

D *Enforcement of Sea Closures*

The issue of enforcement of sea closures was raised by the NT Police in their submission. This submission stated that the NT Police were 'totally unequipped to police the [sea closure] legislation' and did not know of any other government agency that would be in a position to enforce sea closures, and further that 'in terms of enforcement the legislation would be totally ineffective'.¹⁸⁶ This was a stark admission, and beyond the scope of Justice Toohey to address given that the 'provision of facilities necessary to enforce closures is largely a matter for government'.¹⁸⁷ However, his Honour noted that there was 'obvious scope for co-operation between the law enforcement authorities and the communities affected'.¹⁸⁸ This option to cooperate was not pursued by the NT government.

Pursuant to the *AL Act*, the settler state was asserting that sea closures would provide a particular type of reconciling of interests. Aboriginal tradition would be given limited recognition by settler-state law so that Aboriginal communities could control entry of certain classes of people into the sea closure. However, from the outset, the settler-state law seemed incapable of ensuring that sea closures could operate in this way. It appeared that restrictions on entry could not be enforced by the allocated settler-state agency. Aboriginal people did not have a formal role in enforcement despite suggestions that this could be beneficial. In this context, the settler-state law was not able to deliver the compromise of interests that it had set out in the legislation. Further, the settler state was not willing to consider ways in which marine governance models could be usefully modified to involve participation of Aboriginal people in enforcement.

¹⁸⁴ *Final Report: Milingimbi Sea Closure* (n 128) 16–20.

¹⁸⁵ *Ibid* 20, 26.

¹⁸⁶ *Ibid* 23.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid*.

E *Practical Reality of Sea Closures*

From the perspective of potential applicants for a sea closure, the exemptions had to be weighed alongside what proved to be a very involved, lengthy and expensive application process. Justice Toohey attempted to make the first application process as simple and responsive as possible, but given the legislative framework and the novelty of the matters, it still involved nine days of hearings and the associated preparation.

Several academics in fields such as politics and anthropology as well as government officials have critiqued both the application process and effectiveness of sea closures.¹⁸⁹ Their overall critique is that the process to apply for a sea closure was ‘long and costly’ and that Aboriginal people got very little in return.¹⁹⁰ In 1985, after the process had concluded for the first sea closure application, anthropologist Stephen Davis stated that most applications, if they proceeded in the same manner, ‘could be expected to cost between half and one million dollars each’.¹⁹¹ Yet, Davis noted: ‘The “successful” Milingimbi and Glyde River Sea Closure Application resulted in little change for the protection of marine areas for the Aboriginal applicants’.¹⁹² Commercial fishing could continue and government personnel were exempted; therefore, the main potential restrictions would be on tourist boats, recreational fishers and future applicants for commercial fishing licences.¹⁹³ The sea closure framework would allow Aboriginal people to control entry to this latter class through the permit system.

The sea closure provisions in the *AL Act* remain in force. The only two sea closures ever declared still exist, although there is little information available about them, and little sense that they have had, or continue to have, any impact.¹⁹⁴ It was submitted in the 2005 annual report of the Office of the Aboriginal Land Commissioner that ‘[t]o a large extent the original [sea closure] applications have been *subsumed* by applications under the [*ALRA*] and native title claims’.¹⁹⁵ The word ‘subsumed’ takes the focus away from the potential shortcomings of the sea closure mechanism, and instead puts it on Traditional Owners positively choosing to pursue other options, such as recognition of native title. As an example, the Croker Island sea closure application was lodged but not pursued, and instead the native title claim of *Yarmirr v Northern Territory* was lodged.¹⁹⁶ Further, the first sea closure

¹⁸⁹ See, eg, Ganter (n 129); Bergin (n 7); Stephen Davis, ‘Aboriginal Sea Rights in Northern Australia’ (1985) 21 *Maritime Studies* 12; Stephen Davis, ‘Indigenous Maritime Claims on the North Australian Coast’ (1989) 1(2) *Marine Policy Reports* 135, 146–49; Keen (n 118) 427–30.

¹⁹⁰ Ganter (n 129) 200. See also Bergin (n 7) 182; Davis, ‘Aboriginal Sea Rights in Northern Australia’ (n 189) 17.

¹⁹¹ Davis, ‘Aboriginal Sea Rights in Northern Australia’ (n 189) 17.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*; Bergin (n 7) 173.

¹⁹⁴ These are two of the few contemporary mentions of sea closures: ‘Milingimbi’, *East Arnhem Regional Council* (Web Page, 2023) <<https://www.eastarnhem.nt.gov.au/milingimbi-detailed>>; ‘Sea Country Rights’, *Northern Land Council* (Web Page, 2023) <<https://www.nlc.org.au/our-land-sea/sea-country-rights>>. It is possible, but not known, whether some of the commercial fishing licences have been transferred or expired in the intervening years, meaning there could be some areas where there is now limited (or no) commercial fishing.

¹⁹⁵ *Land Commissioner Annual Report 2005* (n 7) 7 (emphasis added).

¹⁹⁶ *Ibid* 42; *Yarmirr FC* (n 10) 580 [105].

application ever lodged (Bathurst and Melville Islands) was not pursued because the Traditional Owners (represented by the Tiwi Land Council) decided that they would negotiate arrangements with fishers.¹⁹⁷ More broadly, at a conference on Indigenous rights to the sea in 1993, after *Mabo v Queensland [No 2]*,¹⁹⁸ politicians from both the NT Government and NT Opposition, and a representative of the NLC, clearly stated that sea closures had not been effective and needed to be reconsidered.¹⁹⁹

VI Conclusion

An examination of the Woodward Commission, the initial legislative debates about sea rights and the first sea closure application demonstrates that there was a genuine sense, from the settler-state perspective, that Aboriginal relationships in sea country were valid and worthy of recognition. However, the drafting of the first land rights Bill by the NT Legislative Assembly and the submissions to, and recommendations of, the Joint Select Committee on Aboriginal Land Rights in the NT, saw the emergence of the prioritisation of assertions of governmental authority (by requiring Aboriginal people to apply for sea closures, and not allowing automatic grants) and obligations to provide certain classes of people with open, third-party access without requiring permission. The final recommendations of the Committee revealed the choice made to ensure settler-state control of marine areas and prioritise non-Indigenous third-party interests.

The sea closure framework was the settler state's first attempt at negotiating the reconciling of Aboriginal and non-Indigenous assertions of sovereignty in the sea in the NT. It was also the first legislation in the broader Australian context that provided significant settler state-based legal recognition of Indigenous rights over an area of sea.²⁰⁰ The legislation was significant in the way that it recognised Aboriginal tradition as underlying an entitlement to use the seas and to have some control over who entered sea country. Yet only a restricted form of control was on offer: the ability to control entry of limited classes of persons into the sea closure. The exemptions, general and for commercial fishing, significantly undermined the ability of Aboriginal communities to control who entered the sea closure. These exemptions were assertions of overarching settler-state governmental authority in the marine space and a clear prioritisation of settler state-sanctioned economic exploitation.

Sea closures are still law 'on the books'. We can say that sea closures were (and are), effectively, a legal and policy failure. However, the legislative debates and, in particular, the first sea closure inquiry played a vital role in articulating the reconciling of Aboriginal assertions of sovereignty to sea country and settler-state assertions of sovereignty to marine areas. In the first sea closure hearing, the Yolngu

¹⁹⁷ Bergin (n 7) 179–80. See also Davis, 'Aboriginal Sea Rights in Northern Australia' (n 189) 18.

¹⁹⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

¹⁹⁹ Steve Hatton, 'Peoples and Sea Rights' in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights 14 July–16 July 1993* (Northern Territory University, 1993) 1, 2 ('*Turning the Tide*'); Wes Lanhpuay, 'Marine Management for 40,000 Years: A Yolngu View of Sea Rights' in *Turning the Tide* at 4, 5; David Allen, 'Some Shadow of the Rights Known to Our Law' in *Turning the Tide* at 53, 57.

²⁰⁰ Smyth (n 177) 136.

community at Milingimbi articulated Yolngu relationships and laws relating to sea country (and their interaction with settler-state laws), contemporary Yolngu use rights (both subsistence and commercial) and the type of control the Yolngu community were seeking.

Through the 1990s and into the 2020s there have been significant further developments with respect to other aspects of Aboriginal sea rights in the NT. As foreshadowed in the introduction these include, in particular, the recognition of sea country native title in *Commonwealth v Yarmirr* and the determination in the *Blue Mud Bay Case*. The latter decision sparked the Blue Mud Bay negotiations which are, to some extent, still ongoing as at March 2023.²⁰¹ The impetus to push further, to try other avenues to ‘claim’ sea country rights, seems to have been grounded in the failure of sea closures to address what was fundamentally at stake in reconciling these assertions of sovereignty. However, post-*Mabo*²⁰² there was a sense that native title might not be able to deliver the type of control that Aboriginal communities were seeking over sea country.²⁰³ This cautious approach was warranted.

Commonwealth v Yarmirr limited native title rights to sea country to non-exclusive rights due to the competing international right of innocent passage and public rights to fish and navigate.²⁰⁴ Therefore, the native title holders could use their sea country, but they could not prevent others from using those seas (or require people to ask permission). The majority in the High Court described the settler state’s assertion of sovereignty as a right to legislate (somewhat akin to the assertion of governmental authority), but the outcome relied heavily on the settler state’s asserted obligation to provide open access.²⁰⁵ This was a prioritisation of third-party, non-Indigenous rights in the sea. Justice Kirby (in his separate judgment) offered up a form of ‘qualified exclusivity’ whereby it was accepted that third-party rights would have priority over the native title holders’ otherwise exclusive rights.²⁰⁶ However, the majority were not open to considering this form of more sophisticated reconciliation.

A legal turning point came with the *Blue Mud Bay Case* — a case that was specifically about the intertidal zone. The legislative context of the *ALRA* meant that the public right to fish went from being an all-encompassing reason to reject exclusive native title rights in the *Yarmirr* cases, to a historical doctrine that was abrogated in the contemporary context.²⁰⁷ The outcome in the *Blue Mud Bay Case* effected a legal reconciliation of Aboriginal assertions of sovereignty with third-party interests that disturbed the contemporary structure of authority in the intertidal zone. Yet, the outcome of this case did not precipitate any immediate practical response in the intertidal zone. The protracted Blue Mud Bay negotiations continue,

²⁰¹ See (n 13).

²⁰² *Mabo* (n 198).

²⁰³ Smyth (n 177) 53; Greg McIntyre, ‘*Mabo* and Sea Rights: Public Rights, Property Rights or Pragmatism’ in *Turning the Tide* (n 199) 112.

²⁰⁴ *Yarmirr HCA* (n 11) 68 [98].

²⁰⁵ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2006) 54.

²⁰⁶ *Yarmirr HCA* (n 11) 127–30 [286]–[291].

²⁰⁷ *Blue Mud Bay Case* (n 12) 58 [28].

to some degree, and the legal rights over the intertidal zone have been used as a bargaining chip to negotiate broader legal and governance opportunities.²⁰⁸

The challenge for the settler state in the contemporary law and governance paradigm is to see Aboriginal assertions of sovereignty over sea country and reconcile them with settler-state assertions of sovereignty. The history of sea closures is important to this contemporary task because it reveals that these Aboriginal assertions of sovereignty over sea country have been clearly put before the settler state since at least the Woodward Commission in the early 1970s.

²⁰⁸ See n 13 above. See also 'History Made with Aboriginal Sea Company Incorporation', *Northern Land Council* (Media Release, 25 February 2022) <<https://www.nlc.org.au/media-publications/history-made-with-aboriginal-sea-company-incorporation>>.

Precarious Work in the High Court

Eugene Schofield-Georgeson* and Joellen Riley Munton†

Abstract

Three recent High Court decisions dealing with forms of precarious work have reaffirmed the ‘primacy of contract’ in determining the rights of workers to the protections of the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*). The court’s approach represents a turn towards what critical contract theorist Roberto Unger has called ‘retro formalism’, curtailing any prospect for the common law of employment to recognise the economic reality of working relationships in determining employment status. This article argues that three aspects of the Court’s reasons produce this outcome: (i) the articulation of a ‘rights and duties’ rule to distinguish employment from independent contracting; (ii) the application of strict commercial contract principles to employment relationships; and (iii) the likelihood that the Court’s emphasis on the primacy of written contracts will thwart the exercise of some statutory powers of the Fair Work Commission under the *Fair Work Act*’s protective provisions. This development signals the urgency for statutory reform to ensure that the most precarious forms of work are captured in statutory labour laws.

Please cite this article as:


Eugene Schofield-Georgeson and Joellen Riley Munton, ‘Precarious Work in the High Court’ (2023) 45(2) *Sydney Law Review* 219.




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I Introduction

In three recent cases — *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,¹ *ZG Operations Australia Pty Ltd v Jamsek*,² and *WorkPac Pty Ltd v Rossato*³ — a majority of the High Court of Australia has asserted the primacy of commercial contract law and rejected a developing jurisprudence that allowed consideration of the totality of the relationship when assessing the character of an employment relationship.⁴ All three cases concerned forms of precarious employment: work that is usually low paid, and invariably insecure or ‘on demand’. *Personnel Contracting* concerned a backpacker engaged by a labour hire company as a builder’s labourer. *Jamsek* involved a pair of truck drivers, required by their employer to resign from secure employment in order that they be rehired as independent contractors.⁵ *Rossato* concerned casual employees engaged by a labour hire agency and placed on long-term assignments with a mining company.⁶ In each case, the hirer had purported to contract out of the imposition of various labour standards afforded to permanent employees by statute. In *Personnel Contracting*, the labour hire agency sought to avoid the application of the Building and Construction On-Site Award 2010 made under the *Fair Work Act 2009* (Cth) (‘*Fair Work Act*’), by treating the worker as an independent contractor.⁷ In *Jamsek*, the employer rejected any obligation to pay accrued annual leave and long service leave entitlements, or to make superannuation contributions on behalf of the workers, on the basis that they were contractors.⁸ In *Rossato*, the employer asserted that an employed worker had been engaged as a casual and was therefore not entitled to paid leave entitlements under ss 86, 95 and 106 of the *Fair Work Act*, notwithstanding that the employee had worked the roster appropriate to a full-time employee from his first assignment in 2014 until his retirement in 2018.⁹ In each case, a majority of the High Court determined the contest between hirer and worker according to the terms of a written contract between the parties, and expressly rejected arguments based on the conduct of the parties in pursuing their working relationships.¹⁰ Taken together, these cases mean that precarious workers may no longer challenge their

¹ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404 (‘*Personnel Contracting*’).

² *ZG Operations Australia Pty Ltd v Jamsek* (2022) 398 ALR 603 (‘*Jamsek*’).

³ *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 (‘*Rossato*’).

⁴ See *Personnel Contracting* (n 1) 416 [44] (Kiefel CJ, Keane and Edelman JJ), 445 [162] (Gordon J); *Jamsek* (n 2) 605–6 [8] (Kiefel CJ, Keane and Edelman JJ), 624 [95] (Gordon and Steward JJ). Note that Gageler and Gleeson JJ dissented on this point, holding that courts may consider the ‘manner of performance of the contract’ in determining whether a contract should be classified as one of employment: see *Personnel Contracting* (n 1) 440–1 [143].

⁵ *Jamsek* (n 2) 606 [11].

⁶ *Rossato* (n 3) 465–8 [11]–[22].

⁷ *Personnel Contracting* (n 1) 405–6 [1]–[7].

⁸ The workers’ entitlement to superannuation contributions was yet to be determined at the time of writing, because the *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3) includes a broader definition of coverage than the common law definition of employment. This question was returned to the Federal Court for determination: see *Jamsek* (n 2) 619 [76].

⁹ *Rossato* (n 3) 465–7 [13]–[21].

¹⁰ *Ibid* 479 [63]–[64] (Kiefel CJ, Keane, Gordon, Edelman, Steward, Gleeson JJ); *Jamsek* (n 2) 606 [9] (Kiefel CJ, Keane and Edelman JJ); *Personnel Contracting* (n 1) 420–1 [59] (Kiefel CJ, Keane and Edelman JJ), 447–8 [172] (Gordon J).

classification as a contractor or casual employee by reference to the objective reality of their working relationship, provided that their employer has clearly formalised their terms and conditions of engagement in a written contract.

In this respect, the cases paint a bleak future for workers in precarious work, particularly the growing armies of on-demand workers in the so-called ‘gig economy’.¹¹ By emphasising the freedom of hirers to fix their terms of engagement in written contract documents, these cases invite the reinvention of forms of engagement that escape employment regulation, and leave many precarious workers in a largely unregulated wilderness of insecure work, at least until such time as Parliament legislates an alternative solution.¹² By focusing on a 19th century notion of ‘freedom of contract’ the Court has ensured that the common law in Australia will play no role in addressing the challenges articulated in the Senate Committee of Inquiry’s *Job Insecurity Report*.¹³ This article discusses the impact of the three decisions upon the treatment of precarious work under the common law by applying critical contract theory to the reasoning of the Court.

The High Court’s renewed emphasis on ‘freedom of contract’ in employment relationships leads the authors to argue that these cases represent a turn towards what critical legal scholar Roberto Unger has called ‘retro formalism’ (a term discussed in more detail, below). In this respect, the cases intensify the risk that formal contract documentation will be used by hirers to disguise the economic reality of the labour exchange. While ever labour statutes such as the *Fair Work Act* continue to rely on the common law to define which workers are covered by their protections, the reasons of the majority in these cases (discussed below) will entrench the exclusion of many workers from those protections. In Australia, large numbers of the labour force are already engaged as casuals, or independent contractors.¹⁴ The majority reasons in these cases may expose even greater numbers of workers to the vicissitudes of the free market, by permitting hirers to classify them as contractors and casuals, without any risk that the reality of their working arrangements will attract the protections of 20th century labour laws.

We suggest that three aspects of these decisions are likely to produce this outcome. First, and most starkly, the decisions introduce a ‘rights and duties’ rule to the determination of when a relationship is properly characterised as one of

¹¹ Uber now claims to be the second largest employer in Australia, based on its engagement of more than 120,000 drivers: Tony Sheldon, ‘The Precarious Grind of Casual Work Is No “Made-Up” Issue’ *Australian Financial Review* (online, 18 April 2022) <<https://www.afr.com>>.

¹² Calls for legislative intervention by extending the definition of employment have been made for many decades now: see Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15(1) *Australian Journal of Labour Law* 235. In the United Kingdom, the *Employment Rights Act 1996* (UK) s 230(3) provides an extended definition of ‘worker’. See *Uber BV v Aslam* [2021] UKSC 5 for a case determining that Uber drivers were ‘workers’ within this extended definition.

¹³ Senate Select Committee on Job Security, Parliament of Australia, *The Job Insecurity Report* (Fourth Interim Report, February 2022) (‘*Job Insecurity Report*’).

¹⁴ See Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2021* (14 December 2021); Geoff Gilfillan, ‘Recent and Long-Term Trends in the Use of Casual Employment’ (Research Paper, Parliamentary Library, Parliament of Australia, 24 November 2021); *Job Insecurity Report* (n 13) ch 2.

employment.¹⁵ This rule elevates the significance of the employer's contract documentation, setting the contractually binding 'rights and duties' of the parties at the time of engagement above workers' evidence of the reality of the performance of work throughout the employment relationship.

Secondly, the decisions cement the law of commercial contract as the means to determine the fundamental question in labour law: 'who is an employee?'. Workers claiming that the reality of their working arrangements should be taken into account in determining the proper classification of their relationship will now be put to the complex task of proving implied terms, contract variation or, possibly, the even more arcane doctrine of estoppel by convention.¹⁶ The same commercial contract principles are to be applied when interpreting whether an employee has been employed on a casual or a fixed-term contract rather than on a continuing employment contract.¹⁷ Casuals and fixed-term employees are afforded more limited protections by statutory labour laws, so employers have financial incentives to define their hiring contracts with employees as casual or fixed-term contracts.¹⁸

Thirdly, and as a consequence of the first two aspects, Fair Work Commissioners exercising some of their statutory powers under the *Fair Work Act* are likely to adopt a similarly deferential attitude to the employer's written contract documentation when determining whether a worker is entitled to a particular statutory benefit. While many rights in the *Fair Work Act* are afforded only to employees, as defined by the common law (leaving the Fair Work Commission no option but to apply High Court jurisprudence), there are some provisions in the Act which allow Fair Work Commissioners (many of whom are not trained commercial or even industrial lawyers) to look past the contracting arrangements made by the parties in order to determine an employee's entitlement to access a statutory benefit. For example, a Commissioner determining whether an employee is entitled to bring an unfair dismissal claim under s 382 of the *Fair Work Act* may need to consider whether the employee was engaged on a fixed-term or fixed-task contract, because terminations of employment at the end of such contracts are not 'dismissals' for the purposes of the unfair dismissal protections.¹⁹ Sub-section 386(3) provides an exception to this exclusion for contracts which are entered into in order to avoid the employer's obligations under unfair dismissal provisions. This necessitates a judgment by the Fair Work Commissioner about the underlying motives of the employer, and in the past has allowed recourse to the actual practices of the

¹⁵ *Personnel Contracting* (n 1) 415–16 [43]–[44], 422 [66] (Kiefel CJ, Keane and Edelman JJ).

¹⁶ Estoppel was raised as a potential avenue for employees to challenge the application of a written contract in *Personnel Contracting* (n 1) 415–16 [43] (Kiefel CJ, Keane and Edelman JJ), 449–50 [177] (Gordon J). For an explanation of estoppel by convention, see Rory Derham, 'Estoppel by Convention: Part I' (1997) 71 *Australian Law Journal* 860; Rory Derham, 'Estoppel by Convention: Part II' (1997) 71 *Australian Law Journal* 976.

¹⁷ *Rossato* (n 3) 487 [96], 491 [105]–[106].

¹⁸ Section 86 of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') excludes casuals from paid annual leave; s 95 excludes casuals from paid personal/carer's leave. Employees engaged on casual and fixed-term contracts have limited entitlements to access the unfair dismissal protections under *Fair Work Act* pt 3-2: see particularly ss 384(2)(a), 386(2)(a). For a study of casual employment in Australia, see Raymond Markey and Joseph McIvor, 'Regulating Casual Employment in Australia' (2018) 60(5) *Journal of Industrial Relations* 593.

¹⁹ *Fair Work Act* (n 18) s 386(2)(a).

employer, particularly those strategically using a rolling series of fixed-term contracts to avoid the application of the statute.²⁰ We have already begun to see members of the Commission citing *Rossato* for the proposition that the tribunal must now defer to the employer's contract in cases such as this, as we explain below.

The Fair Work Commission is not a court, but a tribunal making administrative decisions in the interests of 'equity, good conscience and the merits of the matter'.²¹ It would be unfortunate to see the Commission exercising all of its statutory powers under a protective regime, in deference to the strict terms of contracts strategically drafted to avoid the Commission's jurisdiction. The Commission has itself expressed regret that the High Court's findings in *Personnel Contracting* require Commissioners to 'ignore certain realities' and 'close [their] eyes' to the reality of how working relationships operate in practice when determining whether the worker is an employee at all.²²

The impact of the High Court decisions in these cases indicates the need for legislative intervention to allow the Commission to exercise its powers without undue regard to the contractual stratagems of hirers, and to ensure that the *Fair Work Act* extends its protections to workers engaged in precarious subordinated work.²³

We explain our argument in several parts. First (in Part II) we provide a brief explanation of the High Court majority's reasoning in *Personnel Contracting* and *Jamsek*. Next (in Part III) we look through a critical contract theory lens, and review the literature on critical contract theory pertaining to employment law. This theoretical perspective assists in understanding the significance of the three aspects referred to above, and explained in Part IV. They are: (i) the application of the rights and duties rule to the employee/contractor distinction; (ii) recourse to strict commercial contractual doctrines in construing the terms of work relationships; and (iii) disturbance of the industrial tribunal's jurisdiction to determine matters on the substantive merits of a case. These aspects are well illustrated in the outcomes of the cases, explained in Part V. In Part VI we consider potential legislative solutions to the risk that these effects will exacerbate the growth of precarious forms of work. Potential legislative solutions include the extension of a safety net of wages and entitlements, along with access to industry-level collective bargaining, to particular categories of contractors and on-demand workers. We propose this kind of legislative solution so that contracting stratagems cannot succeed in defeating the application of protective labour law statutes to those precarious workers who most need those protections.

²⁰ See, eg, *D'Lima v Board of Management, Princess Margaret Hospital for Children* (1995) 64 IR 19 (Industrial Relations Court of Australia) ('*D'Lima*').

²¹ *Fair Work Act* (n 18) s 578(b).

²² *Deliveroo Australia Pty Ltd v Franco* (2022) 317 IR 253, 279 [54] (Fair Work Commission Full Bench) ('*Franco*').

²³ Calls for legislative amendment have been made by others: see Stewart (n 12); Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420; Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4.

II Majority Reasoning in *Personnel Contracting* and *Jamsek*: Ignoring Reality for Contractual Form

In *Personnel Contracting*, the High Court needed to determine whether a backpacker engaged by a labour hire company to undertake builder's labourer's duties for one of its clients was an employee or a contractor.²⁴ A full Bench of the Federal Court of Australia had found that the backpacker must be a contractor, but only because the standard form contract under which he had been engaged had already been assessed by an appellate-level court, and had been found to be a genuine independent contract.²⁵ The decision that the backpacker was a contractor allowed his employer to pay him approximately 75% of the minimum wage under the relevant modern award. On appeal, six of the seven members of the High Court Bench overturned this decision (Steward J dissenting). The reasons of most relevance to our argument are those of Kiefel CJ, Keane and Edelman JJ (writing together), and (Gordon J), because these reasons formed the majority on the approach to be applied in determining the proper classification of a work relationship.

Kiefel CJ, Keane and Edelman JJ held that in determining the status of a person hired under a written contract, courts must regard only the terms of the written contract to assess the nature of the working relationship, and cannot regard the reality of that relationship manifested by the way the parties have performed their respective obligations.²⁶ Recourse to any subsequent conduct of the parties could only be relied upon where a contract was proven not to be wholly in writing, or where there was evidence that the contract had been varied, or discharged and replaced by a new contract.²⁷ They said that the essential question for the court was to determine whether the worker was serving the hirer in the hirer's business, or carrying on a trade or business of their own.²⁸ While the multiple indicia set out in the earlier High Court decision in *Stevens v Brodribb Sawmilling Co Pty Ltd*²⁹ should be considered in order to answer this essential question, those indicia should be applied only to an analysis of the text of the written contract. Cases in which lower courts and tribunals had applied these indicia as a kind of 'mechanistic checklist' and regarded the parties' actual conduct were roundly criticised.³⁰ This did not mean that the parties' own labels in contract documentation should determine the issue.³¹ Simply calling workers 'contractors' would not be sufficient to make them so.

²⁴ For a note on the case, see Joellen Riley Munton, 'Boundary Disputes: Employment v Independent Contracting in the High Court' (2022) 35(1) *Australian Journal of Labour Law* 79.

²⁵ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 643 [34] (Allsop CJ), 682 [185] (Lee J) ('CFMMEU'). The Court relied on the Industrial Appeal Court of Western Australia's decision in *Personnel Contracting Pty Ltd v Construction Forestry Mining & Energy Union of Workers* (2004) 141 IR 31 and also referred to the Tasmanian Supreme Court's decision in *Young v Tasmanian Contracting Service Pty Ltd* [2012] TASFC 1.

²⁶ *Personnel Contracting* (n 1) 413–21 [32]–[60].

²⁷ *Ibid* 415–16 [43]. A further qualification was that parties may attempt to raise an estoppel argument.

²⁸ *Ibid* 414–15 [36]–[39], citing *Braxton v Mendelson*, 233 NY 122, 124 (Andrews J) (1922) and *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217 (Windeyer J).

²⁹ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29 ('*Brodribb*').

³⁰ *Personnel Contracting* (n 1) 413–14 [34], 414 [36].

³¹ *Ibid* 421–2 [63]–[66], 424–5 [79].

Nevertheless, where contract terms indicated that the hirer had a right to control the worker, and that the worker was a subordinate in the hirer's business and did not operate any business of their own, the worker was properly characterised as an employee.

Kiefel CJ, Keane and Edelman JJ applied the same reasoning in *Jamsek* to find that two truck drivers who had been driving exclusively for the same business for about 32 years were contractors and not employees, as a full Bench of the Federal Court had found.³² The Federal Court decision found that they had been given no choice but to resign from their employed positions to be re-engaged as contractors, and that their work as contractors had not differed substantially from their earlier employment. On an assessment of the totality of their long relationship with the hirer, it was held that they were in fact employees and were entitled to payment for accrued employment entitlements, such as annual leave and long service leave. The High Court overturned this decision unanimously. Kiefel CJ, Keane and Edelman JJ, again writing together, considered only the terms of the written contract between the parties to find that the drivers were properly characterised as independent contractors, and they stated that the court below had erred in paying regard to the way that 'the parties actually conducted themselves over the decades of their relationship'.³³ They emphasised that Anderson J had made a grave error in finding that the inequality of bargaining power between the hirer and the drivers was at all relevant in determining the respective rights of the parties.³⁴ Only where parties have argued that a contract should be rescinded for some vitiating factor such as unconscionable dealing, or attacked under some statutory provision dealing with unfair contracts, might such an argument be countenanced, and no such claim had been made in this case.³⁵ The terms of the written contracts provided that the drivers were contracting through partnerships with their spouses, so these could not be personal services contracts, even though the drivers were the only ones providing any services.³⁶ The workers were responsible for providing their own vehicles, even though they had been required to purchase these vehicles from the hirer when resigning their employment and accepting the new contract.³⁷ The contracts allowed the drivers to determine their own delivery routes, evidencing their own 'control' over their work.³⁸ The contracts permitted them to undertake other work, even though their long working hours for the hirer left them no opportunity to do so.³⁹

Throughout their reasons, the majority (including Gordon J who agreed in substance with these aspects of the Kiefel CJ, Keane and Edelman JJ reasons) emphasised that Australian courts ought not to follow the approach taken by the United Kingdom ('UK') Supreme Court in *Autoclenz Ltd v Belcher*.⁴⁰ In *Autoclenz* the Supreme Court found that a group of car detailers who had been engaged on

³² *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114.

³³ *Jamsek* (n 2) 605 [6].

³⁴ *Ibid* 617 [62].

³⁵ *Ibid*.

³⁶ *Ibid* 610 [25].

³⁷ *Ibid* 607 [14]–[16], 617 [63].

³⁸ *Ibid* 609 [22].

³⁹ *Personnel Contracting* (n 1) 429–30 [103].

⁴⁰ *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 ('*Autoclenz*').

contracts purporting to treat them as independent contractors were in fact employees. Clauses had been included in the contracts permitting the workers to delegate the work to subcontractors.⁴¹ Such a clause is generally conclusive in finding that the worker is a contractor, not an employee, because the right to delegate contradicts the notion of a contract for personal service. The Supreme Court found that the workers enjoyed no genuine right to subcontract their work, so the written contract did not represent the reality of the agreement between the parties. In reality, the workers were engaged as employees.⁴² This decision was rejected by the majority in *Personnel Contracting* and *Jamsek*, on the basis that it adopted a heterodox view that employment contracts are a special class of contract, and are not governed by orthodox principles of commercial contract law.⁴³

In rejecting *Autoclenz*, the majority of the High Court has asserted that Australian employment law is to be governed by the strict principles of commercial contract law. We turn now to reflect upon that assertion through the lens of critical contract theory.

III Critical Contract Theory

The notion that the orthodox form of contract disguises an oppressive reality between parties to a labour exchange⁴⁴ is not a new one. It was observed by Marx at the time of the emergence of industrial capitalism and its modern law of contract in the mid-19th century.⁴⁵ And it has been at the heart of heterodox approaches to contract law — ‘realist’,⁴⁶ ‘labourist’,⁴⁷ ‘critical’,⁴⁸ ‘deconstructionist’⁴⁹ and

⁴¹ Ibid (n 40) 750, [6].

⁴² Ibid 759 [38]–[39].

⁴³ *Personnel Contracting* (n 1) 421 [60].

⁴⁴ Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) 186.

⁴⁵ Karl Marx, *Capital*, tr Samuel Moore and Edward Aveling, ed Frederick Engels (Progress Publishers, 2015) vol 1 [trans of: *Das Kapital* (1867)]. It was crucial to his theories of: (i) exploitation or ‘surplus-value’ (at 122–3); as well as (ii) employer power or ‘the subsumption of labour to capital’s command’ (at 126–58).

⁴⁶ See, eg, Roosevelt-era reformers and jurists such as Roscoe Pound (pre-1937), Karl Llewellyn and Wendell-Holmes Jnr: Marcus Curtis, ‘Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence’ (2015) 27(1) *Yale Journal of Law and the Humanities* 157, 165–7.

⁴⁷ See, eg, Australian Labor-appointed High Court judges, particularly those associated with drafting the *Australian Constitution* and the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), as well as making many foundational decisions, such as the *Harvester* decision (*H v McKay* (1907) 2 CAR 1). These include Henry Bourne Higgins, Sir Isaac Isaacs and (more recently) Mary Gaudron.

⁴⁸ Predominantly scholars from the Americas (see, eg, Duncan Kennedy, ‘Critical Labor Law Theory: A Comment’ (1981) 4 *Berkeley Journal of Employment and Labor Law* 503; Duncan Kennedy and Karl E Klare, ‘A Bibliography of Critical Legal Studies’ (1984) 94(2) *Yale Law Journal* 461) led chiefly by the writing of Roberto Unger in the 1970s and 1980s (see, eg, *The Critical Legal Studies Movement* (Harvard University Press, 1983) also prominently including Jay Feinman (eg, ‘Critical Approaches to Contract Law’ (1983) 30(4) *UCLA Law Review* 829; Peter Gabel and Jay M Feinman, ‘Contract Law As Ideology’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 1982) 182).

⁴⁹ See, eg, Clare Dalton, ‘An Essay in the Deconstruction of Contract Doctrine’ (1985) 94(5) *Yale Law Journal* 997 and other post-structuralists in the 1980s and 1990s.

‘relational’⁵⁰ — ever since. Among the timeliest and most visionary of these heterodox approaches is critical contract theory, as explained by its leading proponent, Roberto Unger.

Unger’s recent work⁵¹ draws attention to the return of orthodox contract law across the common law world. Unger was a founding member of the critical legal studies movement in North America in the 1970s, and served as a Minister within a social-democratic Brazilian government (2007–09). As such, his work is rooted in the contextual study of law — its embeddedness within relations of social and economic power — and its reform. According to Unger, the merit of this approach in the current political climate is to understand ‘the reorganisation of labor in the guise of decentralised networks of contractual relations and the consequent danger of universal economic insecurity’, in turn permitting the formulation of an alternative set of values and institutions.⁵²

The recent restoration of orthodox contractual relations is directly related to what Unger has termed ‘retro-doctrinalism’ (or, in an Australian context, ‘retro formalism’): a return to pre-realist or non-purposive judicial method, similar to that which dominated 19th century legal thought, in which legal rules and doctrines are represented as having an ‘inherent logic’ or ‘in-built structure’, while context is largely downplayed or disregarded.⁵³ Such a logic, says Unger, has returned for three primary reasons: (i) the constancy of private law as a basis for rational economic and social relations over the course of the 20th century; and (ii) an erosion of faith in realist or purposive legal thought; primarily due to (iii) the reign of subjectivity in the humanities — an escapist post-structuralism disconnected from reimagining and remaking society.⁵⁴ Within a political climate mired in the Thatcherite mantra of ‘there is no alternative [(TINA)]’, ‘retro-doctrinalism represent[s] ... a return to normalcy in legal thought when normalcy mean[s] giving up on fundamental transformation’ of society.⁵⁵

This loss of faith in law as a progressive social project is key to retro-doctrinalism. Echoing the earlier critical contract scholarship of Gabel and Feinman,⁵⁶ Unger has recently written that the ‘defining feature’ of retro-doctrinalism is simply ‘the legal rationalization of the existing institutional form of the market economy’;⁵⁷ in other words, merely cementing customary forms of contractual relations — regardless of ethical or material consequences — into law. For retro-doctrinalism, law is a mirror to dominant social and contractual relations. Law does not attempt change or redirection. In this respect, retro-doctrinalism differs

⁵⁰ See, eg, Hugh Collins, *Regulating Contracts* (Oxford University Press, 2002); Hugh Collins, ‘Is There a Third Way in Labour Law?’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press, 2002) 449.

⁵¹ Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015).

⁵² Ibid 16.

⁵³ Ibid 37.

⁵⁴ Ibid 37–40.

⁵⁵ Ibid 40.

⁵⁶ Gabel and Feinman (n 48).

⁵⁷ Unger (n 51) 39.

from 19th century formalism, in which the doctrine of freedom of contract between equal parties, for instance, expounded the norms of ‘freedom’ and ‘equality’ to justify transformation of markets and social life. Neoliberal doctrinalism, by contrast, pays lip service to these concepts without any such good intentions.⁵⁸

Accordingly, Unger says that retro-doctrinalism represents a ‘darkening’ within legal discourse in which post-structuralism has endowed lawmakers with a willing ‘readiness to defy the consensus regarding the substance of law and its method’, while maintaining a ‘half-belief’ in its practice — an ironic, self-interested and instrumental attitude. Legal theory, sometimes invoked in conjunction with retro-doctrinalism, says Unger, is vacuously detached from any notion of postwar-era social progress and class compromise. He labels this theory a form of ‘high-minded minimalism’⁵⁹ committed to discourses such as European human rights and minimum standards (mostly in the realm of constitutional law). Such theory sees rights as a shield, rather than a sword, acting as the night watch over only the most basic enlightenment gains. The Australian High Court’s recent rediscovery of the doctrine of ‘freedom of contract’ within the realm of Australian labour law is a fitting local example. Such a position advances nothing and may even have regressive consequences.

As heterodox ‘relational’ contract scholar Hugh Collins has said, orthodox contract law sits at the pinnacle of formalist or doctrinal approaches to law, embodied by a belief in neutral and ‘clear rules and logical derivatives’.⁶⁰ Foremost among these neutral rules for the conduct of market relations are two key doctrines: freedom *to* contract (to enter or refuse to enter into contracts and to choose contractual partners) and freedom *of* contract (to select the terms of agreement). As Unger has theorised, both orthodox doctrines contain a series of counter-principles that frame the ‘form’ or systemic logic of each.⁶¹ His theory runs like this:

Freedom *to* contract is premised upon a key legal counter-principle: an ‘intention to create legal relations’.⁶² This principle discourages contractual relations among family and friends, who are assumed to lack any intention to conduct business or make contracts.⁶³ Intrinsic to this assumption is a separation between public and private spheres and, in particular, the preservation of patriarchal authority in the private sphere (upon which the pre-contractual law of master and servant was

⁵⁸ Ibid 37–39; Henry E Smith, ‘Property as the Law of Things’ (2012) 125(7) *Harvard Law Review* 1691.

⁵⁹ Unger (n 51) 33.

⁶⁰ Hugh Collins, ‘Contract and Legal Theory’ in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986).

⁶¹ Unger (n 51) 146.

⁶² Another counter-principle to freedom to contract is: freedom to choose a contract partner will not be permitted to work in ways that subvert communal aspects of social life (eg, compulsory contracts, precontractual dealing, special responsibilities regarding position: Unger (n 51) 147). Yet another is: there are obligations for another’s justified reliance upon promises (promissory estoppel and restitution for unjust enrichment — ‘quasi-contract’): Unger (n 51) 147. The current common law on the intention to create legal relations is stated in *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502; *Rose & Frank Co v JR Crompton & Bros Ltd* [1925] AC 445.

⁶³ Unger (n 51) 148.

based).⁶⁴ In the public sphere, meanwhile, an intention to create legal relations prescribes ultimate authority to the intentions of the parties. This is because in the public sphere, parties are imagined to be equal in power and knowledge (this imagined equality is also key to the principle of ‘fairness’, discussed further below). Therefore, orthodox approaches to contract law will always read ‘intention’ to protect justified reliance on a bargain.⁶⁵ Such an observation is particularly astute in light of the *Rossato* decision, discussed below, in which the intentions of the parties were a battleground between first instance and appellate judges and their respective heterodox and orthodox approaches to contract. In this respect, a retro-doctrinalist approach held the parties to their perceived intentions at the outset of the contract, regardless of any obvious inequality in bargaining power, or indeed of any evidence of their intentions or expectations derived from the performance of their relationship.

In respect to freedom of contract, Unger posits the counter-principle of ‘fairness’: that unfair bargains should not be enforced.⁶⁶ This counter-principle is the formal legal acknowledgement of the classical liberal assumption that when entering into a transaction, parties in the market have equal access to knowledge and power.⁶⁷ To be clear, in the 19th century, doctrinal contractual approaches assumed or merely imagined such equality between parties by virtue of their freedom to contract.⁶⁸ Such doctrinalism manifestly denied the oppressive character of the market and lack of real personal agency experienced by most workers as parties to bargains.⁶⁹ Owing to this formalist legal reasoning, nothing other than the parties’ intention, expressed by the terms of the contract, could be considered by lawmakers when interpreting the terms of the bargain. It is precisely this approach that the majority of the Australian High Court has adopted in its turn towards retro-doctrinalism in the *Personnel Contracting* and *Jamsek* decisions described above.

In the 20th century, heterodox approaches to contract introduced reality to the legal fictions of freedom and equality of contract.⁷⁰ Introducing reality to bargains involving an obvious disparity in bargaining power — for example, the relationship between labour and capital — immediately undermines the 19th century assumption

⁶⁴ On this point, see also Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2011) ch 1.

⁶⁵ Unger (n 51) 148.

⁶⁶ Ibid 153. The common law’s response to the principle of ‘fairness’ is limited to the doctrine permitting the vitiation of contracts for ‘unconscionable dealing’, encapsulated in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. This doctrine prevents predatory exploitation of another’s special weakness, but does not go so far as to adjust rights purely on the basis of an inequality of bargaining power.

⁶⁷ Unger (n 51) 153, 156.

⁶⁸ Gabel and Feinman (n 48) 175–7.

⁶⁹ Ibid 177.

⁷⁰ Gabel and Feinman (n 48) 175–7; Dalton (n 49); Peter Drahos and Stephen Parker, ‘Critical Contract Law in Australia’ (1990) 3(1) *Journal of Contract Law* 30, 31. These authors describe four techniques by which this has been achieved, including: (i) *privileging*: privileging form over substance, writing over words, words over silence and signature over non-signature; (ii) *displacing*: or ‘hiving off’ an area of contract law for special treatment (eg, labour law or equity); (iii) *rhetoric*: deploying ‘objective tests’ — cloaking a judicial decision with that of the metaphorical ‘person in the street’; and (iv) *duty creation*: creating a duty, pretending it was anterior to the facts, and then enforcing it (creating an equity or a fiduciary or constructive notice are similar concepts: Drahos and Parker at 38–9).

of ‘fairness’ between the parties. Conveniently for labour lawyers, this problem had mostly been circumvented in the early- to mid-20th century across the common law world by ‘hiving off’⁷¹ the most contested areas of contract law — such as those involving labour and capital — by creating statutory collective bargaining schemes and statutory minima. Through a technocratic common law lens, these interventions exist as states of exception to orthodox contract, providing new legal standards, protections, and specialist channels for negotiation and bargaining. Indeed, enabling workers to face capital on more equal terms ultimately validates the contractual counter-principle of fairness between equal parties to a bargain.⁷² The system of specialised laws created mandatory terms for labour engagements. And over time, this system brought unprecedented levels of industrial peace and job security to workers, forming the basis of a post-war or ‘golden-age’ compact between labour and capital within Western liberal democracies. In Australia, this was achieved by the enactment of laws enabling the setting of mandatory minimum terms of employment by a process of conciliation and arbitration of collective industrial disputes.⁷³

As Unger has observed, however, the process of hiving off labour law from orthodox contract law has created two enduring and interrelated problems. First, the more powerful party always has an incentive to escape these statutory labour laws and revert to the common law of contract wherever possible.⁷⁴ This is manifested when a hirer chooses a contractual form to hire labour that avoids the coverage provisions of labour laws. And second, operating under liberal capitalist constraints, statutory labour laws can never completely replace managerial discretion — the rights and power of employers to direct and command labour within their own firms.⁷⁵ This means that the boundaries of collective agreement, labour standards and managerial prerogative, or the ‘retained rights’ of employers, remain unclear.⁷⁶ In legal practice, the judicial language of ‘contract’ protects employer power (in turn, derived from employer ownership of productive capacity) from being completely usurped by statutory and executive labour law. Indeed, the first aspect of this problem is directly implicated in the turn to retro-doctrinalism in precarious employment cases. This awkward coexistence of statutory labour law alongside orthodox contract has recently seen the High Court permit employers to escape the aspirations of labour law, and revert to freedom to determine their own obligations

⁷¹ Drahos and Parker (n 70) 38; Unger (n 51) 154, 158–60; Gabel and Feinman (n 48) 180–2.

⁷² Karl E Klare, ‘Critical Theory and Labor Relations Law’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 1982) 65, 66; Unger (n 51) 156–60.

⁷³ The first federal enactment of this kind in Australia was the *Conciliation and Arbitration Act 1904* (Cth), underpinned by the labour power in the *Australian Constitution*, s 51(xxxv). Conciliation and arbitration was retained in the *Industrial Relations Act 1988* (Cth), and was abandoned only with the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). For a history of the system, see Michael Kirby and Breen Creighton, ‘The Law of Conciliation and Arbitration’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 98; Richard Naughton, *The Shaping of Labour Law Legislation: Underlying Elements of Australia’s Workplace Relations* (LexisNexis Butterworths, 2017) 60–119.

⁷⁴ Unger (n 51) 158–60.

⁷⁵ See Karl Renner, *The Institutions of Private Law and Their Social Functions* (Routledge, 1976) ch 2, discussing a nexus between property and contract.

⁷⁶ Unger (n 51) 158–60.

under contract. As mentioned at the outset, the consequences of this process are threefold, and are discussed in the ensuing section.

IV Three Consequences

A ‘Rights and Duties’ Rule and the Definition of Employment

The definition of employment is the gatekeeper at the threshold between the jungle of commercial contract law, on one hand, and a haven of secure and protective labour law rights, on the other.⁷⁷ As such, the definition of employment determines which disputes about work belong in the territory of labour law, and which remain subject to the law of the jungle. To use Unger’s terminology, the definition of employment determines which aspects of labour law are ‘hived off’ from contract. The authors suggest that the High Court’s reasoning in *Personnel Contracting*, and the affiliated decisions in *Jamsek* and *Rossato*, reorient courts towards contract law, enabling hirers to avoid obligations under protective labour laws to precarious workers. The High Court has done so by favouring a ‘retro-formalist’ or 19th century approach to defining employment that privileges the form of the contract over the reality of the employment relationship.

In delivering this new approach, the plurality of the Court in *Personnel Contracting* — Kiefel CJ, Keane and Edelman JJ — introduced the ‘right and duties’ rule to the test of employment.⁷⁸ The rights and duties rule derives from general commercial and contract law and embodies the notion of freedom of contract. The plurality made this clear by eliding both concepts in a ‘freedom to agree upon the rights and duties which constitute [the parties’] relationship’.⁷⁹ In practice, the rights and duties rule simply requires a court to examine the terms of the parties’ own contract, and where the contract is in writing (and not alleged to be a ‘sham’), only the written terms can be consulted, without consideration of the practical reality of the relationship. As the plurality put it,

there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship. ... there [is] no reason why, subject to statutory provisions or awards, established legal rights and obligations in a contract that is entirely in writing should not exclusively determine the relationship between the parties ... there is every reason why they should. The ‘only kinds of rights with which courts of justice are concerned are legal rights’. The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or

⁷⁷ For a study of the common law definition of employment undertaken prior to these High Court decisions, see Pauline Bomball, ‘Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work’ (2019) 42(2) *Melbourne University Law Review* 370, 377–85. See also Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 36–65; Joellen Riley, ‘The Definition of the Contract of Employment and Its Differentiation from Other Contracts and Other Work Relations’ in Mark Freedland, Alan Bogg, David Cabrelli, Hugh Collins, Nicola Countouris, ACL Davies, Simon Deakin and Jeremias Prassl (eds), *The Contract of Employment* (Oxford University Press, 2016) 321.

⁷⁸ *Personnel Contracting* (n 1) 415–16 [43]–[44], 417 [48], 419–20 [56], 421–2 [58]–[59], 421 [61], 422 [66], 424–5 [79], 427 [88].

⁷⁹ *Ibid* 421 [58].

psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties.⁸⁰

Gordon and Steward JJ agreed with this proposition.⁸¹ Only Gageler and Gleeson JJ supported the view taken in earlier decisions that it is legitimate to consider the totality of a working relationship, including the way it has been performed, in determining whether the relationship should be characterised as one of employment.⁸²

The veneration of written contracts in the majority's reasoning is problematic for a range of reasons. A key problem is that it relies on an assumption, buried in passing in the opening sentence of the above-quoted passage, that an employment contract can be 'entirely in writing', without recourse to conduct or reality. The assumption arises because the Court has conflated the contract of employment with general commercial contract law, in which exclusively written contracts are the norm, rather than the exception. In other words, the Court has ignored the separate evolution of protective labour laws that have sought to distinguish employment relationships from commercial bargains. For over a century, labour laws have ameliorated the harsh consequences of commercial contract law principles for vulnerable workers, in support of the principle that labour ought not to be commoditised.⁸³

Another problem arising from this reversion to 19th century contractual doctrine is that, in Unger's words, it merely imagines 'fairness' or equality between the parties. In this respect, it pays insufficient regard to the risk that 'freedom of contract' may disguise economic coercion. The classic formulation of freedom of contract was stated by Sir George Jessel MR, at the height of the industrial revolution, in *Printing & Numerical Registering Co v Sampson*, where Sir George expounded that

men [sic] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.⁸⁴

This begs the question of what free and voluntary service means for many precarious workers, in a world where one must work to live, and must accept whatever terms are offered, at the risk of starvation. The High Court majority made a brief concession to the potential for a contract to be set aside for duress, or unconscionable dealing, or under some statutory provision prohibiting misleading and deceptive or unconscionable terms,⁸⁵ but these doctrines and statutory provisions have proven to be of little benefit to workers pressed only by their impecunious circumstances and lack of legal knowledge into accepting the employer's contract. This is precisely why earlier Australian High Courts expressly excluded 'freedom of contract' as a

⁸⁰ Ibid 415–16 [43]–[44] (Kiefel CJ, Keane and Edelman JJ) (emphasis in original) (citations omitted).

⁸¹ Ibid 448 [173] (Gordon J), 458 [203] (Steward J).

⁸² Ibid 429–30 [102]–[103], 435 [121], 437–8 [132].

⁸³ See Paul O'Higgins, "'Labour is Not a Commodity": An Irish Contribution to International Labour Law' (1997) 26 *Industrial Law Journal* 225.

⁸⁴ *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.

⁸⁵ *Jamsek* (n 2) 605–6 [8] (Kiefel CJ, Keane and Edelman JJ).

factor to be taken into consideration in their application of the ‘multi-indicia’ test for characterising work relationships.⁸⁶ The application of the multi-indicia or multifactorial test to the totality of the employment relationship required consideration of the worker’s experience of the labour process (reality) together with the terms of the employer’s contract (form).⁸⁷ Accordingly, the application of freedom of contract by the Court in *Personnel Contracting* is a remarkably clear example of Unger’s concept of ‘retro-formalism’. The Court has returned to a 19th century understanding of employment, bereft of any good (if misconceived) intentions such as ‘equality’ between the parties or freedom from coercion that 19th century liberal law once proposed. It has adopted what Unger refers to as ‘retro’ formalism. The result is a test — the rights and duties rule — that largely permits employers to determine the character of the relationship under which they engage labour, by avoiding acknowledgement of circumstances in the relationship that would signify employment.

This means that the employer need only assert, in the terms of the written contract, that the worker is to undertake tasks in the manner of an independent contractor. The kinds of clauses which will achieve this end include that the worker need not provide the services personally, but may delegate tasks to another, even though in reality the worker desperately needs to do all the work to earn a living and has no intention of subcontracting. The plurality in *Personnel Contracting* expressly denied that a mere label, ‘contractor’, will determine the character of the relationship.⁸⁸ It is for the court and not the parties themselves to determine the legal character of a relationship. It made a similar finding in *Rossato* (concerning the definition of casual employment)⁸⁹ in which the Court first asserted the return to ‘freedom of contract’ in employment law.⁹⁰ Nevertheless, it is within the power of employers (or the lawyers drafting their contracts) to include provisions typical of a genuine independent contract: a right to delegate work; an obligation to provide capital equipment; an apparent freedom to refuse tasks. They may include a requirement that the worker contract through a small corporation or partnership (as was the case in *Jamsek*). These ‘boilerplate’ clauses enable employers to evade the risk of engaging workers in employment relationships by legitimising what Unger has called ‘decentralised contractual networks’.⁹¹ In practice, such a process provides larger firms with greater access to lawyers — such as platform companies

⁸⁶ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 41 [46] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) (*‘Hollis’*). The Court referred to the exclusion of ‘considerations respecting economic independence [of the parties, ie, without coercion] and freedom of contract’.

⁸⁷ *Brodrigg* (n 29); *Hollis* (n 86); *On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 123 [208] (Bromberg J); *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146.

⁸⁸ *Personnel Contracting* (n 1) 421–2 [63]–[64] (Kiefel CJ, Keane and Edelman JJ).

⁸⁹ *Rossato* (n 3) 488 [97]. In the month before the High Court handed down its decision in *Rossato*, the Parliament amended the *Fair Work Act* (n 18) by inserting new s 15A, reversing the decision of the Full Federal Court in the matter on appeal (known as the ‘*Skene* principle’ from *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536) for future casual employment cases. Section 15A diverges from the High Court’s perspective on contractual labels in that it appears to confirm that the label ‘casual’ is influential, as one of the four matters listed in s 15A(2) that can be considered in determining casual employment status.

⁹⁰ *Rossato* (n 3) 477 [58], 489 [99].

⁹¹ Unger (n 51) 16.

in the gig economy — with a defensible business structure as well as an excuse to circumvent sham contracting provisions within the *Fair Work Act*.⁹²

To be clear, the Court’s assertion of contractual orthodoxy in *Personnel Contracting* was not absolute. The plurality permitted limited consideration of reality and context outside the written contract (‘post-formation conduct’), in a number of discrete circumstances. These were:

- in determining whether the contract is wholly in writing, or includes oral terms.⁹³ The parties’ conduct may be relevant to establishing oral terms of the contract, so long as the conduct is used to construe the contractual commitments made by the parties at the inception of their relationship;⁹⁴
- in establishing that the initial contract has been varied, or discharged and replaced by a new contract;⁹⁵
- in establishing that the written contract is a sham;⁹⁶ and
- in establishing a new claim based on the doctrine of estoppel by convention.⁹⁷

None of these arguments were raised in *Personnel Contracting* or *Jamsek*. Given that in *Jamsek* the plurality stated that ‘claims of sham cannot be made by stealth under the obscurantist guise of a search for the “reality” of the situation’,⁹⁸ it is unlikely that any of these concessions will be of assistance to workers seeking to rely only on the practical reality of their working arrangements to establish that written contract terms should be ignored.⁹⁹ We reflect on the difficulty of establishing a contractual variation in the face of an extensive written contract below.

⁹² *Fair Work Act* (n 18) ss 357–9. Section 357 prohibits an employer from knowingly or recklessly misrepresenting an employment relationship as an independent contractor relationship. Section 358 prohibits an employer from dismissing an employee and rehiring them as a contractor, while s 359 prohibits the employer from making false statements to persuade an employee to re-engage with the employer as an independent contractor. These provisions are subject to penalties of up to 60 penalty units for individuals and 300 penalty units for corporations: ss 539, 545–6.

⁹³ *Personnel Contracting* (n 1) 415 [42] (Kiefel CJ, Keane and Edelman JJ), 449–50 [177] (Gordon J).

⁹⁴ *Ibid* 416 [44] (Kiefel CJ, Keane and Edelman JJ), 448 [174] (Gordon J). Carter states that consideration of post-formation conduct does ‘not necessarily conform to orthodox principles’ of contractual formation. He nevertheless suggests that courts will occasionally consider post-formation conduct subject to a high legal threshold: John Carter, *Carter on Contract* (LexisNexis, 2022) [02-060].

⁹⁵ *Personnel Contracting* (n 1) 415–16 [43] (Kiefel CJ, Keane and Edelman JJ), 449–50 [177] (Gordon J).

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

⁹⁸ *Jamsek* (n 2) 617 [62] (Kiefel CJ, Keane and Edelman JJ). The majority in *Rossato* (n 3) also criticised recourse to expectations arising from performance as a ‘descent into ... obscurantism’: at 479 [63].

⁹⁹ For discussion of the narrow doctrine of ‘sham’ contracts, see Gordon Anderson, Douglas Brodie and Joellen Riley, *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar, 2017) 53, citing *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786.

1 *Significance of Control*

All members of the majority in *Personnel Contracting* reaffirmed the importance of the control test in characterising employment contracts.¹⁰⁰ The control test hails from 19th century ‘master and servant’ law and determines employment status by reference to the nature and extent of an employer’s control over a worker.¹⁰¹ Since the High Court’s decision in *Brodrigg*, the test had been relegated to being merely one of a number of multiple indicia used to determine the existence of employment, although one which bore considerable weight in later cases, including *Hollis v Vabu Pty Ltd*.¹⁰² The majority in *Personnel Contracting* emphasised the significance of the control test;¹⁰³ however, they looked no further than the written terms of the contract to determine an employer’s ‘right to control’.¹⁰⁴ The majority roundly condemned the approach of looking to the ‘totality’ of the relationship itself (as opposed to the written contract) in assessing an employment relationship.¹⁰⁵ This means that workers’ evidence of the way in which the relationship was performed is ignored in the face of a written contract including terms that set up an independent contracting arrangement.

Applying the control test to the contract alone is a curious and arguably contradictory judicial practice. Control acknowledges and condones an obvious disparity in power between the parties, yet restricting its application to the contract holds fast to the ideology of equality between them. Such doctrine resembles what Unger has described as cynical and convenient judicial practice that lies at the heart of his notion of retro-formalism.¹⁰⁶ In effect, it means that a written clause permitting delegation of work will prevail over the reality that delegation was never a genuine option for workers who needed to keep the work themselves. This point was clearly made in the minority judgment of Gageler and Gleeson JJ, citing Allsop CJ in the matter below. Quoting Allsop CJ, they said

the [totality approach] is likely to be distorted, not advanced, by an overly weighted importance being given to emphatic language crafted by lawyers in the interests of the dominant contracting party. The distortion will likely see formal legalism of the chosen language of such party supplant a practical and intuitively sound assessment of the whole of a relationship by reference to the elements of the informing conceptions.¹⁰⁷

¹⁰⁰ *Personnel Contracting* (n 1) 423–4 [73]–[78] (Kiefel CJ, Keane and Edelman JJ), 433 [115], 444 [157] (Gageler and Gleeson JJ), 456 [193] (Gordon J).

¹⁰¹ *Queensland Stations Pty Ltd v Commissioner of Taxation (Cth)* (1945) 70 CLR 539, 551; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404; *Brodrigg* (n 29).

¹⁰² Owens, Riley and Murray (n 64) 155–65.

¹⁰³ See, eg, *Personnel Contracting* (n 1) 447–8 [172]–[174] (Gordon J).

¹⁰⁴ Ibid 423–4 [73]–[78] (Kiefel CJ, Keane and Edelman JJ).

¹⁰⁵ Ibid 417–18 [50], 427 [88] (Kiefel CJ, Keane and Edelman JJ) 451 [181] (Gordon J), 458 [203] (Steward J).

¹⁰⁶ Unger (n 51) 37–40.

¹⁰⁷ *Personnel Contracting* (n 1) 437 [131], quoting *CFMMEU* (n 25) 639–40 [21].

B *The Primacy of Commercial Contract Law*

The second concern raised by these cases is the assertion that employment contracts should be construed and interpreted according to the principles of commercial contract law. That is, these decisions narrow the means by which precariously employed workers can challenge the terms of a written contract of engagement, for instance, on the basis that there has been a ‘contractual variation’, as suggested by the majority in *Personnel Contracting*. The requirement that orthodox principles of commercial contract law must be met before establishing there has been any variation means that workers’ grievances about how they have been required to perform their contracts will need to engage with complex contract law and equitable arguments. As Unger explains, orthodox contract law will always read the intention of the parties (committed to contract) to justify reliance on the bargain. The reality of its performance, meanwhile, will be treated as an irrelevance.¹⁰⁸

Accordingly, after the orthodox formalist approach adopted by the plurality in *Personnel Contracting*, discharge of a written contract by oral agreement is not an easy matter to establish, where the argument is based on conduct alone and there is no proof of new express terms. Likewise, it is difficult to establish that a hirer should be estopped from relying on the express terms of a contract because of a sufficiently certain representation that the worker has relied upon to their detriment, or because of a mutually agreed course of conduct, when something more than a course of subsequent conduct must be proved to establish such a claim.¹⁰⁹

Although the majority conceded that the conduct of the parties may be called in evidence of any argument that the contract has been varied, or the hirer should be estopped from relying on written terms, it is unlikely in the extreme that any such argument would prove useful for precarious workers. These doctrines, all developed in commercial law, present difficult challenges for any precarious worker seeking to make such an argument. With a few notable exceptions (such as the case of *Quinn v Jack Chia (Australia) Ltd*¹¹⁰ involving a very senior manager) it has been difficult to argue a contractual variation, in the face of a detailed written contract, particularly without evidence of a long passage of time, and significant changes to the employee’s duties since the initiation of the original contract. No such argument was made in either *Personnel Contracting* or *Jamsek*.

The difficulty in arguing variation of a contract is well illustrated by *Rossato*, a case concerning whether an employee was a casual employee, or a permanent employee entitled to paid leave entitlements. The employee in that case, Mr Rossato,

¹⁰⁸ Unger (n 51) 148.

¹⁰⁹ For authorities on estoppel by convention, see *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244; *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 8. See *Leggett v Hawkesbury Race Club [No 3]* (2021) 317 IR 1 (Federal Court), [158] (Rares J) for a recent application of this doctrine in an employment context. See also Derham (n 16); Joellen Riley, ‘Estoppel in the Employment Context: A Solution to Standard Form Unfairness?’ [2007] *University of New South Wales Faculty of Law Research Series* 49.

¹¹⁰ *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567.

was hired by WorkPac for placement with host employers in the mining industry.¹¹¹ As a labour hire employee, he was able to be paid a rate different from (and almost certainly lower than) the rates of pay that the host employer's directly hired employees were entitled to receive. One of the benefits host employers seek in using labour hire firms to supply staff is that they can avoid paying the rates that have been negotiated by unions for directly employed staff. This is a consequence of the *Fair Work Act*'s requirements that (with very limited exceptions) collective bargaining must take place at the single enterprise level.¹¹² WorkPac initiated this litigation following its defeat in a case involving another of its casual employees. In *WorkPac Pty Ltd v Skene*,¹¹³ a full Bench of the Federal Court affirmed an earlier decision that one of WorkPac's employees who had been engaged as a casual, was in fact a permanent member of staff, entitled to paid leave entitlements. By pursuing the *Rossato* matter, WorkPac sought to test whether the labour hire industry's widespread practice of hiring workers as casuals to place on long-term assignments with host employers was a legitimate means of avoiding the costs associated with permanent employment.

The *Rossato* case provides a clear illustration of the way in which contractual formalism is at odds with the reality of worker engagement, particularly in the labour hire industry. The contract arrangements set up by WorkPac were complex, and were designed to characterise its staff as casuals engaged on a series of separate contracts, none of which promised continuing work. Mr Rossato initially applied for work with WorkPac through an online portal, and then attended WorkPac's offices to sign a single-page document entitled 'Casual or Maximum Term Employee Terms & Conditions of Employment — Employee Declaration'.¹¹⁴ These were subsequently referred to as the General Conditions. They described Mr Rossato as a casual employee who would be employed on an 'assignment by assignment' basis, and stated that his contract could be terminated on one hour's notice. Subsequently, WorkPac placed Mr Rossato with its mining industry clients, and he was provided with fresh contract documentation for each assignment, each contract adopting the General Conditions. So, viewed through the prism of strict commercial contract law, Mr Rossato was engaged on a series of discrete contracts, and none of these contracts offered him any guarantee of continuing work. This is why the High Court found that he was a casual employee, with no commitment to ongoing employment.

Viewed through Mr Rossato's eyes, however, he was a regular employee who was committed to full-time hours in continuing employment, by virtue of his inclusion on the mining client's rosters, made up 12 months in advance by the host employer.¹¹⁵ Moving from one contract assignment to another made little practical difference to Mr Rossato's work routine. The Federal Court paid regard to the practical reality of his working arrangements, and found that the existence of the long-term rosters indicated that Rossato had a reasonable expectation of continuing

¹¹¹ *Rossato* (n 3) 462–3 [2].

¹¹² *Fair Work Act* (n 18) s 172.

¹¹³ *WorkPac Pty Ltd v Skene* (n 89). For an earlier and similar finding, under equivalent provisions in the *Workplace Relations Act 1996* (Cth), see *Williams v MacMahon Mining Services Pty Ltd* (2010) 201 IR 123 (Federal Court).

¹¹⁴ *Rossato* (n 3) 465 [12].

¹¹⁵ *Ibid* 478 [62].

work, according to a regular pattern of work. This satisfied the definition of permanent employment.¹¹⁶ The High Court overturned this finding, and held that the General Conditions in Mr Rossato's initial engagement contract with the labour hire agency left no room for the host employer's roster to determine his status.¹¹⁷ Those General Conditions providing that his engagement was on 'an assignment by assignment' basis meant that he was under no legal compulsion to accept shifts according to the host employer's roster.¹¹⁸

One of the clauses in the General Conditions appeared to support a finding that Mr Rossato was in fact obliged to complete his assignments, and was not at liberty to quit on an hour's notice. This clause required him to 'complete an assignment' or else bear the risk of paying any of WorkPac's costs for his failure to do so.¹¹⁹ In the Federal Court, White J found that this clause meant that it was 'implausible' that Mr Rossato had no contractual obligation to attend for his rostered shifts.¹²⁰ The High Court said that White J erred in this conclusion.¹²¹ They held that the obligation to complete assignments must be read down in the light of the clause in the General Conditions allowing the parties to terminate the contract with one hour's notice.¹²² In that case, the obligation to compensate WorkPac for leaving an assignment must be limited to compensation for the inconvenience of removing Rossato from the worksite, or the costs incurred as a result of his failure to provide an hour's notice.¹²³

If the regular replacement of his assignment contracts, and the rostering arrangements settling his working hours a year in advance, could be given no weight in interpreting Mr Rossato's contractual obligations to show up for his assignments, even in the light of an apparent penalty for non-attendance, one wonders how it would ever be possible to demonstrate that subsequent conduct has effected a variation to the initial contract terms. If the creation of a documented 12-months roster did not create a variation in the contract term describing the arrangement as temporary, one wonders what kind of subsequent conduct would ever be deemed sufficient to support an argument for variation of a contract. It would appear that nothing short of new written terms, forswearing the application of the original contract terms, would be sufficient, given the High Court's assertion that it is only legal rights and duties, and not mere 'reasonable expectations', that create a contract.¹²⁴ What is clear from *Rossato* is that a hirer can easily acquire the services of a long-term employee on discounted rates by adopting a practice of offering a series of separate contracts.

The application of commercial contract principles also means that it will be extremely difficult, if not impossible, for a worker to establish that a term should be

¹¹⁶ *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179, 188 [10]–[12], 245 [292].

¹¹⁷ *Rossato* (n 3) 487–8 [96].

¹¹⁸ *Ibid* 485 [88].

¹¹⁹ *Ibid* 486–7 [91]–[92].

¹²⁰ *Ibid* 486 [91].

¹²¹ *Ibid*.

¹²² *Ibid* 486 [92].

¹²³ *Ibid*.

¹²⁴ *Ibid* 487–8 [96].

implied in fact or by law into a contract of engagement, to give contractual effect to any reasonable expectations that have evolved between the parties during the course of their relationship. The *BP Refinery* test¹²⁵ applied consistently in cases of written employment contracts provides very little room to assert that an expectation of continuing work is necessary to give a contract ‘business efficacy’, given the propensity for hirers (or their lawyers) to draft extensive written contracts. Inclusion of a term that the contract provides casual engagement and can be terminated upon short notice leaves no room for the implication in fact of any term reflecting a practice of continuous engagement, bearing in mind that terms implied in fact can never contradict an express term.

Likewise, the High Court has left little room for the development of any new term implied by law that employers must honour any reasonable expectations of continuity of employment engendered by their practices in continually renewing casual contracts. In *Commonwealth Bank of Australia v Barker*,¹²⁶ the High Court held that Australian employment law did not accept the existence of any implied term of ‘mutual trust and confidence’ in employment contracts.¹²⁷ This English invention was held to be too ‘indeterminate’ for Australian law. Any new term implied by law needed to meet the test of necessity in commercial law, meaning that the contract must be rendered ‘nugatory’ without it.¹²⁸

The majority decision in *Personnel Contracting* is a formalist common law response to the lack of any statutory definition permitting recourse to the practical reality of the parties’ relationship in distinguishing employees from contractors. In terms of Unger’s theory, it results from a legislative failure to sufficiently define the coverage of the specialist labour law system to prevent the escape of hirers who wish to avoid its application. By relying on the common law definition of employment for coverage, the *Fair Work Act* allows hirers some discretion to choose instead to be governed by the common law of contract, that largely benefits the hirers of labour at the expense of precarious workers.

C The Influence on the Decisions of the Fair Work Commission

The third concern raised by these cases is that the High Court’s strident assertion of the primacy of contract in employment law will further erode the power and jurisdiction of the specialist labour law system, thereby expanding what Unger has described as its inherent problem — the ability of employers to evade its jurisdiction by asserting their managerial prerogative to contract out of it.¹²⁹ The Fair Work Commission maintains statutory authority to determine matters within its jurisdiction according to ‘equity, good conscience and the merits of the matter’.¹³⁰ In performing its functions, the Commission is expressly authorised to avoid

¹²⁵ From *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (Privy Council).

¹²⁶ *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 (‘Barker’).

¹²⁷ *Ibid* 195 [41]. For an explanation of this implied obligation in the law of employment in the United Kingdom, see Douglas Brodie, ‘Fair Dealing and the World of Work’ (2014) 43(1) *Industrial Law Journal* 29.

¹²⁸ *Barker* (n 126) 189 [29].

¹²⁹ Unger (n 51) 158–60.

¹³⁰ *Fair Work Act* (n 18) s 578(b).

‘unnecessary technicalities’.¹³¹ Unfortunately, the confluence of a statutory reliance on the common law definition of employment in the Act, and the High Court majority’s recent assertion that only the written contract can determine the existence or otherwise of an employment relationship, means that the Fair Work Commission’s opportunities to determine matters according to these principles has been restricted. In a string of cases since the High Court’s decision in *Personnel Contracting*, members of the Fair Work Commission have noted the High Court decisions and their influence in restricting the Commission’s jurisdiction.¹³² Deference to the terms of an employer’s contract documentation has left little room for the Commission (which is an administrative body and not a court) to honour its statutory obligation to ensure a ‘fair go all round’ in employment disputes.¹³³ This is the third and final way in which the High Court’s retro-formalist decision in *Personnel Contracting* reasserts the primacy of an employer’s private bargain or contract over a statutory scheme of labour law.

The majority’s assertion of the ideology of ‘freedom of contract’ has overridden a useful common law tool, applying a checklist of factors to assist Commissioners in performing their statutory role in maintaining the boundary between their own jurisdiction over employment relationships, and the independent contracting arrangements outside of their purview. The tribunal’s own checklist in *Abdalla v Viewdaze Pty Ltd*¹³⁴ (derived from earlier High Court authority in *Brodribb* and *Hollis*) provided a convenient template for tribunal members (some of whom are not trained commercial lawyers) to use to draw a practical distinction between those workers within the contemplation of the industrial statute’s protections, and those outside of it. They used this to assess the totality of the relationship, informed largely by the parties’ contract, but also by the way the parties performed their obligations. As has often been noted, the boundary between employment and contracting is not always easy to discern.¹³⁵ Despite criticism, the multi-indicia checklist provided a useful guide for commissioners charged with a duty to make difficult decisions. In a somewhat high-handed manner, the High Court majority poured scorn on this useful checklist, as a ‘mechanistic counting of ticks

¹³¹ Ibid s 577(b).

¹³² See, eg, *Franco* (n 22); *Gu v Geraldton Fishermen’s Co-operative Pty Ltd* (2022) 320 IR 109 (Fair Work Commission); *Alouani-Roby v National Rugby League Ltd* [2021] FWC 6282 (*‘Alouani-Roby’*), affd (2022) 318 IR 389 (Fair Work Commission Full Bench).

¹³³ A similar finding was reached by the Federal Court in *Pruessner v Caelli Constructions Pty Ltd* [2022] FedCFamC2G 206. The concept of the ‘fair go all round’ derives from *Re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95, and is still referred to in *Fair Work Act* (n 18) s 381(2).

¹³⁴ *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 (Australian Industrial Relations Commission), 229–31.

¹³⁵ The literature critiquing the tests for employment is extensive. For a small sample of some of the more recent scholarship, see Orsola Razzolini, ‘The Need to Go beyond the Contract: “Economic” and “Bureaucratic” Dependence in Personal Work Relations’ (2010) 31(2) *Comparative Labor Law and Policy Journal* 267; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011); Riley (n 77) 321; Pauline Bomball, ‘Intention, Pretence and the Contract of Employment’ (2019) 35(3) *Journal of Contract Law* 243; Pauline Bomball, ‘The “Entrepreneurship Approach” to Determining Employment Status: A Normative and Practical Critique’ (2021) 44(4) *UNSW Law Journal* 1336; Bomball, ‘Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work’ (n 77).

on a multifactorial checklist'.¹³⁶ In its place, the Court deposited the new formalist 'rights and duties' approach which it said would ensure 'cogency and coherence'.¹³⁷ With respect, this is an ambitious claim, given the history of difficulty in this field.¹³⁸ By contrast, courts across most of the liberal democratic world have accepted that the cost of fairness in appraising the employer/contractor distinction is a logical, albeit nuanced and difficult multifactorial test.¹³⁹

The High Court majority did acknowledge that the multiple indicia from *Brodrigg* and *Hollis* can be useful in assessing the terms of a written contract. Although they roundly criticised the 'mechanistic checklist' approach, they did apply the various indicia (including control, ownership of vehicles, and permission to delegate work) when analysing the contract in *Jamsek*. The plurality said:

The foregoing should not be taken to suggest that it is not appropriate, in the characterisation of a relationship as one of employment or of principal and independent contractor, to consider the 'totality of the relationship between the parties' by reference to the various indicia of employment that have been identified in the authorities.¹⁴⁰

This somewhat confusing statement appears to suggest that the 'various indicia' are relevant to determining the answer to the two key questions: whether the worker serves in the business of the hirer, and whether the worker was subject to the control of the hirer.¹⁴¹ The significant difference between the High Court's approach and that adopted by the Commission prior to *Personnel Contracting*, is that the Commission cannot apply these indicia to the performance of the employment relationship but only to the terms of a written contract, and nor should they weigh conflicting factors against each other.

It is unfortunate that the High Court majority has directed Fair Work Commissioners away from their former practice, and has instead instructed them to apply commercial contract law principles to determine the character of the contract, rather than the true nature of the relationship.

We have already seen a Deputy President of the Fair Work Commission defer to the terms of the employer's contract when deciding whether a football coach, who had been employed continuously from January 2015 to November 2020, was

¹³⁶ *Personnel Contracting* (n 1) 414–15 [39] (Kiefel CJ, Keane and Edelman JJ).

¹³⁷ *Ibid.*

¹³⁸ See KW Wedderburn and J Clark, 'Modern Law: Problems, Functions and Policies' in KW Wedderburn, R Lewis and J Clark (eds), *Labour and Industrial Relations* (Clarendon Press, 1983); Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1; Adrian Brooks, 'Myth and Muddle: An Examination of Contracts for the Performance of Work' (1988) 11(2) *UNSW Law Journal* 48; Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (1990) 10(3) *Oxford Journal of Legal Studies* 353; Stewart (n 12); Mark Freedland, *The Personal Work Contract* (Oxford University Press, 2003); Guy Davidov and Brian Langille, *Boundaries and Frontiers of Labour Law* (Hart, 2006); Mark Freedland 'From the Contract of Employment to the Personal Work Nexus' (2006) 35 *Industrial Law Journal* 1, and the more recent scholarship noted above (n 135).

¹³⁹ Paul Benjamin, 'Who Needs Labour Law? Defining the Scope of Labour Protection' in Conaghan, Fischl and Klare (n 50) 75–93, 76.

¹⁴⁰ *Personnel Contracting* (n 1) 421 [62] (Kiefel CJ, Keane and Edelman JJ), citing *Brodrigg* (n 29) 29 and *Hollis* (n 86) 33 [24], 37 [33].

¹⁴¹ *Personnel Contracting* (n 1) 422 [68], 423 [73].

nevertheless employed on a one-year fixed-term contract at the time his employment was terminated.¹⁴² Cross DP cited the *Rossato* decision for the proposition that the character of the legal relationship between parties is to be ‘determined only by reference to the legal rights and obligations which constitute that relationship’, and these obligations must be determined by reference to the written contract between the parties.¹⁴³

This finding was made notwithstanding the express permission granted by s 386(3) of the *Fair Work Act* to ignore a contractual term stipulating a fixed term of employment

if a substantial purpose of the employment of a person under a contract of that kind is, or was at the time of the person’s employment, to avoid the employer’s obligations under this Part.

In earlier decisions of the federal industrial tribunal, employers who have engaged employees on a rolling series of fixed-term contracts have often been found to be subject to the provisions guarding against unfair and unlawful dismissals, because the focus of the enquiry was on the duration of the whole employment relationship, and not merely on the most recent contract document.¹⁴⁴ A focus on the relationship rather than the contract is justified by the wording of s 386(1) of the *Fair Work Act*, which refers to a person’s ‘employment’ being terminated at the employer’s initiative, not the ‘contract’ being terminated. Australian law has consistently distinguished between the concept of the employment relationship, and the employment contract.¹⁴⁵ This is an important distinction. It recognises that the ‘employment relationship’ describes the phenomena, and the ‘employment contract’ describes only one form of regulation that is applied to determine the rights and duties of parties to the employment relationship. The High Court — including the majority in *Personnel Contracting* — recognised this. In *Personnel Contracting*, the plurality stated:

An employment relationship will not always be defined exclusively by a contract between the parties. Historically, the employment relationship was recognised and regulated by the law before the law of contract came to govern the relationship. An employment relationship, though principally based in contract, may be affected by statutory provisions and by awards made under statutes. It may also be that aspects of the way in which a relationship plays out ‘on the ground’ are relevant for specific statutory purposes. So for example, a statute may operate upon an expectation generated in one party by the conduct of another, even though that expectation does not give rise to a binding agreement.¹⁴⁶

¹⁴² *Alouani-Roby* (n 132).

¹⁴³ *Ibid* [50].

¹⁴⁴ *D’Lima* (n 20). In *NSW Trains v James* (2022) 316 IR 1, a majority of a full Bench of the Fair Work Commission has stated that s 386(1) contemplates both termination of the employment relationship, and termination of the employment contract: at [46].

¹⁴⁵ See *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312; *Visscher v Giudice* (2009) 239 CLR 361; *Personnel Contracting* (n 1) 432 [111] (Gageler and Gleeson JJ).

¹⁴⁶ *Personnel Contracting* (n 1) 415 [41] (citations omitted). They cite as an example *Fair Work Act* (n 18) s 65(2)(b)(ii), dealing with the rights of casuals who have a ‘reasonable expectation of continuing employment’ to make requests for flexible working arrangements.

It is important to ensure that members of the Commission are reminded of this when called upon to exercise their powers in matters where they do have authority to look beyond the contractual stratagems of hirers. The very purpose of statutory regulation of labour law is to ameliorate the risks inherent in allowing the law of the commercial jungle to prevail in employment law, especially when the worker is the kind of worker intended to be protected by the legislation. The *Fair Work Act* provides a ‘high income threshold’ — presently set at a salary level of \$162,000 per annum — for applicants for unfair dismissal protection who are not covered by awards or enterprise agreements.¹⁴⁷ Likewise, a person on a salary above that threshold can agree to forego the benefits of a modern award.¹⁴⁸ The *Fair Work Act* reserves the majority of its protections for low to middle income earners who are rarely in a position to assert their own ‘freedom to contract’ or ‘freedom of contract’. They must accept employment, and they are rarely invited to negotiate the terms of their contracts. Where the Fair Work Commission has been given powers that override the employer’s prerogative to dictate terms, it is important that members of the Commission are not overawed by imperious statements from the High Court asserting the primacy of contract.

V Outcomes

The outcome in *Personnel Contracting* was a 6:1 finding that a labour hire worker, classified as an independent contractor by a labour hire firm and paid below award rates, was in fact an employee of the firm. Even from a formalist perspective, such a finding might have been ineluctable, given that the worker was an unskilled 22-year-old backpacker performing day-labour on construction sites without his own tools.¹⁴⁹ Accordingly, it is the reasoning, rather than the finding in this case, that presents problems for other precariously employed workers. Indeed, the application of this reasoning premised upon the logic of freedom of contract, has already begun to cause problems for precarious workers who have arguably been misclassified as ‘contractors’ and ‘casuals’ in cases such as *Jamsek* and *Rossato*. The outcome in *Rossato* has been discussed above. *Jamsek* concerned two truck drivers who worked exclusively for the same firm from 1977 to 2017. They were hired as employees but reclassified as contractors in 1986, when they were required to purchase their trucks from their employer. They were encouraged to establish partnerships with their wives, and to contract for work through these partnerships. A full Bench of the Federal Court applied a realist approach, declaring that the obvious inequality in bargaining power between the workers and the employer was a form of coercion that vitiated the possibility of the workers’ free and equal consent to the ‘contractor’ arrangement in 1986.¹⁵⁰ However, this decision was reversed by the High Court. In this case, all members of the Court focused on the terms of the new contract between

¹⁴⁷ *Fair Work Act* (n 18) s 382(b)(iii). See also *Fair Work Regulations 2009* (Cth) reg 3.05 for calculations of the high-income threshold.

¹⁴⁸ *Fair Work Act* (n 18) s 47(2).

¹⁴⁹ This view was expressed by a full Bench of the Federal Court at second instance, where Lee J commented that the worker’s classification as a contractor, pursuant to existing authority regarding labour hire arrangements, was ‘somewhat less than intuitively sound’: *CFMMEU* (n 25) 682 [185] (Lee J, Allsop CJ agreeing at 641–2 [26]–[28], Jagot J agreeing at 644 [41]).

¹⁵⁰ *Jamsek* (n 2) 614 [50].

the employer and the partnerships, and ignored the underlying reality of these arrangements that had been engineered by the employer. Applying this retro-formalist lens, ignoring entirely the inequality of bargaining power between the parties, they found that the contracts were independent contracts. The fact that the contracting party was a partnership with a spouse (even though there was no evidence that the workers' wives were ever actually involved in the businesses), and that the workers (through their partnerships) now provided the use of significant capital equipment (the trucks) in addition to their own labour, was sufficient to legitimise the characterisation of this arrangement as an independent contract. The employer was thereby relieved of any obligation to meet claims for accrued annual and long service leave entitlements. It remains to be determined whether the employer must pay superannuation guarantee contributions for these workers, because s 12 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) relies on a wider definition of worker to determine coverage. The matter has been remitted to the Federal Court to determine this matter. The superannuation regime, involving a matter of considerable importance to the revenue authorities, has been deliberately drafted to ensure that employers cannot escape obligations to contribute to the support of retirement incomes by clever contracting stratagems. This begs the question of why our Fair Work laws should continue to be confined to covering 'employees' according to the common law definition.

The High Court itself has alluded to the need for Parliament to determine these issues, if any solution is required.¹⁵¹ The Court appears to have set its face against development of the common law to resolve questions concerning the 'fairness' of relationships involving the engagement of workers. While ever employment contract law is constrained to conform with general commercial contract law, a statutory solution is, perhaps, the only answer.

Any system of regulation that permits parties to make their own contracts to determine their respective rights will always favour the more powerful party to the relationship, especially where the principles of contract construction and interpretation favour the terms set out in a written document. In these days of word processing and cloud sharing, it is an easy matter for an employer to download a standard form document for issue to a new employee. Whether this document truly reflects the genuine understandings between the parties as to the terms upon which they agree to engage with each other is a matter of conjecture. But while the parties are not permitted to bring evidence of how their agreement was actually performed, it will be almost impossible to determine whether the written document reflected their 'real' agreement. The High Court plurality in *Jamsek* alluded somewhat scornfully to the notion of the 'reality' of the parties' agreement.¹⁵² It is not, however, a concept unknown to contract theorists.

In *Regulating Contracts* Professor Hugh Collins identified three 'rationalities' which form the basis of any contractual relationship:¹⁵³ the business relation, the business deal, and the contract (meaning the written documentation of

¹⁵¹ *Barker* (n 126) 195 [40] (French CJ, Bell and Keane JJ).

¹⁵² *Jamsek* (n 2) 617 [62] (Kiefel CJ, Keane and Edelman JJ).

¹⁵³ Collins, *Regulating Contracts* (n 50) 173.

the agreement). The ‘business relation’ refers to the context and reality of the parties’ interdependent relationship, and the ‘business deal’ is the bargain they have made. The contract is a document used to commit the terms of the deal to writing. While the relationship flourishes, the parties make little reference to this document, and indeed, over time, the terms of their relationship may evolve to accommodate changing circumstances, often without anyone revising the written documentation of their bargain. It is only when the parties come into conflict that the document is consulted. Warning against solutions framed by contractual orthodoxy such as those described by Unger, Collins advised that courts ought not to be ‘mesmerised by the words of the planning documents’. Like Unger, Collins has implored courts to address reality, specifying that contracts must be read in light of the business relation or the business deal.¹⁵⁴ To privilege the terms of the written documentation over evidence of the true bargain defeats the functional purpose of contract law, which is to support the mutual expectations of parties to voluntary agreements. In the context of evolving relational contracts, such as employment, there is good reason to view the contract documentation with suspicion, especially in the light of evidence as to how the business relation was conducted.

For a time, decisions made at the Federal Court level were taking this approach, inspired by the UK Supreme Court decision in *Autoclenz*.¹⁵⁵ As noted above, *Autoclenz* concerned the engagement of car detailers. The terms of their contracts were deliberately amended by the hirer to include a clause allowing them to present substitutes to perform their duties.¹⁵⁶ This clause was clearly a subterfuge to make the workers look more like independent contractors. Perhaps influenced by the work of Collins, the UK Supreme Court applied an approach that appraised the reality of the employment relationship. The Court looked past the written clauses, and assessed the totality of the working arrangements to find that the written contract did not represent the true agreement between the parties. The workers were found to be employees.¹⁵⁷ The majority in *Personnel Contracting* rejected this approach, and said that it could not ‘stand with the statements of the law in [Australian authority]’.¹⁵⁸ In the UK, at least in the field of employment law, the courts appear to have treated the common law as ‘a living system of law, reacting to new events and new ideas, and so capable of providing ... a system of practical justice, relevant to the times in which [citizens] live’.¹⁵⁹ Unfortunately, the highest court in Australia considers that such an approach risks descent into ‘obscurantism’.¹⁶⁰ Our courts require proof of hard-edged ‘rights and duties’. Since employers are unlikely to afford those rights and duties voluntarily by contract if they can avoid it, it falls to Parliament to ensure that statutory labour laws remain fit for purpose in an evolving world of work.

¹⁵⁴ Ibid.

¹⁵⁵ *Autoclenz* (n 40).

¹⁵⁶ Ibid 750 [6].

¹⁵⁷ Ibid 759 [38]–[39].

¹⁵⁸ *Personnel Contracting* (n 1) 421 [60], referring to *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407 and *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597.

¹⁵⁹ *Kleinwort Benson Ltd v Lincoln City Council* [1998] 2 AC 349, 377 (Lord Goff of Chieveley).

¹⁶⁰ *Jamsek* (n 2) 617 [62]; *Rossato* (n 3) 479 [63], 489 [99].

VI Legislative Solutions

If the protections of labour law statutes are to be reliably enjoyed by the most precarious of workers, it will be necessary to find a statutory solution, and at the time of writing in early 2023, the Albanese ALP Government indicated a willingness to consider such reform. There are many options. The most modest would be to provide an extended definition of employment in the *Fair Work Act* that permitted decision-makers to adopt the approach preferred by Gageler and Gleeson JJ in *Personnel Contracting*.¹⁶¹ A statutory enactment of a version of the multiple indicia test, along with permission for decision-makers to look past the cloud of words in a written contract to the ‘lived experience’ of the working relationship, would go some way to ensuring that precarious workers who are in fact subjugated to the control of a hirer could benefit from protections, notwithstanding the words in a written contract. More radical proposals include the creation of additional categories of workers who are deemed to be included in certain protections, much in the same way as workers compensation laws presently capture categories of ‘deemed’ and ‘presumed’ employees, to ensure that the kinds of vulnerable workers contemplated by these schemes do not fall outside of the net by virtue of clever contracting strategies.¹⁶²

An even more adventurous approach is that proposed by a group of scholars in *Beyond Employment*,¹⁶³ that certain fundamental protections (such as minimum wages, protection against capricious dismissal, rights to collective bargaining, and access to affordable dispute resolution) should be available to all workers, regardless of their classification under contract laws.¹⁶⁴ It is not our purpose here to assess each of these proposals, only to state that it is high time that Parliaments gave serious consideration to quarantining statutory labour laws from erosion caused by reliance on common law doctrines to determine coverage.¹⁶⁵

VII Conclusion

As critical and relational contract law scholars have shown, employment relationships are complex and often develop over time. ‘Reality’ or the ‘business relation’ and even the ‘business deal’ at any given time is not easily captured in the initial contract documentation provided by a hirer. To ignore the reality of the relationship and instead adjudicate the character of the working relationship only on

¹⁶¹ *Personnel Contracting* (n 1) 434–5 [120].

¹⁶² See, eg, *Workers Compensation Act 1951* (ACT) ss 8–15; *Workers Compensation Act 1998* (NSW) s 5, sch 1; *Return to Work Act 1986* (NT) ss 3B(1)–(19); *Workers Compensation and Rehabilitation Act 2003* (Qld) s 11(2), sch 2; *Return to Work Act 2014* (SA) s 4, sch 1; *Workers Rehabilitation and Compensation Act 1988* (Tas) ss 3–4E; *Workers Compensation Act 1958* (Vic) s 3. See also Stewart and McCrystal (n 23) 21–2.

¹⁶³ Johnstone et al (n 44). For other discussions of proposals, see Stewart and Stanford (n 23) 420–37.

¹⁶⁴ See also Michael Rawling and Joellen Riley Muntton, ‘Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry’ (Final Report, Transport Education Audit Compliance Health Organisation, January 2021).

¹⁶⁵ For a more detailed discussion of potential legislative solutions, see Michael Rawling and Joellen Riley Muntton, ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New Form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *UNSW Law Journal* 7.

the basis of one party's written and often 'standard form' documentation, is to weight an important adjudicative process in favour of that party. The characterisation of working relationships is a matter for the law (as the High Court acknowledged in its rejection of mere labels). Much hangs upon this characterisation, because many labour law protections apply only to employees (and those deemed to be such). This article has argued that the approach now adopted by the High Court majority to the employee/contractor distinction permits hirers to evade protective labour law statutes. The majority's approach allows this because of three features of the majority reasoning in *Personnel Contracting*, namely (i) the employer's contract documentation is privileged above the parties' evidence of the performance of the employment relationship (the 'rights and duties rule'); (ii) the restrictive principles of orthodox commercial contract law must be applied in the interpretation of these rights and duties, and will limit the scope for any argument that initial contracts have been varied; and finally (iii) the robust assertion that the parties' own contract document prevails is likely to influence the federal industrial tribunal when exercising its statutory powers.

As palpably unfair as it may seem, stacking the deck against one party in legal proceedings is not out of place in the realm of retro-formalist legal decision-making. As Unger has theorised, the defining features of retro-formalism involve jettisoning evidence of reality and experience in favour of abstract written contracts, in the interests of an alleged 'freedom of contract', even though courts now explicitly acknowledge that the 19th century assumptions of party equality and autonomy which justified this doctrine do not reflect contemporary experience. The High Court majority did not dispute that there was inequality of bargaining power in the *Jamsek* case. They simply asserted that it was none of their business to take it into account when determining the contractual rights and duties of the parties.¹⁶⁶ This approach to defining employment epitomises a *neo-liberal* approach. Given the significance that the definition of 'employment' has to the lowest paid workers, and the Court's refusal to allow development of the common law, legislative intervention is necessary. At the least, the *Fair Work Act* requires a statutory definition which permits adjudicators to consider and assess evidence of the reality of the relationship in determining the appropriate classification of the relationship. Given the inherent inequality of bargaining power between hirers and the most precarious workers, further and more radical reform may be necessary to ensure that the most vulnerable workers cannot be cast into an unregulated jungle by a deliberate decision to define them as independent contractors, notwithstanding the economic reality of their subjugation to a hirer's business interests. Reform measures that ensure the provision of minimum standards to all vulnerable workers, regardless of contractual status, would go some way to removing the incentives for hirers to concoct exploitative contractual arrangements with workers.

¹⁶⁶ *Jamsek* (n 2) 617 [62] (Kiefel CJ, Keane and Edelman JJ).

Responding to Ecological Uncertainty in the Context of Climate Change: Thirty Years of the Precautionary Principle in Australia

Laura Schuijers*

Abstract

The precautionary principle is one of the central principles to have emerged from the 1992 international Earth Summit and subsequently to have been integrated into Australian law. It is a principle that responds to the uncertainty attending serious environmental threats by justifying measures to prevent threat materialisation. This article explores the contemporary relevance of the precautionary principle three decades on, at a time when Australia's ecology and biological diversity is subject to multiple compounding and cumulative threats, including the serious and irreversible consequences of climate change. Following the decisions in three recent cases — *Leadbeater's*, *Masked Owl* and *Tree Geebung* — I make three contentions in relation to the principle. First, if particular 'conditions precedent' to the application of the principle are met, then the principle must be applied; the need to apply and act on the principle cannot be trumped by other considerations. Second, application is capable of demonstration. Third, precautionary approaches can and should take into account the state of the environment. These contentions underscore the precautionary principle's importance in the context of activity that threatens to exacerbate the baseline threat of climate change to the species and places that form part of Australia's complex ecological systems.

Please cite this article as: Laura Schuijers, 'Responding to Ecological Uncertainty in the Context of Climate Change: Thirty Years of the Precautionary Principle in Australia' (2023) 45(2) *Sydney Law Review* 249.



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I Introduction

The precautionary principle is a legal and policy principle that guides managers and decision-makers in responding to uncertainty. Articulated in various ways depending on the statute or instrument in which it is found, the essence of the principle is that where there is scientific uncertainty about a particular fact — such as the nature, likelihood or magnitude of a serious or irreversible environmental threat — this lack of certainty should not be a reason to postpone or fail to implement measures that could prevent environmental degradation (or in other words prevent the materialisation of the threat).

The principle is found in international instruments and in the domestic laws of foreign countries. It has an important place in Australian environmental law too, as this article will explore. The principle is non-prescriptive in that applying it does not dictate a particular outcome or require any specific measure to be taken. However, a given situational context will inform a spectrum of appropriate measures and, in some situations, that spectrum could be rather narrow. The precautionary principle has been conceptualised as, in effect, shifting the evidentiary burden of proof from the one asserting a threat to the one denying it.¹ In my view, it might be better conceived slightly differently as lowering the standard of proof for the party asserting potential harm. As I will explain, there must be an identifiable threat of a serious or irreversible nature to enliven the principle, and there must also be uncertainty. Since the threat need not be established as a certain fact, the standard of proof is necessarily lower than it would be were scientific certainty required. But the party denying the risk is not realistically in a position to then prove that no — or only a negligible — risk of harm exists. It would be difficult to prove this, when uncertainty is essential for the principle's enlivenment. Accordingly, I will argue that we can understand the required response to the precautionary principle as follows: once the principle is enlivened, it must be applied to the situation at hand, and a precautionary approach taken. What needs to be proved if there is a challenge is that either the principle was not enlivened (which generally will not be possible if uncertainty and a serious or irreversible threat are established), or that it *was* applied (and potentially, as I will also discuss, was *appropriately* applied). The overarching result of the precautionary principle in any case is that where the nature of a threat is sufficiently grave, uncertainty as to that threat operates to justify preventative measures, and, at the same time, cannot be used to justify a failure to take such measures.

In this article, I consider 30 years of the precautionary principle in Australia, with a particular focus on the decisions in *Leadbeater's case* (*Friends of*

¹ This conception has been presented in both literature and case law: see, eg, Carl F Cranor, 'Some Legal Implications of the Precautionary Principle: Improving Information-Generation and Legal Protections' (2005) 11(1) *Human and Ecological Risk Assessment: An International Journal* 29; *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 273–5 [150]–[155] ('*Telstra*'); *Conservation Council of South Australia v Tuna Boat Owners Association of South Australia* [1999] SAEDRC 86 [23]–[25]; *Warburton Environment Inc v VicForests* [No 5] [2022] VSC 633 ('*Tree Geebung*') [321]–[323], [361].

Leadbeater's Possum Inc v VicForests [No 4] ('original decision')² and *VicForests v Friends of Leadbeater's Possum Inc* ('appeal decision').³ In the original decision, Mortimer J found that the forestry operations of Victorian logging company VicForests, to be conducted in the critical habitat of an endangered possum species, were unlawful given the context of recent bushfire and VicForests' obligations to apply the precautionary principle. Her decision that VicForests could not continue its logging as planned was overturned on appeal, but the appeal court upheld the findings relevant to the principle. *Leadbeater's* case offers a particularly useful insight into the precautionary principle and invites reflection on how the principle might be relevant in future situations where there is not only a lack of scientific certainty about the impacts of one particular activity, but where those impacts are exacerbated by compounding cumulative impacts. This situation is likely to arise increasingly frequently as economic activity continues in the face of worsening global climate change. The two subsequent decisions of *Masked Owl*⁴ and *Tree Geebung*⁵ are testament to this, as each concerned forest-dwelling species threatened by direct disturbances to forests, and by climate change.

I make three novel contentions about the operation of the precautionary principle as we enter its fourth decade. These contentions each represent how the principle can be understood in a way that does justice to the normative reasons underpinning its inclusion in environmental laws and policies. These reasons include the ethical values of environmental conservation and the avoidance of irreversible loss, which are typically reflected in the objects and purposes of the instruments in which the principle is found.⁶ The first contention is that *if particular 'conditions precedent' to the application of the principle are met, then the principle must be applied*. The need to apply or invoke the principle once it has been enlivened by these conditions should not be trumped, or held to be inconsistent with other objectives. This is important for species protection in the context of irreversible climate change impacts, because it means that threats that might render a species extinct need to be acted upon regardless of the economic value or convenience of ignoring them. It does not mean that risks cannot be taken and it does not remove discretion as to how to apply the principle (that is, what actions to take) as directed by the statutory context and facts of the situation. The second contention is that *the precautionary principle is capable of demonstration*. While the principle does not require any specific course of action, a reviewing judge might find that it was, or was not, (appropriately) applied in a particular case when it should have been. This is one of the more critical points that can be drawn from *Leadbeater's* case and *Tree Geebung*, which arguably signal a developing jurisprudence around a precautionary

² *Friends of Leadbeater's Possum Inc v VicForests [No 4]* (2020) 244 LGERA 92 ('*Leadbeater's* original decision').

³ *VicForests v Friends of Leadbeater's Possum Inc* (2021) 285 FCR 70 ('*Leadbeater's* appeal decision').

⁴ *Bob Brown Foundation v Minister for the Environment [No 2]* (2022) 253 LGERA 356 ('*Masked Owl*').

⁵ *Tree Geebung* (n 1).

⁶ On the general normative underpinnings of the principle, see Marko Ahteensuu and Per Sandin, 'The Precautionary Principle' in Sabine Roeser, Rafaela Hillerbrand, Per Sandin and Martin Peterson (eds), *Handbook of Risk Theory: Epistemology, Decision Theory, Ethics, and Social Implications of Risk* (Springer, 2012) 961, 974. Also note the comment of Preston CJ in *Telstra* (n 1) that '[t]o avoid environmental harm, it is better to err on the side of caution': at 273 [151].

standard. The third contention is that *precautionary approaches can and should take into account the state of the environment* — meaning the extent to which the environment is degraded, is in the process of becoming degraded, or is threatened to be degraded in the future. This necessarily involves cumulative impacts. This point was not often contemplated in the literature or case law prior to *Leadbeater's* case and so represents a gap on which the recent cases invite comment.

In Part II, I survey how the precautionary principle is articulated in Australian legislation and explain how it has been interpreted by judges over three decades. In doing so, I set out the first two of the three contentions. An important function of the principle internationally is in guiding the development of environmental and health-based policies, such as regulating new technology. However, my focus is on how the precautionary principle guides executive decision-makers whose conduct is governed by the principle, including in deciding whether to approve a project proposal associated with potentially significant adverse environmental effects. There are two reasons for this focus. One is that executive decision-making is more typically subject to judicial review and thus the potential intervention of courts than is policy-making or standard-setting. This invites discussion on the justiciability of the principle, and on the role of courts in developing a precautionary standard. The other is that I am interested in the context of ecological uncertainty and climate change. Much of the Australian case law on the precautionary principle involves threatened species or protected places and examines executive decision-making in the context of adverse threats to these species and places. In Part III, I present the third contention, exploring what *Leadbeater's* case and science-based or systems thinking can teach us about cumulative impacts. I conclude in Part IV by considering, briefly, the future of the precautionary principle in light of (i) the recent case law discussed in this article, (ii) the most recent federal legislative review of Australia's environmental law, and (iii) the recent change in federal government.

II The Precautionary Principle 1992–2022

A Statutory Articulation

The history of the precautionary principle in Australian law has been described by others,⁷ and although this history need not be repeated in detail, it will be useful to provide a brief summary here. The emergence of the principle can be understood as a response to the situation that uncertainty around potential threats to the natural environment was being used as a reason to avoid taking action to protect it, despite the reality that certainty and clear evidence cannot always be ascertained before

⁷ See, generally, Ronnie Harding and Elizabeth Fisher (eds), *Perspectives on the Precautionary Principle* (Federation Press, 1999); Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (Federation Press, 2005); Justice Brian J Preston, 'The Judicial Development of the Precautionary Principle' (2018) 35(2) *Environmental and Planning Law Journal* 123; A Stewart, 'Environmental Risk Assessment: The Divergent Methodologies of Economists, Lawyers and Scientists' (1993) 10(1) *Environmental and Planning Law Journal* 10; Justice S Escourt, 'The Precautionary Principle, the Coast and *Temwood Holdings*' (2014) 31(4) *Environmental and Planning Law Journal* 288. A summary is sometimes also provided in judgments to which the principle is relevant, including many of those discussed in this article.

harm occurs.⁸ The precautionary principle was and is an important aspect of the international sustainable development agenda, which attempts to ensure development does not continue in a way that jeopardises ecological sustainability.⁹ In Australia, this is evinced in the 1992 National Strategy for Ecologically Sustainable Development,¹⁰ which included the precautionary principle as a guiding principle, and in the *Intergovernmental Agreement on the Environment*,¹¹ which includes a definition that provides for the *application* of the principle:

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- an assessment of the risk-weighted consequences of various options.¹²

Various state and territory environment statutes incorporate the precautionary principle in some respect. For example, in Victoria the *Flora and Fauna Guarantee Act 1988* (Vic) as amended in 2019 (the relevant legislation in Tree Geebung) requires that decisions, policies, programs and processes ‘give proper consideration’ to the precautionary principle.¹³ The *Environment Protection Act 2017* (Vic) includes the precautionary principle as one of the ‘principles of environment protection’¹⁴ central to the legislation, to which Victoria’s Environment Protection Authority (‘EPA’) and Environment Minister must have regard in decision-making. The Act also includes a ‘general environmental duty’ which provides that ‘[a] person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable’.¹⁵ The *Sustainable Forests (Timber) Act 2004* (Vic), relevant to Victorian forestry cases, includes the precautionary principle as one of the ‘guiding principles’ of ecologically sustainable development (‘ESD’) to which ‘regard is to be had’ in undertaking sustainable forest management.¹⁶ In New South Wales, the *Protection of the Environment Administration Act 1991* (NSW) provides that an objective of the NSW EPA is to ‘protect, restore and enhance’ the quality of the environment, having regard to ESD,¹⁷ which can be achieved through

⁸ International Union for Conservation of Nature (‘IUCN’), *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management*, as approved by the 67th meeting of the IUCN Council, 14–16 May 2007. See also *Telstra* (n 1) 275 [156].

⁹ *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (vol I) (12 August 1992) annex I (‘Rio Declaration on Environment and Development’) principle 15; *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (‘Biodiversity Convention’) preamble.

¹⁰ *Prepared by the Ecologically Sustainable Development Steering Committee and endorsed by the Council of Australian Governments, December 1992.*

¹¹ *National Environment Protection Council Act 1994* (Cth) sch (‘Intergovernmental Agreement on the Environment’).

¹² *Ibid* s 3.5.1.

¹³ *Flora and Fauna Guarantee Act 1988* (Vic) s 4A(d).

¹⁴ *Environment Protection Act 2017* (Vic) s 20.

¹⁵ *Ibid* s 25.

¹⁶ *Sustainable Forests (Timber) Act 2004* (Vic) s 5(1), (4).

¹⁷ *Protection of the Environment Administration Act 1991* (NSW) s 6(1).

implementation of the precautionary principle.¹⁸ In Queensland, the *Environmental Protection Act 1994* (Qld) includes the precautionary principle as part of the standard criteria to be considered in impact assessment.¹⁹ These examples demonstrate the influence of ESD — and in particular the precautionary principle — as a foundation or reference point for Australian environmental law and for the actions taken and decisions made under it. Where a piece of legislation requires consideration or application of the precautionary principle, and where there is an avenue of review available to a party contending that the principle was not considered (including as a relevant consideration under judicial review) or not applied, the principle is arguably justiciable.²⁰ Without a means of reviewing an alleged failure to consider or adequately apply the principle, the principle serves more as a compass, divorced from accountability via the courts.

The federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'), which came into force in 2000, adopts the precautionary principle in two ways. First, its consideration is required by the federal Environment Minister, who must take account of the principle when making decisions under the Act. This includes deciding whether to characterise an action²¹ as one to which the EPBC Act applies, as well as whether ultimately to approve an action following impact assessment.²² Accordingly, under the *EPBC Act*, the principle applies to the decision whether an action requires assessment and approval on the basis that it is likely to significantly impact a protected species or place,²³ and the decision whether an action should be approved if it is indeed found likely to significantly impact a protected species or place. Second, the Minister must take into account the principle as part of the process of considering environmental, social, and economic matters relevant to an approval decision regarding an action, including what conditions might be appropriate.²⁴ Unlike the *Intergovernmental Agreement on the*

¹⁸ Ibid s 6(2).

¹⁹ *Environmental Protection Act 1994* (Qld) sch 4 (definition of 'standard criteria').

²⁰ But see Elizabeth Fisher, 'Is the Precautionary Principle Justiciable?' (2001) 13 *Journal of Environmental Law* 315. Fisher contended (more than two decades ago now) that the principle appeared not to be justiciable, mainly because of a perception that review under the principle does not fall within the courts' institutional or constitutional competence: at 316. However, she does allude to the potential justiciability of the principle if the constitutional relationship between the courts and the executive is reconsidered (so, if environmental and administrative law develop to allow it). Fisher comments that some courts have overcome competence, or reconceptualised the principle so that reviewing it is within their competence. The fact that courts can reconceptualise the principle so that it falls within their competence to review it is relevant to the present developments in Australian law.

²¹ An action, defined in s 523 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'), includes a project, development, undertaking, activity and series of activities.

²² Ibid s 391(3).

²³ More specifically, the relevant impact is an impact on one of the nine matters of national environmental significance ('MNES') listed in pt 3 of the *EPBC Act*. These are the heritage values of a World Heritage property or National Heritage place, the ecological character of a Ramsar wetland, a listed threatened species or ecological community, a listed migratory species, the environment (generally) where a nuclear action is concerned, the environment (generally) from an action taken in a Commonwealth marine area or the Great Barrier Reef Marine Park, and water resources where the action is a coal seam gas development or large coal development taken by a corporation or the Commonwealth. More information on these categories can be found in the specific provisions of pt 3, which incorporate legislation, lists of species and places, and treaties to which Australia is a party (these are the basis of several MNES).

²⁴ Ibid s 136(2)(a).

Environment, the *EPBC Act* does not articulate how the precautionary principle might be applied in practice. Whether ‘take into account’ requires the taking of a precautionary approach, and the subsequent question what a precautionary approach looks like, may be open to interpretation. I discuss some thoughts below.

It is worth noting that the precautionary principle does not tend to appear in conjunction with — let alone interlinked with — climate change obligations in Australian statutory law. An exception is Victoria’s *Flora and Fauna Guarantee Act 1988*, recently amended to insert climate change as a matter which, together with the precautionary principle, must be given proper consideration.²⁵ Explicitly, the Act does not require that climate change be considered *when applying* the precautionary principle; rather, the precautionary principle and climate change are each relevant considerations for decisions, policies, programs and processes under the Act.²⁶ Nonetheless, in *Tree Geebung*, Garde J found that the tree geebung (*Persoonia arborea*), which needs to grow back from seed to regenerate, is vulnerable to climate change-induced alteration in fire patterns, and this was relevant when applying the precautionary principle to the consideration of timber harvesting activities.²⁷

Because of the different possible future warming scenarios and the complex causative factors that will determine climate trajectories, a lack of full scientific certainty characterises our understanding of the expected effects of climate change on species and ecological communities. Such effects may well be serious or (often *and*) irreversible. Given the trend of more frequent and more diverse climate change litigation,²⁸ recognising the relevance of the principle to threats that may be exacerbated by the impacts of climate change (for example, loss of available habitat for particular species, as in the forest cases) could be an important priority for federal legislative reform. The new federal *Climate Change Act 2022* (Cth) does not include the precautionary principle, and the *EPBC Act* mentions climate change only incidentally. Without statutory interlinkage of climate change and the precautionary principle, it is up to executive decision-makers (and reviewing courts) to consider the two issues together. Internationally, climate change and the precautionary principle have to an extent always been linked. The *United Nations Framework Convention on Climate Change*²⁹ — a treaty to emerge as part of the 1992 bloom in international environmental law that also brought the precautionary principle onto the world stage — explicitly incorporates the principle as art 3.3. Similarly, the 1992 *Convention on Biological Diversity* incorporates the precautionary principle,³⁰ and

²⁵ Ibid s 4A.

²⁶ See *Tree Geebung* (n 1) [313].

²⁷ Ibid [358].

²⁸ For example, note the recent challenge to a series of pending fossil fuel projects, which argues that the Environment Minister should reconsider her predecessors’ conclusions that the projects will not significantly impact threatened species, on the basis that the projects’ contributions to climate change will result in a significant impact on all Australian threatened flora and fauna and all Australian natural heritage sites: see Part IV of this article. See further Laura Schuijers and Margaret Young, ‘Climate Change Litigation in Australia: Law and Practice in the Sunburnt Country’ in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill, 2021) 47; Sabin Center for Climate Change Law, ‘Australia’, *Climate Litigation Database* (Web Page, 2023) <<http://climatecasechart.com/non-us-jurisdiction/australia>>.

²⁹ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

³⁰ *Biodiversity Convention* (n 9) preamble.

work under the convention directly recognises the threats to biodiversity from climate change.³¹

B *Judicial Interpretation*

The precautionary principle's ubiquity across environmental statutes rendered it a fashionable topic of discussion in the years following its integration into Australian law. In 1993, in an early case to consider its meaning, the principle was described by Stein J as 'a statement of commonsense'.³² This notion was echoed by Mortimer J several decades later in *Leadbeater's* case. Although faced with lengthy submissions on the application of the precautionary principle to the loss of native possums' habitat, she felt that applying the principle could be treated as a 'relatively straightforward' exercise that need not be 'overcomplicated', lest the point of the precautionary principle be frustrated or lost.³³ Yet, in the intervening years, it was not always treated as uncomplicated.

1 *Enlivening the Precautionary Principle*

(a) *The Bifactorial Approach: Seriousness or Irreversibility, and Scientific Uncertainty*

In Australian law, it is now well established that the precautionary principle is relevant in situations where there are threats of serious or irreversible environmental harm, and not in situations where harm is trivial or easily reversible.³⁴ This question, in each instance, is one of fact.³⁵ The seminal case to clarify when the principle is enlivened and should be applied is *Telstra Corporation Ltd v Hornsby Shire Council*.³⁶ Preston CJ, in the NSW Land and Environment Court, found that there are two conditions precedent, or thresholds, that trigger the principle's application: one is the threat of serious or irreversible environmental damage; the other, scientific uncertainty. Preston CJ's bifactorial approach to the enlivenment of the principle has been repeatedly endorsed, even though the elaborative judgment could be critiqued as deviating from the simplistic sensibilities earlier articulated.³⁷ The facts of the case, which involved concern over radiation from mobile phone towers, readily distinguish it from nature conservation cases.³⁸ However, the approach has proven to be translatable across contexts. It was applied by Osborn J in *Brown Mountain*³⁹ to threats from logging to the threatened long-footed potoroo (*Potorous longipes*)

³¹ 'Climate Change', *Convention on Biological Diversity* (Web Page, 2023) <<https://www.cbd.int/topic/climate-change>>.

³² *Leach v National Parks and Wildlife Service* (1993) 81 LGERA 270, 282.

³³ *Leadbeater's* original decision (n 2) 303–1 [846]–[847].

³⁴ *Telstra* (n 1).

³⁵ See *Leadbeater's* original decision (n 2) 297 [810]; *Tree Geebung* (n 1) [321].

³⁶ *Telstra* (n 1).

³⁷ See also Jacqueline Peel's broader critique in 'When (Scientific) Rationality Rules: (Mis) Application of the Precautionary Principle in Australian Mobile Phone Tower Cases' (2007) 19(1) *Journal of Environmental Law* 103.

³⁸ In *Leadbeater's* original decision (n 2), Mortimer J accepted the 'conditions precedent' established in *Telstra* (n 1), but noted that the context 'could hardly be more different': at 300 [826].

³⁹ *Environment East Gippsland Inc v VicForests* [2010] 30 VR 1 ('*Brown Mountain*').

and sooty owl (*Tyto tenebricosa*), and over a decade later in *Tree Geebung*, both of which concerned the Victorian statutory regime. Recently, in *Masked Owl*, the Federal Court endorsed Preston CJ's test and confirmed that it applies to the federal *EPBC Act*.⁴⁰

There has been some debate as to whether the two conditions precedent can be considered together in sequence, or whether they need to be considered as two separate prongs, but the difference may not be material. In *Leadbeater's* case, Mortimer J's approach was to consider threats of serious or irreversible environmental damage as the primary consideration or enlivening trigger, with uncertainty as the secondary or consequential consideration, such that if there were threats of serious or irreversible environmental damage, then, consequently, VicForests could not justify its lack of preventative actions with a lack of scientific certainty about what it needs to do.⁴¹ This manner of expressing the principle aligns with the way in which the principle is worded, as an if-then principle. On appeal, VicForests argued that Osborn J's 'two pronged' approach in *Brown Mountain* should be preferred to Mortimer J's 'consequent obligation' approach, and that Mortimer J should not have departed from Osborn J's approach without finding it was plainly wrong. The appeal court found that Mortimer J was entitled to depart from Osborn J's approach, noting that she had said that application of Osborn J's approach would lead her to the same result in any case.⁴² What we might take from this is that even if the precautionary principle is phrased as a consequent obligation, there are two critical elements (a serious or irreversible threat, and scientific uncertainty). The notion that once a serious or irreversible threat is established, a failure to take precautionary measures cannot be justified on the basis of a lack of full scientific certainty is essentially the other side of the coin to the notion that, once a serious or irreversible threat is established, precautionary measures must be taken if there is also a lack of full scientific certainty.

It should be noted that the relevant Victorian Code of Practice for timber harvesting operations has now been amended to specifically incorporate Osborn J's understanding of the principle evinced in *Brown Mountain*,⁴³ meaning that his is the preferred interpretation of the principle for Victorian forest cases governed by that Code. One such case was *Tree Geebung*, in which Garde J traced Osborn J's approach to Preston CJ's decision in *Telstra*.⁴⁴ Preston CJ had said that the bifactorial approach was to treat the two conditions precedent or thresholds as cumulative.⁴⁵ Garde J considered first whether there was a threat of serious or irreversible damage to the environment by reason of the proposed timber harvesting

⁴⁰ *Masked Owl* (n 4) 365 [19].

⁴¹ *Leadbeater's* original decision (n 2) 303 [845].

⁴² *Leadbeater's* appeal decision (n 3) 115 [183].

⁴³ *Code of Practice for Timber Production 2014* (Vic) (as amended 2022) Glossary, 'Precautionary principle' Note: 'It is intended by this definition and section 2.2.2.2 that the precautionary principle and its application in section 2.2.2.2 be understood as it was by Osborn J in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 (in relation to the precautionary principle as it appeared in the *Code of Practice for Timber Production 2007*).'

⁴⁴ *Tree Geebung* (n 1) [315].

⁴⁵ *Telstra* (n 1) 269 [128].

operations central to the case, and then whether the threat was attended by a substantial lack of scientific certainty⁴⁶ (he found both).

In tort law, ‘a risk though remote may nevertheless be real and not fanciful or far-fetched’.⁴⁷ The precautionary principle recognises that real risks may also be uncertain. Scientific uncertainty can mean that the likelihood (probability), the nature (kind), or the magnitude (gravity) of a risk is not well, or not fully, understood, and there might be a combination of these. Uncertainty does not necessarily mean a lack of data (although it can) or that there is methodological uncertainty; in science, uncertainty may also refer to uncertainty of an epistemic or ontological kind. For the purpose of the precautionary principle, uncertainty does not need to be quantified in order for the principle to be enlivened. As mentioned above, Garde J required ‘substantial’ uncertainty in *Tree Geebung*, echoing Osborn J’s requirement that there be ‘substantial’ uncertainty in *Brown Mountain* (remembering that Garde J was obliged by the relevant Code of Practice to follow Osborn J’s interpretation of the precautionary principle). Osborn J did not clarify what he meant by his standard of substantial uncertainty and, further, he did not say that uncertainty must *always* be substantial — instead, he said that in that particular case (*Brown Mountain*), he was imposing a standard of substantial uncertainty which he felt was ‘within the ambit’ of the principle.⁴⁸ In *Telstra*, Preston CJ said the principle will not be enlivened if there is ‘no or no considerable’ uncertainty.⁴⁹ Most other decisions have either followed *Telstra* or not mentioned a specific standard for uncertainty.

Full scientific certainty is essentially an oxymoron, which might imply that the principle is almost always going to be invoked where there are threats of serious or irreversible harm unless there is an additional standard for establishing uncertainty. Scientists do not express their findings as fully certain, but as associated with a particular value (known as a ‘p’ value), which reflects the likelihood that they would have arrived at their finding if the null hypothesis (rather than the hypothesis being tested) were true. To apply the precautionary principle, we might well impose a standard of substantial uncertainty, but another approach would be to look at the degree and kind of uncertainty present in order to inform what actions are needed to achieve better certainty, if that is possible, with a view to ultimately minimising risk. In other words, focus not on *whether* there is uncertainty but on *what* and *how substantial* is the uncertainty, so that we know how to respond to it and therefore what is an appropriate precautionary response. At one end of the spectrum, a small degree of uncertainty will mean a threat is relatively well understood and will tend toward the need for a preventative rather than a precautionary approach. At the other end, a great deal of uncertainty may mean that critical information and data are lacking, justifying an approach that postpones environmentally degrading measures at least until more information is gathered to better understand the risk, or until the uncertainty itself is understood and can be better accommodated. To consider a climate-related example, where there has been a recent extreme weather event and

⁴⁶ *Tree Geebung* (n 1) [339]–[363].

⁴⁷ *Wyong Shire Council v Shirt* [1980] 146 CLR 40, 48 (Mason J), quoted in *Brown Mountain* (n 39) 47 [191].

⁴⁸ *Brown Mountain* (n 39) 48 [197].

⁴⁹ *Telstra* (n 1) 273 [149].

the likely aftermath is poorly understood, or where there are so few members of a species or community remaining that scientists face difficulties studying their behaviour and chances of survival in situ, uncertainty may be high yet the risk of serious or irreversible damage grave.

The decision in *Masked Owl* confirmed that failure to adequately engage the first condition precedent — namely, to consider and make a finding as to whether there is a serious or irreversible risk of harm — amounts to an error. Moshinsky J considered whether a delegate of the Environment Minister failed to consider or apply the precautionary principle as she was required to do under the *EPBC Act*, concerning an application by foreign-owned mining company MMG to conduct works relating to a waste storage facility in Tasmania's *takanya*/Tarkine rainforest. Moshinsky J found that the Minister's delegate had failed to take account of the precautionary principle⁵⁰ regarding, for example, potential threats to the Tasmanian masked owl (*Tyto novaehollandiae castanops*). He noted that a decision-maker must engage the bifactorial test, and that regarding the first factor, considering whether there is a serious or irreversible risk of harm 'requires the decision-maker to bring an active intellectual process to this matter'.⁵¹ Identifying threats was not enough: the decision-maker needed to discuss the threats and make a finding.⁵² Costs were awarded to the Bob Brown Foundation.⁵³ Interestingly, Moshinsky J did not refer to either *Brown Mountain* or *Leadbeater's* case in his judgment. The decision is significant, though, because it tells us that the Minister (or a delegate) cannot determine that the precautionary principle is not enlivened by simply saying as much; they must actively find the absence of a serious or irreversible threat. Presumably, if the two-pronged approach is preferred, the Minister could alternatively find the absence of a lack of full scientific certainty (for example, to the standard of there being no *substantial* lack of certainty, or only a *negligible* amount of uncertainty) in order to validly conclude that the precautionary principle does not apply. In such a case, the implication would be that either the threat is certain, or that there is certainly no threat.

(b) *Burdens of Proof*

As I alluded to in Part I, there is a view that once the precautionary principle is enlivened, it operates to shift the evidentiary burden of proof onto the party objecting to the principle's application, to prove that no threat exists. In *Telstra*, Preston CJ said that what happens is that once both conditions precedent are met, a decision-maker 'must assume that the threat ... is no longer uncertain but a reality',⁵⁴ and '[t]he burden of showing that this threat does not in fact exist or is negligible effectively reverts to the proponent of the economic or other development plan, programme or project'.⁵⁵

⁵⁰ *Masked Owl* (n 4) 371 [48].

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Bob Brown Foundation Inc v Minister for the Environment and Water* [No 3] [2022] FCA 989.

⁵⁴ *Telstra* (n 1) 273 [150].

⁵⁵ *Ibid.*

He continued:

The rationale for requiring this shift of the burden of proof is to ensure preventative anticipation; to act before scientific certainty of cause and effect is established. It may be too late, or too difficult and costly, to change a course of action once it is proven to be harmful. The preference is to prevent environmental damage, rather than remediate it. The benefit of the doubt is given to environmental protection when there is scientific uncertainty. To avoid environmental harm, it is better to err on the side of caution.⁵⁶

Essentially, the view is that a preventative approach should be taken unless the proponent of the action linked to the harm in question is able to show that it should not be because the threat is not real or is only negligible. However, when a court is reviewing the actions of a ministerial decision-maker under the *EPBC Act*, or the proponent of a project associated with the risk of an environmental threat, it does not tend to require the potential risk-taker to show no risk or, if it cannot, to hold that party to a standard of prevention. Courts have not required proponents or decision-makers to act as though a risk is a certainty unless the party denying the risk can discharge the burden of proving that the risk can fairly be denied. In my respectful view, the burden of proof might be a useful metaphor to conceptualise the sentiment captured in the passage extracted above, but at the same time it has the potential to cause confusion.

Instead, we might characterise the process in practice as one in which the party asserting a threat must show that there is a threat, but the standard of proof is low on account of the precautionary principle. There must be seriousness or irreversibility, and a degree of uncertainty, but that is all that is required in terms of proof. Once the principle is enlivened, the decision-maker must then take a precautionary approach. The required approach (or spectrum of acceptable approaches) may be afforded a degree of discretion. However, if the proponent has *no* evidence denying the risk, then, most likely, they should properly act as though the risk was a certainty; and if they have *some* evidence denying it — or a credible plan to gather more information and overcome the uncertainty before significant harm is occasioned — then they may be able to act accordingly depending on the facts.⁵⁷ In this manner, case by case, we might start to see the evolution of a precautionary standard, so long as courts are comfortable intervening to help develop that standard. The notion of a precautionary standard is underpinned by the following two arguments: that the precautionary principle must be applied once it is enlivened, and that application is capable of demonstration.

⁵⁶ Ibid 273 [151].

⁵⁷ In *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, the Queensland Land Court recognised uncertainty in relation to groundwater-related impacts of the Adani Group's Carmichael coal mine. Applying the precautionary principle, the Court determined that an adaptive management approach would allow the Adani Group to commence mining operations despite not knowing critical information about potential environmental impacts, such as to the Doongmabulla Springs Complex. Later modelling determined an impact to the Springs above the set acceptable threshold. The Queensland Department of Environment and Science subsequently issued Adani with an order prohibiting it from commencing underground mining operations until it could demonstrate compliance with the conditions of its environmental approval: 'Adani's Australian Arm Bravus Issued with Environment Protection Order over Future Underground Works at Carmichael Mine', *ABC News* (online, 4 March 2023) <<https://www.abc.net.au/news>>. To be effective, adaptive management needs to involve monitoring, and an appropriate response to new information.

2 *Application May Be Informed but Not Trumped by Other Considerations*

In *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts*, Tracey J found that the Minister, who had used conditions to justify the approval of a pulp mill in Tasmania under the *EPBC Act*, was not obliged to accord pre-eminence to the principle: ‘So long as the Minister ... takes account of the precautionary principle, it is a matter for him to determine what weight is to be accorded to the principle having regard to the wide range of other considerations’.⁵⁸ This argument is rooted in the notion that, in accordance with the separation of powers doctrine, the judiciary’s role in administrative review is not to tread into the territory of merits review. There is a concern that scrutinising how a factor was taken into account, as opposed to whether it was taken into account, might constitute an overstep.

Although s 136 of the *EPBC Act* (which sets out the matters and factors for consideration in a federal-level approval decision) does not require supremacy to be given to the precautionary principle over the other matters and factors listed in that section, it also does not allow other matters and factors to negate the principle as if it did not exist. I suggest that it is appropriate to interpret the requirement to consider or have regard to the principle as a requirement to apply the *Telstra* test. If one or both of the conditions precedent in *Telstra* are not met, then there is no need to apply a precautionary approach, and the decision-maker may wish to be informed by other relevant factors whether to take a preventative or permissive approach to harm, as a matter of discretion.⁵⁹ As we recently learned from the *Masked Owl* decision, findings are required in the proper application of the test. If the precautionary principle is enlivened, because both thresholds are established, then a precautionary approach should be taken, no matter how compelling competing social or economic considerations: Preston CJ’s judgment in *Telstra* mentions ‘the concomitant need to take precautionary measures’ that follows a finding that the principle has been enlivened,⁶⁰ and as just discussed, he felt that it is then to be assumed that the threat is no longer a possibility but a reality.⁶¹

If precautionary measures are not taken after the principle is enlivened, it is then arguable that the principle cannot have been given due regard or adequately to have been taken into account (although note that the expression of the principle might include qualifying words, such as that the precautionary principle must be applied ‘wherever practicable’). Measures need not go beyond what is appropriate

⁵⁸ *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203, 219 [36] (*‘Lawyers for Forests’*).

⁵⁹ In *Telstra* (n 1), Preston CJ noted that if there is no, or no considerable, scientific uncertainty, but there is a threat of serious or irreversible damage, then ‘[m]easures will still need to be taken but these will be preventative measures to control or regulate the relatively certain threat of serious or irreversible environmental damage, rather than precautionary measures which are proportionate in relation to uncertain threats’: at 273 [149].

⁶⁰ *Ibid* 269 [128].

⁶¹ *Ibid* 273 [150].

and necessary; in other words, they can be proportionate to the facts of the case,⁶² and may, for example, be dealt with through conditions rather than by not issuing an approval for the action or activity associated with the threat.⁶³ This may depend on the proponent's evidence either denying or otherwise accounting for management of the threat, as discussed. However, the need to apply the principle cannot be outright rejected or dismissed by the argument that it is only one of a number of relevant factors. This question could be avoided in *Leadbeater's* original decision because the applicable Code of Practice explicitly stated that the principle should be applied.⁶⁴

With respect to s 391(1) of the *EPBC Act* (which requires the principle to be taken into account for decisions made under the Act), the precautionary principle need only be taken into account to the extent that this can be done consistently with the other provisions of the Act. In *Australian Conservation Foundation v Minister for the Environment* (2016) 251 FCR 308, a case concerning the climate-related impacts of the Adani Group's Carmichael coal mine, Griffiths J noted that 'other provisions of the Act' included the definition of 'impact' found in s 527E. He implied that because the Minister had allowed the mine proposal to proceed on the basis that, inter alia, downstream combustion emissions associated with the mine ('scope 3 emissions') were not an 'impact' of the proposal for the purposes of the *EPBC Act*, he could not apply the precautionary principle to the scope 3 emissions.⁶⁵

In that case, it would have been open to the Federal Court reviewing the decision to determine that the principle had not been applied to scope 1 and 2 emissions, but it did not do so. It would also have been open to the Minister to determine that scope 3 emissions *were* an impact of the proposal, adopting similar reasoning to that of Preston CJ in the subsequent NSW Land and Environment Court decision in *Gloucester Resources Ltd v Minister for Planning*.⁶⁶ The issue of whether scope 3 emissions are an 'impact' of coal mining, and how the precautionary principle is relevant, may return to the Federal Court soon. The present Environment Minister has recently determined that three Australian coal projects pending final approval will have no net effect, or only a very small effect, on global climate change, and therefore will not have an impact on the matters protected under the *EPBC Act*, within the meaning of s 527E.⁶⁷

The aspect of s 391 that requires the precautionary principle to be taken into account to the extent that this can be done consistently with other provisions of the

⁶² According to Preston CJ in *Telstra* (n 1), the 'degree of precaution' that is appropriate in a given situation will depend on the combined effect of the seriousness of the threat and the degree of uncertainty, and the margin of error may be controlled by an adaptive management approach: at 276–9 [161]–[178].

⁶³ See above (n 57).

⁶⁴ *Leadbeater's* original decision (n 2) 302 [841]. See also *Code of Practice for Timber Production* 2014 (n 43).

⁶⁵ *Australian Conservation Foundation v Minister for the Environment* [2016] 251 FCR 308 [185].

⁶⁶ *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257.

⁶⁷ See Statement of Reasons: Decision under Section 78 (Notice) for each of Ensham Life of Mine Extension (EPBC No 2020/8669), Narrabri Underground Mine Stage 3 Extension Project NSW (EPBC No 2019/8427) and Mount Pleasant Optimisation Project (EPBC No 2020/8735), each published 11 May 2023 on *EPBC Act Public Portal* (Web Page, 30 May 2023) <<https://epbcpportal.awe.gov.au/all-notices>>.

EPBC Act has been mentioned in other cases (for example, in *Masked Owl*),⁶⁸ but it has not otherwise been held that another provision of the *EPBC Act* is inconsistent with the precautionary principle. At least where an impact has been determined, it is difficult to see how taking into account the precautionary principle could be impossibly inconsistent with many, if any, of the legislative provisions designed to protect the environment and conserve biodiversity through impact assessment. Specifically, the precautionary principle is unlikely to be inconsistent with s 136, which introduces social and economic considerations into the *EPBC Act*, supported by the fact that the principle is embedded into s 136. Ministerial decision-makers should thus not be able to argue that a precautionary approach cannot be applied consistently with the other provisions of the *EPBC Act* if what they want to do is effectively give greater weight to (for example) positive economic factors over adverse environmental factors.

3 *Application Is Capable of Demonstration*

(a) *Identifying Failure to Take a Precautionary Approach*

The precautionary principle does not dictate a course of action which then must be taken to the exclusion of all others.⁶⁹ In some contexts, as we have seen, the statutory expression of the principle might provide that decision-making should involve an evaluation to avoid damage, and an assessment of risk-weighted consequences for the options available. As to what other more specific actions or outcomes might constitute a precautionary approach, or whether these actions need to be taken if not specified, this is typically a question for the decision-maker tasked with applying the principle, and not one for which answers can be found in statute. This reflects a need for flexibility depending on the circumstances.

Reviewing courts contemplating whether the precautionary principle was adequately considered or applied have found that although these institutions are not in a position to suggest what should have been done, courts can conclude that what was in fact done was not consistent with the precautionary principle. In *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management*, the Federal Court noted that what is required by the precautionary principle will differ from case to case. Wheeler J said, reflecting a proportionality point Preston CJ made in *Telstra*, that at the less onerous end of the spectrum, a precautionary approach might mean doing research and study, while at the other end,

[w]here endangered species are concerned for example, one can see that where readily accessible and unambiguous research material pointed to a serious risk that numbers of the species would be dramatically reduced by a course of action, then the adopting of that course of action, in the absence of any evidence of consideration of alternatives, would seem to point inevitably to a finding that there had been no relevant ‘caution’.⁷⁰

⁶⁸ *Masked Owl* (n 4) 366–73 [33]–[54].

⁶⁹ *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102, 118–19.

⁷⁰ *Ibid* 119.

In *Brown Mountain*, Osborn J accepted the submission of VicForests that it is ‘not possible to readily postulate a generalized failure to give effect to the precautionary principle’ in respect of the proposal to log at Brown Mountain.⁷¹ He nonetheless held that proposed logging was unlawful as it was set to go ahead before surveys to determine the location of endangered species were undertaken.⁷² In that case, the lack of adequate research was evidence that a precautionary approach had not been taken. In *WOTCH Inc v VicForests [No 5]*, an injunction hearing, Keogh J noted that whether VicForests’ adaptive management measures for proposed logging in the Victorian Central Highlands was a proportionate response to the plight of the greater glider possum (*Petauroides volans*) after the 2019–20 bushfires may be a question at trial.⁷³ Closing submissions concluded in March 2023 and at the time of writing, judgment was pending. Courts can and should inform themselves of a spectrum of appropriate responses — a flexible standard below which the precautionary principle cannot be said to have been applied — through expert scientific opinion.

(b) *Leadbeater’s Case*

The argument that the precautionary principle is capable of demonstration is most strongly supported by *Leadbeater’s* case. So, and since it has not been discussed in depth in the literature, I will provide some background.⁷⁴ The plaintiff, Friends of Leadbeater’s Possum Inc, sought an injunction to halt logging in the critical habitat of two endangered possum species: the Leadbeater’s possum (*Gymnobelideus leadbeateri*), and the greater glider (*Petauroides volans*). The defendant, VicForests, proposed to log 66 coupes where the possums lived. Both species are deemed threatened with extinction, and the area proposed to be logged is recognised as habitat important to each species’ survival. The legal basis on which the plaintiffs objected to the logging was that VicForests had not complied with its obligations to apply the precautionary principle, and was not likely to in the case of future operations. VicForests argued that it did consider the principle and was taking precautionary measures, but both at first instance and on appeal, the court found that what VicForests was doing was insufficient. Accordingly, *Leadbeater’s* case suggests that it is not enough that the precautionary principle be paid only ‘lip service’.⁷⁵ Because bushfire was a critical part of the context informing the nature of the threat to the possum species from forestry, the case also suggests that cumulative impacts are relevant to the precautionary principle, which I discuss in Part III below.

Over 375 paragraphs of the *Leadbeater’s* original judgment were devoted to the precautionary principle. The expression of the principle relevant to the case was that in the *Code of Practice for Timber Production 2014* (Vic). Clause 2.2.2.2 of the

⁷¹ *Brown Mountain* (n 39) [182].

⁷² *Ibid* [184].

⁷³ *WOTCH Inc v VicForests [No 5]* [2020] VSC 528 [35].

⁷⁴ See, additionally, Laura Schuijers and Lee Godden, ‘Law and Litigation for the Conservation of Forest Communities’ (2022) 9(2) *Griffith Journal of Law and Human Dignity* 71.

⁷⁵ In *Lawyers for Forests* (n 58), Tracey J noted that there may be cases where a decision-maker has only paid ‘lip service’ to an obligation to have regard to a matter such as the precautionary principle, but they will be rare: at 220 [38].

Code requires that the precautionary principle be applied to the conservation of biodiversity values. The version relevant in the case provided in the definition of ‘precautionary principle’ that

when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.⁷⁶

At first instance, Mortimer J applied this definition to the effect that

if the circumstances of VicForests’ forestry operations mean it is ‘dealing’, objectively, with circumstances where there are likely to be threats of serious environmental damage, or threats of irreversible environmental damage, then in undertaking its evaluation and assessment of how (and if) those forestry operations should be conducted, VicForests cannot justify its lack of measures to prevent environmental degradation by relying on a lack of scientific certainty about what it needs to do.⁷⁷

After establishing that there was a threat of serious damage to the greater glider, and that ‘there is still much that is not known about how the Greater Glider is able to cope with the impacts of forestry operations in and around its habitat’⁷⁸ she concluded, in relation to the threat, that ‘VicForests must “deal” with it’.⁷⁹ A lack of research, evidence or data could not be relied on as a reason for not adopting effective measures, and VicForests could not ‘do nothing or procrastinate ... take half-hearted or minor measures’ pending better research or data.⁸⁰ Mortimer J found that drawing up an interim strategy focusing on the protection of the greater glider, once it became clear it would be adversely affected by forestry operations, was a ‘poor compromise in the face of the need to be seen to be doing something’, and not a careful evaluation of management options.⁸¹ She also noted that VicForests’ ‘defensive and negative approach’ towards conservation, which, she found, it treated as an inconvenience, was not consistent with cl 2.2.2.2.⁸²

Additionally, VicForests’ suggestion that it was implementing a new policy which might reduce adverse impacts for coupes not yet logged, was dismissed as being a course of action undertaken for the purpose of deriving a commercial benefit from an environmental certification, ‘such as getting its products into places like

⁷⁶ *Leadbeater’s* original decision (n 2) 145 [138]. Note the new definition in *Code of Practice for Timber Production 2014* (n 43) (as amended 2022) Glossary: ‘precautionary principle’ means that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, decisions by managing authorities, harvesting entities and operators must be guided by: (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and (ii) an assessment of the risk-weighted consequences of various options.’

⁷⁷ *Leadbeater’s* original decision (n 2) 303 [845].

⁷⁸ *Ibid* 301 [829].

⁷⁹ *Ibid* 304 [849].

⁸⁰ *Ibid* 304 [849].

⁸¹ *Ibid* 323 [937].

⁸² *Ibid* 344 [1009].

Bunnings'.⁸³ Noting that '[c]onscientious and careful engagement in a process designed to be attentive to the protection and conservation of threatened fauna and flora is likely to comply' with the principle,⁸⁴ Mortimer J specifically rejected VicForests' argument that cl 2.2.2.2 concerns matters of degree and judgment in a way that renders it not susceptible to clear application in a given factual situation.⁸⁵ This aspect of the judgment paves the way for further development of precautionary principle jurisprudence. Future case law may eventually contribute to the evolution of a de facto (but necessarily flexible) precautionary standard, if it can be determined that in a given case the principle was not applied as required, and these cases accumulate to form a body of law.

On appeal, VicForests alleged 29 grounds. The ground of appeal that succeeded was that Mortimer J as primary judge erred in finding that VicForests' conduct needed to comply with the Regional Forest Agreement ('RFA') applicable to VicForests' operations, in order to secure the benefit of an exemption in the *EPBC Act* that carves out forestry operations conducted in accordance with an applicable RFA.⁸⁶ In other words, the Full Federal Court found that where an RFA applies, the *EPBC Act* does not — even if the RFA is not complied with. The case had relied on the *EPBC Act* applying to VicForests' conduct, because that was the basis on which the plaintiff could bring its action.

VicForests failed on all grounds of appeal relating to the precautionary principle. Relevantly, the appeal court rejected the notion that the precautionary principle (as articulated in the Code of Practice) does not direct a particular outcome and so is merely exhortatory, as the primary judge had. Instead, their Honours noted that courts can judge conduct by a standard that has an evaluative or qualitative element and are used to doing so, for example when considering whether 'reasonable care' was taken,⁸⁷ and that vagueness or uncertainty in the law does not render it incapable of application.⁸⁸

The appeal court also rejected VicForests' argument objecting to Mortimer J's construction of the principle as requiring that measures be taken to arrest and reverse a decline in threatened species because that 'elevates a purpose of environmental protection above timber production'.⁸⁹ Their Honours similarly rejected all of VicForests' arguments that various aspects of the evidence drawn on in the case did not support a conclusion that it had not applied and would not apply the precautionary principle to its timber harvesting operations.⁹⁰

⁸³ Ibid 379 [1157].

⁸⁴ Ibid 305 [853].

⁸⁵ Ibid 301 [833].

⁸⁶ The exemption is found in s 38(1) of the *EPBC Act*: 'Part 3 does not apply to an RFA Forestry Operation conducted in accordance with an RFA'.

⁸⁷ *Leadbeater's* appeal decision (n 3) 106 [137]–[139].

⁸⁸ Ibid 107 [143] citing *Brown v Tasmania* (2017) 261 CLR 328.

⁸⁹ *Leadbeater's* original decision (n 2) 263 [630]; *Leadbeater's* appeal decision (n 3) 115–16 [187]–[190].

⁹⁰ *Leadbeater's* appeal decision (n 3) 116–25 [192]–[243].

(c) *Tree Geebung Case*

The *Tree Geebung* case also concerned timber harvesting operations conducted by VicForests in the Central Highlands region of Victoria, a region to which the tree geebung (*Persoonia arborea*) is endemic. Unlike *Leadbeater's* case, *Tree Geebung* did not involve an argument as to the application of the *EPBC Act*, instead being directed to the requirements relating to the precautionary principle expressed in the *Flora and Fauna Guarantee Act 1979* (Vic), under which the tree geebung was recognised as endangered, and the *Code of Practice for Timber Production 2014* (Vic), amended after *Leadbeater's* case. The plaintiff, Warburton Environment Inc, alleged that, with respect to the tree geebung, VicForests had not complied with the Code or the standards embodied therein, and that it would not in future unless injunctions or declarations were granted.

Garde J relied on expert witness' opinion, as well as on the Victorian government's Threatened Species Assessment, to conclude there was a serious and irreversible threat to the species from logging. The evidence showed that, given the context of wild and planned (regeneration) fire impacting the tree geebung, timber harvesting intervals were too short, and it could take centuries to reverse losses. Garde J felt there was 'every reason to expect that significant losses of mature Tree Geebungs will continue in coupes harvested by VicForests in the future unless adequate precautions and controls are put in place'.⁹¹ He also considered that there was 'very substantial' uncertainty associated with the threat of harm to the tree geebung from timber harvesting operations, due to unknown factors relating to the abundance, distribution and behaviour of the species.⁹²

As a result of the precautionary principle therefore being enlivened, Garde J said, '[i]t follows that the lack of scientific certainty on the matters I have discussed should not be used as a reason for postponing measures to prevent environmental degradation'.⁹³ His next step was to determine what was the minimum practicable response that needed to be taken to protect the tree geebung,⁹⁴ a step dependent on expert scientific opinion.⁹⁵ The purpose of this was to then be able to say whether VicForests' proposed adaptive management plan was sufficient, or whether the injunctions sought by Warburton were required.

Given the extent of the uncertainty, Garde J first determined that the minimum conduct necessary to identify and therefore protect mature tree geebungs in wet forest coupes was to conduct 30m transect surveys in these coupes:

I conclude that 30m transect surveys are likely to be highly effective in locating mature Tree Geebungs, whether or not in flower, and that the conduct of surveys of this type will significantly reduce the risk and threat to mature Tree Geebungs caused by the use of mechanical equipment and regeneration burning. Protective measures cannot be taken until it is known where mature Tree Geebungs are located. This information should be known prior to the completion of coupe planning so that appropriate exclusion areas and buffers

⁹¹ *Tree Geebung* (n 1) [343].

⁹² *Ibid* [360].

⁹³ *Ibid* [361].

⁹⁴ *Ibid* [364].

⁹⁵ *Ibid* [404].

can be established, and operational maps endorsed with the necessary information and instructions.⁹⁶

Then, he considered the need for a vegetation buffer to protect the tree geebung species during harvesting, and concluded that

a minimum 50m buffer radius, with each mature Tree Geebung at least 15m from the perimeter of the buffer, is essential if Tree Geebungs are to be protected from destruction or damage during harvesting and by exposure and windthrow subsequent to harvesting.⁹⁷

This, Garde J found, was ‘reasonably practicable having regard to the area required for harvesting and buffers and the area of State forest available’.⁹⁸ Additionally, he found based on the available evidence that a 10m fire break was needed to prevent trees from destruction or scorching during regeneration burning.⁹⁹ Having so found, he then concluded that VicForests’ planned adaptive management was insufficient, and issued injunctions preventing VicForests from harvesting in any wet forest coupes without complying with the minimum standards he set out. However, because the precautionary principle was qualified in the Code of Practice as requiring action to avoid serious or irreversible environmental damage ‘wherever practicable,’ the injunction was conditional, meaning VicForests did not have to comply if it was not reasonably practicable to do so.¹⁰⁰ In such cases, though, VicForests needed to record the destruction or damage of every tree geebung in a logbook, state why compliance was not reasonably practicable, have it signed off, and then report it, with a copy sent to Warburton as beneficiary of the injunctions.¹⁰¹

III Cumulative Impacts and the State of the Environment

A *The Importance of Context*

Another particularly pertinent way in which *Leadbeater’s* case is significant is in its acknowledgement of the cumulative nature of environmental impacts. Cumulative impacts and cumulative effects are terms used to describe additive and synergistic contributions to adverse environmental outcomes, when considered together. All of the major Earth system-scale environmental problems — including climate change and biodiversity loss — have resulted from many contributions over time. From the small-scale perspective of one threatened species or critical habitat place, multiple different threats will invariably operate cumulatively, influencing the likelihood of an outcome such as habitat degradation or species extinction. It may seem obvious that environmental impacts are cumulatively caused, but cumulative causation is tricky for the law to deal with, and so the concept has been met with some reticence, as evinced by early case law. *Leadbeater’s* case recognised that cumulative impacts and the precautionary principle are interrelated — among other things, a lack of full

⁹⁶ Ibid [411].

⁹⁷ Ibid [425].

⁹⁸ Ibid.

⁹⁹ Ibid [429].

¹⁰⁰ Ibid [463].

¹⁰¹ Ibid.

scientific certainty is more likely where there is a complex, multi-factorial causal relationship.

The *EPBC Act* does not specifically address cumulative impacts, yet the way in which it operates — project by project — is a key reason why cumulative impacts are such a problem in Australia. As Professor Graeme Samuel noted in his statutory review of the *EPBC Act*, the project-by-project nature of the Act means cumulative impacts are not systemically considered, and the overall result is environmental decline.¹⁰² The reforms flagged in the federal government's response to the review indicate that it will address cumulative impacts via regional planning,¹⁰³ but it is not clear at this stage whether there will be any significant statutory changes that will impact the way individual projects are assessed in context under the Act.

If a particular harm is a manifestation of many contributions, some of which do not fall within the purview of the *EPBC Act* — for example, because they are too small or causally remote to meet the definition of significant impact, or because they are not caused by human action, or not by human action regulated by the *EPBC Act* — then it may not be a type of harm which the *EPBC Act*, or impact assessment law more generally, is well-equipped to prevent. This is a difficult conundrum where the harm is exactly what the law explicitly sets out to avoid, such as the loss of threatened species and their habitat.

The *EPBC Act* is concerned with managing likely, significant impacts to nine 'matters of national environmental significance' ('MNES').¹⁰⁴ Broadly, these are protected species and places with a designated status under international agreements to which Australia is a party, such as the *Convention on Biodiversity* and the *World Heritage Convention*.¹⁰⁵ A 'significant' impact under the *EPBC Act* is an impact which is important, notable or of consequence, having regard to its context or intensity.¹⁰⁶ Significance depends upon the sensitivity, value and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impact.¹⁰⁷

The Explanatory Memorandum to the Environmental Protection and Biodiversity Conservation Bill 1999 (Cth) expressed the view that cumulative impacts were not intended to be considered under the significance test. The Memorandum stated that an action not likely to have a significant impact will not require approval *even if* the overall impact would be significant, on the basis that cumulative impacts should be assessed through state planning and land management

¹⁰² Graeme Samuel AC, *Independent Review of the EPBC Act: Final Report* (October 2020) 39, 42.

¹⁰³ Department of Climate Change, Energy, the Environment and Water (Cth), *Nature Positive Plan: Better for the Environment, Better for Business* (December 2022).

¹⁰⁴ The MNES are the matters protected under *EPBC Act* (n 21) pt 3: see the list at n 23.

¹⁰⁵ *Convention concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

¹⁰⁶ *Booth v Bosworth* (2001) 114 FCR 39; Department of the Environment (Cth), *Matters of National Environmental Significance* (Significant Impact Guidelines 1.1, 2013) 2; *Tasmanian Aboriginal Heritage Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment [No 2]* (2016) 215 LGERA 1, 63–4 [240]; *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491.

¹⁰⁷ Department of the Environment (Cth) (n 106) 2.

legislation and recovery plans.¹⁰⁸ The Memorandum was released prior to the guidelines and case law which have established that context and intensity are relevant to the consideration of significance under the *EPBC Act*. It may be that the drafters of the Explanatory Memorandum had in mind a definition of cumulative impacts focused on potential other projects, rather than other contributing factors such as unexpected extreme weather events as well.¹⁰⁹

Through having regard to context, the significance enquiry is an appropriate place to consider the state or condition of the environment with respect to the MNES concerned. A degraded or threatened environment will be more sensitive to any given impact, thus increasing the intensity of the impact attributable to the proposal under consideration.¹¹⁰ A similar enquiry into significance for the purpose of establishing whether there is a controlled action is made when considering whether there is a threat of serious or irreversible harm under the precautionary principle. In other words, when determining the first condition precedent to the enlivenment of the precautionary principle, whether or not there is serious or irreversible harm should be determined with reference to the state of the relevant environment at the time in question. This is a moving status. The greater glider, for example, was once an abundant species throughout eastern Australia. It was listed as vulnerable in the mid to late 2010s, and as endangered on 5 July 2022, with ‘frequent and intense bushfires, inappropriate prescribed burning, climate change, land clearing and timber harvesting’ cited as principal threats.¹¹¹ Clearly, a contribution to the decline of the species prior to the 2010s would be perceived differently than would a timber operation now, and the risk then was not as significant or serious as it is now.

Australian State of the Environment reporting offers an opportunity to scientifically inform an enquiry as to how the environment is being affected and will in future be affected by multiple compounding threats, paired with relevant conservation advice documents and action statements prepared by the Commonwealth and state-level governments from time to time. The most recent State of the Environment Report was published in July 2022.¹¹²

Concepts of fragility and resilience, popular as they are in environmental science, are typically not explicitly addressed at all by the law. This, in my view, is an important problem, because it is impossible to adequately conclude on significance, seriousness, or irreversibility without acknowledging the context of environmental fragility and the expected resilience of the environment (its ability to buffer threats). The state of the environment (including the state of a species and its

¹⁰⁸ Explanatory Memorandum, Environmental Protection and Biodiversity Conservation Bill 1999 (Cth) 28 [51], 30 [61], 33 [79].

¹⁰⁹ This is consistent with Jessup J’s judgment in *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 (*‘Tarkine’*) which failed to find that cumulative impacts should be considered under s 136 (the approval provision) of the *EPBC Act* (n 21).

¹¹⁰ See *EPBC Act* (n 21) s 572E (definition of ‘impact’).

¹¹¹ Department of Climate Change, Energy, the Environment and Water (Cth), *Conservation Advice for Petauroides Volans (Greater Glider (Southern and Central))* (in effect under the *Environment Protection and Biodiversity Conservation Act 1999* from 5 July 2022) 9 <<http://www.environment.gov.au/biodiversity/threatened>>.

¹¹² Department of Climate Change, Energy, the Environment and Water (Cth), Australia: *State of the Environment — 2021* (Web Page, July 2022) <<https://soe.deceew.gov.au>>.

habitat) can — by referencing context — and must inform a conclusion on whether there is a risk of serious harm and therefore whether (and how) the precautionary principle is to be applied.

B When Cumulative Impacts Are Relevant to Decision-Making

1 Reconciling Tarkine National Coalition v Minister

*Tarkine National Coalition Inc v Minister for the Environment*¹¹³ is one of the few decisions prior to *Leadbeater's* case to address cumulative impacts. It is not a case on the precautionary principle, but is considered here because the *EPBC Act's* treatment of cumulative impacts is relevant to the argument that cumulative impacts can be considered under the precautionary principle, especially for *EPBC Act* precautionary principle cases. Arguably, the precautionary principle can be interpreted in a way that accommodates cumulative impacts regardless of what case law suggests about cumulative impacts otherwise being relevant or not to decision-making under the *EPBC Act* (as *Leadbeater's* case shows). However, it will be useful to examine the reasoning.

Tarkine concerned the approval of a hematite mine in the *takanya*/Tarkine area of north-western Tasmania. The decision was challenged over concerns about, inter alia, impacts to the habitat of the Tasmanian devil, wedge-tailed eagle, and spotted-tail quoll. A principal issue was whether cumulative impacts were required to be considered under s 136 of the *EPBC Act*.¹¹⁴

It was the submission of the appellant that [the Minister] was obliged to look at how that habitat had been affected by existing actions, how it would be, or would be likely to be, affected by the proposal itself, and how it would be, or would be likely to be, affected by other actions of which the Minister was aware but which, at the time of his decision, lay only in the future.¹¹⁵

Jessup J expressed the opinion that as a matter of ‘common sense’ the impact of a proposal would normally be considered against a baseline ‘constituted by the existing circumstances for that species’.¹¹⁶ He stated that past natural and human-induced effects would have created that baseline circumstance, but it was the circumstance rather than the specific events that required consideration as part of forecasting impacts related to the proposal. He distinguished past impacts from present and future impacts, finding that the Minister was under no obligation to take account of the consequence of any other proposed action. The particular proposed actions in question in the case were two other mines, about which the Minister would have been aware, based on their inclusion in the documentation to which he had to have regard pursuant to s 136(2). Although Jessup J found that the Minister did not have to consider the impacts of those mines just because he knew about them, he said

¹¹³ *Tarkine* (n 109).

¹¹⁴ Section 136 of the *EPBC Act* (n 21) sets out the matters and factors that the Environment Minister needs to consider when making an approval decision or a decision not to approve a proposal referred under the Act (including the precautionary principle).

¹¹⁵ *Tarkine* (n 109) 268 [40].

¹¹⁶ *Ibid* 268 [41].

the question would be whether the Minister was possessed of information that showed that the operations of these other mines would contribute, or were likely to contribute, to the consequences that the proposal would have, or was likely to have, on the [MNES] in relation to the proposal.¹¹⁷

If so, he would ‘have then come under an obligation to take account of the consequences referred to’.¹¹⁸

It is, arguably, equally a matter of common sense that present and future impacts constitute the existing circumstance for a threatened species, in addition to past impacts; past impacts change the ‘likelihood and significance’, as well as the ‘seriousness or irreversibility’ of future risk. Many environmental impacts are associated with a degree of latency, so it may be that effects do not manifest at all for some time.¹¹⁹ More commonly, small changes to a species’ ‘circumstance’ are happening constantly, due to cumulative factors. Environmental systems tend to buffer or assimilate impacts until a threshold or tipping point is reached, after which a significant, serious or irreversible effect comes to light (this is the concept of resiliency in complex systems). To suggest that cumulative impacts, including not only those that constitute a baseline but also the effects of present and future threats, are relevant to a species’ circumstance is not necessarily inconsistent with the *Tarkine* judgment. In *Tarkine* the Minister did not have to decide whether actions he knew about contributed to the circumstance of the threatened species in question, and thus whether they increased potential sensitivity of the species to the proposal under consideration. However, those actions were specific mine proposals. If the focus is on general impacts such as bushfire, or a class of ongoing activity such as forestry operations, *Tarkine* may be distinguishable on the basis that those future risks constitute a present circumstance.

Additionally, the judgment left room for a cumulative impact to be relevant to approval decisions if the nature of the impact is set out in the documentation provided to the decision-maker. The future circumstance of threatened species is often set out in conservation advices, which are government-led documents that must be considered under *EPBC Act* decision-making where there is likely to be a significant impact on a threatened species.¹²⁰ A conservation advice will not likely evaluate impacts of specific proposals, but it will lay out threats from general issues. The advice for Leadbeater’s possum, for example, lists the collapse of hollow-bearing trees, extensive wildfire, and logging as ‘known current’ threats; climate change as a ‘suspected future’ threat; and predation by feral cats and competition for nest hollows with sugar gliders as ‘suspected current’ threats.¹²¹ These categories demonstrate the way in which uncertainty (‘suspected’) and future threats are part of the picture describing the circumstances of Leadbeater’s possum. This holistically represents the ‘state of the environment’, and to exclude future threats from a

¹¹⁷ Ibid 273 [53].

¹¹⁸ Ibid.

¹¹⁹ For an analysis in the coal seam gas context, see Rebecca Nelson, ‘Big Time: An Empirical Analysis of Regulating the Cumulative Environmental Effects of Coal Seam Gas Extraction under Australian Federal Environmental Law’ (2019) 36(5) *Environment and Planning Law Journal* 531.

¹²⁰ *EPBC Act* (n 21) s 139(2).

¹²¹ Threatened Species Scientific Committee, *Conservation Advice: Gymnobladeus Leadbeateri — Leadbeater’s Possum* (2019) <<http://www.environment.gov.au/biodiversity/threatened>>.

consideration of a proposed future impact would be somewhat artificial, potentially facilitating an unwanted or unexpected outcome. A second (related) basis upon which *Tarkine* might be distinguished, then, is where there is information on future threats and the effect of those threats on a particular species available to the decision-maker at the time s 136 of the *EPBC Act* is engaged.

2 Leadbeater's Case and Cumulative Impacts

The concept that the circumstance of a species will depend on cumulative contributions to its key threats is, as alluded to, one of the significant points picked up in *Leadbeater's* case. The stage was set some 10 years earlier by *Brown v Forestry Tasmania* [No 4], where Marshall J considered that 'present and likely future forestry operations' would have a significant impact on the threatened Tasmanian wedge-tailed eagle (*Aquila audax fleayi*), on the basis of Forestry Tasmania's operations forming 'part of the well-established cumulative impact of native forest harvesting in Tasmania on the eagle'.¹²² Here, Marshall J effectively considered the contribution of the logging operation under question with respect to the context of cumulative forestry impacts on the eagle population. He also found that forestry operations were likely to have a significant impact on the broad-toothed stag beetle (*Lissotes latidens*), as well as the swift parrot (*Lathamus discolor*), due to 'all' of the threats to these species.¹²³

In *Leadbeater's* case, wildfire was a critical cumulative impact relevant to 'seriousness' under the precautionary principle. Mortimer J found that fire is relevant to forestry 'as a matter of logic and common sense' because fire risk increases the value of the remaining habitat of a threatened species, therefore increasing the damage that would be caused by destruction of that habitat from forestry operations.¹²⁴ She also said:

All threats to the species can be considered in deciding if, objectively, there are threats of 'serious' damage to the species. For a listed threatened species, this is not a very difficult threshold to meet. In substance, it is inherent in the listing of a species that there are threats of serious damage to it: that is the purpose of the listing criteria.¹²⁵

Mortimer J specifically noted that this 'wider view' of threats of damage is important to understand; VicForests' expert had assumed that the relevant question was whether *forestry operations in the logged coupes*, in a narrow sense, posed the threat of serious or irreversible damage. She found that, in the context of the precautionary principle, only serious or irreversible harm need be established in a case, and that both could arise from sources other than the action under consideration, in conjunction with the action. She was persuaded on the balance of probabilities that there were risks of serious *and* irreversible threats to the possum species, from timber harvesting and wildfire combined.

¹²² *Brown v Forestry Tasmania* [No 4] [2006] 157 FCR 1, 16 [102]. See also *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Kiefel J).

¹²³ *Brown v Forestry Tasmania* [No 4] (n 122) 20 [137], 24 [162].

¹²⁴ *Leadbeater's* original decision (n 2) 272 [674].

¹²⁵ *Ibid* 303–4 [847].

Leadbeater's case advanced a much-needed clarification that cumulative impacts are relevant to decision-making concerning threatened species and their habitat. To the extent that this might provoke fears of a dramatically expanded scope for environmental impact assessment, *Tarkine* can be called upon as a guide: the Minister does not need to actively engage in fact-finding about all other relevant possible threats. The Minister will already be aware of the key threats on account of the conservation advices required to be considered under the *EPBC Act* (although it must be noted that these are not always complete or available for all species), as well as other material elicited from environmental surveys, reports and public submissions.

Mortimer J's judgment also helps us to appreciate that cumulative impacts are inherently related to the precautionary principle. Cumulative impacts are almost always associated with at least a degree of uncertainty by reason of interacting, non-linear causal relationships. In complex systems there is a synergistic element to cumulative impacts in that threats may be interrelated — the manifestation of one contributing to or worsening another. In the Conservation Advice on *Leadbeater's possum*, for example, the collapse of hollow-bearing trees is explicitly recognised as 'also influenced by the other main threats listed here, fire and logging'.¹²⁶ The previous neglect of cumulative impacts by the law governing environmental management and decision-making is an omission that needs remedying; cumulative impacts have always underpinned environmental problems, yet two things have changed: knowledge of cumulative impacts and of the way in which complex environmental systems work has advanced, and environmental problems have worsened. The law is necessarily going to have to evolve to deal with decision-making in the face of uncertainty due to cumulative impacts, and the precautionary principle is an important tool that can aid in this evolution.

IV The Next Phase of the Precautionary Principle

On 8 July 2022, the Environment Council of Central Queensland Inc wrote to Australia's newly appointed Environment Minister, the Hon Tanya Plibersek, asking her to reconsider the suite of coal and gas projects pending approval under the *EPBC Act*.¹²⁷ Relying on s 78A of the Act,¹²⁸ they argued that substantial new information about the impacts of climate change on the environment that was not before her predecessors warranted a revocation of the decision in each case that there was not likely to be a significant impact on threatened species and protected places. The Minister stated in early November 2022 that she will reconsider 18 projects.¹²⁹ In

¹²⁶ Threatened Species Scientific Committee (n 121).

¹²⁷ For an explanation of the case and the evidence being relied upon, see 'About These Climate Cases', *Living Wonders* (Web Page, 2023) <<https://livingwonders.org.au/about-this-action>>.

¹²⁸ Section 78A of the *EPBC Act* (n 21) allows a person to request the Minister to reconsider a decision that an action (eg, a coal extraction project) is a 'controlled' action under the Act (per s 75(1)), meaning a finding that there is likely to be a significant impact to one or more of the MNES in pt 3 of the Act.

¹²⁹ Michael Slezak, 'Coal and Gas Projects To Be Reassessed after Conservation Group Wins Legal Bid on Climate Change Impacts', *ABC News* (online, 4 November 2022) <<https://www.abc.net.au/news/2022-11-04/coal-projects-reassessed-after-legal-bid/101617118>>.

making new decisions on significant impact, the Minister is required to consider the precautionary principle.¹³⁰ At the time of writing, the Minister had reconsidered three coal projects. In doing so, she determined that climate change will likely have a significant impact on essentially all of the *EPBC Act* protected species and places. As alluded to in Part II(B)(2), however, she concluded that the three projects, each considered separately, were not likely to have a significant impact on the matters protected by the *EPBC Act*, because the coal projects were not sufficiently causally connected to the impacts of climate change. A potential challenge to this decision or to an approval decision might offer an opportunity to clarify the relationship between individual coal projects and climate-related impacts on protected species and places. Future climate litigation could also further our understanding of whether and how the precautionary principle can be employed to help navigate a response to the intersecting biodiversity and climate crises.

As we continue through the decade of the 2020s and beyond, the natural world will continue to be adversely impacted by climate change. In many cases, climate change will increase the likelihood or disturbance pattern of other threats, such as with Australian forest habitats and bushfire, Australian coastal habitats and sea level rise, and Australian riverine habitats and flooding.¹³¹ This inevitably changes the context in which human development activities will take place, and changes the circumstances for Australia's threatened flora, fauna and ecological communities.

There is much that we do not know about the future that could be characterised as scientific uncertainty. Even if threats could be faithfully anticipated, the question of how habitats and in turn the species that live in them (including humans) are likely to respond to this are relevant types of uncertainty as well.¹³² National Geographic reported that the 2019–20 bushfires 'laid bare just how little is known about populations of even iconic species ... as well as how little protection conservation laws have provided vulnerable wildlife amid rampant deforestation, development, and climate change' citing a 'lack of fundamental data' as a key concern.¹³³

The federal *EPBC Act* was independently reviewed in 2020. The report by the chair of the review, Professor Samuel, concluded that the precautionary principle is not being given sufficient weight or prominence in approval decisions.¹³⁴ One of the recommendations the review offered was the introduction of national environmental standards to serve as a reference point against which approval decisions should be made. Specifically, the review proposed that actions, decisions,

¹³⁰ *EPBC Act* (n 21) s 391.

¹³¹ See Intergovernmental Panel on Climate Change ('IPCC'), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Working Group II Contribution to the IPCC Sixth Assessment Report) <<https://www.ipcc.ch/report/ar6/wg2>>.

¹³² *Leadbeater's* original decision (n 2). For a general summary of types of scientific uncertainties relevant to law, see Lee Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (Oxford University Press, 2nd ed, 2019) 364.

¹³³ Todd Woody, 'Koalas and Other Marsupials Struggle to Recover from Australia's Bushfires' *National Geographic* (online, 17 July 2020) <<https://www.nationalgeographic.com/animals/2020/07/australia-marsupials-struggling-after-fires>>.

¹³⁴ Samuel (n 102) 43.

plans and policies that relate to the environmental matters protected by the *EPBC Act* should be consistent with the precautionary principle, and reflect a principle of non-regression.¹³⁵ The new Labor government issued a response to the review in December 2022, confirming that it will introduce national standards.¹³⁶ Whether the incorporation of environmental standards in this way will be enough to change decision-making behaviour to better align with the precautionary principle remains to be seen. Assuming the *EPBC Act*'s architecture remains broadly the same — in the sense that decisions made under its auspices are reviewable via judicial review and not on their merits, which appears to be the present intention¹³⁷ — courts will still be deferential to ministerial decision-making to a degree, but new standards might help direct courts with respect to reviewing application of the precautionary principle as well as approval decisions more generally.

In this article, I have argued that both consideration and application of the precautionary principle must be taken more seriously — as a legislative requirement as well as a scientifically-supported imperative — if we are to avoid catastrophic ecological loss and the worst impacts of climate change. *Leadbeater's* case offers guidance on how this might be done, although, as I have shown, it is not the only relevant case to support the contentions made in this article. First, application of the principle should not be trumped by other considerations. Second, if (or because) application is capable of demonstration, conduct taken while under an obligation to apply the principle can be judged, including under judicial review. Third, application and consideration of the principle as we move further down the path of climate change will necessarily involve a consideration of context that takes into account the state of the environment with respect to the manifest and projected impacts of climate change. This may mean that activities which might have been considered acceptable two or three decades ago can no longer be tolerated by the changed environment, and therefore will have much more significant impacts than they once would have. Both the executive and the courts have a role to play in advancing the practical impact of the precautionary principle.

In particular, to see real change as we enter the fourth decade of the precautionary principle, courts must take earnestly their role in adjudicating the precautionary principle when reviewing the actions of the executive. There will not always be an opportunity. *Leadbeater's* case invited the Federal Court to assess the conduct of a forestry operator bound by the precautionary principle under code. However, the effect of the appeal decision is that this review avenue is closed off. Despite the wording of s 38 potentially implying that the *EPBC Act* is a safety net where forestry operations are not conducted in accordance with relevant forestry agreements, the view of the Full Federal Court was that it does not operate this way. In other cases, application of the precautionary principle may similarly not be easily reviewable by courts, if there are barriers such as standing or if the requirements surrounding the principle are heavily qualified and therefore application is difficult to challenge. For precautionary principle jurisprudence to advance, courts need to have an opportunity to review the application of or failure to apply the principle.

¹³⁵ Ibid 203.

¹³⁶ Department of Energy, Climate Change, the Environment and Water (Cth) (n 103).

¹³⁷ Ibid 5.

This will present at judicial review where a ground of review is that the precautionary principle was a relevant consideration to executive decision-making. In these cases, courts should carefully conceptualise their role in reviewing executive decision-making where the precautionary principle is involved. Recent case law suggests that courts *can* recognise a failure to apply the precautionary principle, and as *Leadbeater's* case and *Tree Geebung* each show, can embrace science as a means of informing this adjudication.

The past half-century of human activity has resulted in rapid planetary destruction, including extreme biodiversity loss and dramatic climatic change that has already scarred the Australian landscape.¹³⁸ Human activity will have to change in response if worse impacts are to be avoided. That this should be reflected in the result of environmental decision-making even if we do not know exactly how grave the result will be otherwise, should not be controversial. A contemporary interpretation of the precautionary principle that demands the consideration of and response to cumulative context and which is associated with a basic degree of accountability, therefore, is only common sense.

¹³⁸ See Department of Climate Change, Energy, the Environment and Water (Cth) (n 112); IPCC (n 131).

All About the Land: The (Mis)application of Public Health Orders to Strata Schemes during the Delta Variant COVID-19 Outbreak in Sydney, Australia

Cathy Sherry*

Abstract

Stay-at-home orders have been a key element in the management of the COVID-19 pandemic both in Australia and overseas, with profound consequences for freedom of movement, association, work, recreation and privacy. The rationale for orders is the minimisation of the spread of disease between unrelated households. However, for maximum intended effect, people need to live in residential premises that contain a single household, such as a freestanding house or terrace. In reality, well over two million Australians live in multi-household residential premises, typically strata title schemes. When confined to their homes, these people will of necessity have contact with other households through their use of collectively accessible, private common property. This article analyses the way in which NSW public health orders relied on categories of land to trigger their operation, but failed to properly account for physical and legal differences in land and buildings. The result was nonsensical, potentially ineffective and — eventually — draconian public health orders, offending the rule of law. Given the likelihood of future public health lockdowns, and the severity of their impact on ordinary freedoms, lessons must be learnt from the past to protect the health, social wellbeing and basic rights of millions of people who live in high-density housing.


Please cite this article as: Cathy Sherry, ‘All About the Land: The (Mis)application of Public Health Orders to Strata Schemes during the Delta Variant COVID-19 Outbreak in Sydney, Australia’ (2023) 45(2) *Sydney Law Review* 279.



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My thanks to Amanda Farmer and Dr Nicole Johnston, Australian College of Strata Lawyers; Jane Hearn and Karen Stiles, Owners Corporation Network; and Jimmy Thomson, FlatChat.

I Introduction

As a nation, Australia fared relatively well during the initial stages of the global pandemic of COVID-19. A combination of strict border controls and state-mandated lockdowns, followed by high vaccination rates limited our national death toll to 31 deaths per 100,000 until mid-2022.¹ In comparison to other nations, Australia's lockdowns were strict, and — in the case of Melbourne — extended.

The key element of lockdowns was stay-at-home orders. Their public health motivation was to increase social distancing and to minimise the spread of disease between unrelated households. Social distancing has been adopted worldwide to reduce the spread of COVID-19, as well as during previous viral pandemics, such as the Spanish flu and SARS pandemics.² While research on the efficacy as well as the social and political acceptability of lockdowns is ongoing, epidemiological studies have shown that 'the COVID-19 pandemic can be suppressed by a lockdown';³ thus, it is accepted that lockdowns, including stay-at-home orders, have epidemiological benefits. At the same time, it is acknowledged that lockdowns impose extraordinary restrictions on ordinary freedom of movement, association, work, recreation and privacy — recognised human rights — with profound consequences for social and economic wellbeing. As a result, if lockdowns are used as a public health tool, they must be implemented through justifiable, intelligible and efficacious law.

The ability of stay-at-home orders to create social distancing, and to minimise the spread of disease, is dependent on the physical nature of the homes to which people are being confined. If those homes are freestanding houses or terraces, social distancing will be created between households. However, if those homes are in multi-household residential premises, typically strata schemes, people will of necessity have contact with other households through their use of collectively accessible, often poorly ventilated, private common property such as lifts and corridors. Well over two million Australians live in these kinds of homes. This article analyses public health orders declared during the 2021 outbreak of the Delta variant of COVID-19 in New South Wales ('NSW'), identifying the way in which these orders used land to trigger their operation, but failed to adequately account for physical and legal differences in residential land. For residents of high-density housing, the result was nonsensical, potentially ineffective and — eventually — draconian public health orders.

Research on the application of public health orders to high-density housing is significant both in Australia and overseas. First, although it is often locally contested, the construction of new high-density housing is inevitable in most cities worldwide. Using Australia as an example, our population is predicted to double by

¹ In contrast, the United States had a death rate of 300 per 100,000 and the United Kingdom had a death rate of 262 per 100,000: 'WHO (Coronavirus) Dashboard: Data Download', *World Health Organization* (online 23 May 2022) <<https://covid19.who.int/data>>.

² Alexandra Medline, Lamar Hayes, Katia Valdez, Ami Hayashi, Farnoosh Vahedi, Will Capell, Jake Sonnenberg, Zoe Glick and Jeffrey D Klausner, 'Evaluating the Impact of Stay-at-Home Orders on the Time to Reach the Peak Burden of COVID-19 Cases and Deaths: Does Timing Matter?' (2020) 20(1) *BMC Public Health* 1750, 4.

³ *Ibid.*

2066, largely from inward migration, with most growth occurring in capital cities, specifically Sydney and Melbourne.⁴ Sydney's outward expansion is limited by the Blue Mountains to the west and the Pacific Ocean to the east. While urban sprawl will continue in the northwest and southwest sectors, 'greenfields' development on the urban fringe is expensive owing to the lack of infrastructure. In the medium to long term, governments will continue to implement urban consolidation policies that encourage or mandate high- and medium-density development within Sydney's existing footprint. Millions of residents, either through positive choice or lack of alternatives, will live in and/or manage strata schemes. Second, at the time of writing, the COVID-19 pandemic is not over, and future lockdowns for new waves, including more-virulent and/or vaccine-evading variants,⁵ are possible. Research suggests that Australians during 2020–21 were generally accepting of lockdowns, being willing to trade some freedom to avoid the negative consequences of disease.⁶ Although they were more vigorously contested in other nations, lockdowns still occurred, and of course, lockdowns in all countries remain possible in the event of inevitable future pandemics. As a result, it is imperative that we learn from the mistakes of initial lockdowns, particularly mistakes in the application of public health orders to a significant segment of most cities' housing stock. Public health officials must have an accurate understanding of the legal status of space within high-density housing, as well as the powers and responsibilities of stakeholders in the sector. That understanding can only come from a fine-grained analysis of the legislation that regulates high-density housing, as well as foundational principles of land law. If we want to ensure that public health orders operate fairly and effectively on the ground, in people's lives and homes, we need to focus our analysis on the law that regulates those lives and spaces. To date, this analysis has not been done elsewhere.⁷

⁴ 'Population Projections, Australia', *Australian Bureau of Statistics* (Web Page, 22 November 2018) <<https://www.abs.gov.au/statistics/people/population/population-projections-australia/latest-release#capital-cities>>

⁵ Deborah Cromer, Megan Steain, Arnold Reynaldi, Timothy E Schlub, Adam K Wheatley, Jennifer A Juno, Stephen J Kent, James A Triccas, David S Khoury and Miles P Davenport, 'Neutralising Antibody Titres as Predictors of Protection against SARS-CoV-2 Variants and the Impact of Boosting: A Meta-Analysis' (2022) 3(1) *Lancet Microbe* e52–e61.

⁶ Kathleen Manipis, Deborah Street, Paula Cronin, Rosalie Viney and Stephen Goodall, 'Exploring the Trade-off between Economic and Health Outcomes during a Pandemic: A Discrete Choice Experiment of Lockdown Policies in Australia' (2021) 14(3) *The Patient: Patient-Centered Outcomes Research* 359.

⁷ Relatively high-level recommendations about Australian governments' responses to the pandemic were made in Peter Shergold, Jillian Broadbent, Isobel Marshall and Peter Varghese, *Faultlines: An Independent Review into Australia's Response to COVID-19* (Report, Paul Ramsay Foundation, October 2022). However, one general recommendation the panel made that was pertinent to the strata sector related to the need for all levels of government 'to invest in relationships with business and civil society to harness their expertise and networks in a crisis by committing to comply with the principles and core values for community engagement': at 12. In NSW, it was a source of frustration for the strata sector, strata lawyers and researchers that NSW Health was generally unwilling to consult with or benefit from sector-specific expertise.

II Public Health Orders in NSW

Australian state governments used public health orders to respond quickly and decisively to the COVID-19 global pandemic.⁸ Orders are created with executive powers exercised through delegated legislation. The advantages of this approach are speed and flexibility; the disadvantages are a lack of parliamentary scrutiny, infringements of people's liberties and the potential misuse of powers.⁹ In addition, when orders are drafted quickly and frequently, there are real risks of poor and incorrect drafting, creating confusion for citizens and their lawyers, as well as ineffective public health outcomes. O'Brien and Waters argue that along with front-end controls on power, back-end reviews are essential to determine whether powers were 'exercised in a manner which was lawful and meritorious in the sense that the resulting decisions were necessary and proportionate to the end to be achieved'.¹⁰ Formal back-end reviews include judicial review and commissions of inquiry,¹¹ while informal reviews include academic analysis of the drafting, creation, dissemination and operation of orders. This article is one such analysis.

The power to deal with a public health emergency varies from state to state in Australia,¹² but in NSW, s 7 of the *Public Health Act 2010* (NSW) gives the Minister for Health extremely broad powers to make directions if they believe on reasonable grounds that a situation has arisen that is likely to be a risk to public health. Unlike in other states, it is not necessary for an emergency declaration to be made.¹³ Under s 7(2) the Minister may take such action and by order give such directions they consider necessary to deal with the risk and its possible consequences. Although 'public health order' is defined in the Act as an order made under s 62 by an authorised medical practitioner (including the Chief Health Officer), directions of the Minister under s 7(2) can also be made by order, as was the case during the 2021 Delta outbreak. Consistent with this terminology, this article uses the term 'public health order' to refer to ministerial directions under s 7.

At daily press conferences throughout the Delta outbreak, the then NSW Premier Gladys Berejiklian emphasised that all decisions in relation to public health orders were informed by medical advice from the Chief Health Officer, Dr Kerry Chant. While there is little doubt that medical advice formed a significant part of the government's response to COVID-19, medical advice was balanced with concerns about the effect of lockdowns on the economy and people's mental health, and in

⁸ Peta Stephenson, Ian Freckelton and Belinda Bennett, 'Public Health Emergencies in Australia' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 69, 76–89.

⁹ Ibid 69, 82–8; Janina Boughey, 'Executive Power in Emergencies: Where Is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168; Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19' (Research Paper No 2, Parliamentary Library and Information Service, Parliament of Victoria, August 2020) 4–5.

¹⁰ Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28(2) *Journal of Law and Medicine* 346, 347–8.

¹¹ Ibid 348; Ian Freckelton, 'Government Inquiries, Investigations and Reports during the COVID-19 Pandemic' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 90.

¹² O'Brien and Waters (n 10) 346–53; Stephenson, Freckelton and Bennett (n 8) 69–89.

¹³ *Public Health Act 2010* (NSW) s 7(1); Stephenson, Freckelton and Bennett (n 8) 69, 76.

NSW, unlike other states, the ultimate content of public health orders by ministerial direction is determined by politicians, not public health officials.¹⁴ Further, medical advice must be implemented through the letter of the law. While public education and behavioural change were a central part of government strategy, ultimately, legal imperatives to take particular action or refrain from certain behaviour could only be found in the specific wording of the public health orders. If those orders were improperly drafted, public health aims could not be achieved.

III The COVID-19 Delta Variant Public Health Orders

Between June and September 2021 over 40 public health orders were declared with multiple amendments, culminating in stay-at-home orders in late June 2021. These required residents of Greater Sydney to remain in their homes unless they had a ‘reasonable excuse’ to leave.¹⁵ Reasonable excuses included performing work not practicable to do from home, obtaining household goods and services, exercising, for childcare, providing assistance to vulnerable people and for compassionate reasons, including seeing a person with whom someone was in a relationship.¹⁶ The orders were amended multiple times a week, and eventually implemented a five-kilometre radius in which people could shop or exercise, as well as a curfew for particular areas of Sydney.

The continual remaking and amendment of public health orders gradually increased restrictions on movement over the initial stages of the outbreak, and then gradually decreased restrictions as the outbreak subsided.¹⁷ The government was presumably concerned to minimise extraordinary restrictions on movement and freedom of action. However, the result of gradual and continuous changes to orders was widespread confusion in the community, the legal profession and, most concerning, the police force. Speaking in early 2022 about thousands of unpaid fines issued for alleged breach of public health orders, Redfern Legal Centre lawyer Sam Lee said:

What we found with these COVID fines is a majority of them, in our experience, were not issued according to law, so it’s a due process issue rather than a public health issue ... I don’t necessarily blame police because the orders kept changing so rapidly that no one was keeping up properly. It was inevitable that the outcome was going to be badly issued fines.¹⁸

Frequent changes were further complicated by multiple sources of information, including public pronouncements at press conferences by the Premier,

¹⁴ In other states, the power to make orders or directions in a public health emergency rests with the Chief Medical Officer: see O’Brien and Waters (n 10) app 1. In 2021 Victoria passed the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic), inserting s 165AI into the *Public Health and Wellbeing Act 2008* (Vic) which now vests power to make public health orders in the Minister.

¹⁵ *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW).

¹⁶ *Ibid* cls 20(1), (2), sch 1.

¹⁷ NSW Government, ‘Public Orders Relating to Delta Outbreak Restrictions’, *NSW Legislation* (Web Page, March 2023) <<https://legislation.nsw.gov.au/information/covid19-legislation/temporary-movement-gathering-restrictions>>.

¹⁸ Quoted in Caitlin Fitzsimmons, “‘People are Struggling’: \$42 Million in Unpaid COVID Fines after Lockdown Blitz”, *The Sydney Morning Herald* (online, 22 May 2022) <<https://www.smh.com.au>>.

the Minister for Health, the Chief Medical Officer, the Minister for Police, the Police Commissioner and Assistant Police Commissioners. One disturbing source of confusion was allegations by the Minister for Police and Police Commissioners about people exploiting ‘loopholes’ in the public health orders,¹⁹ a concept that is deeply legally flawed. The starting point for public health orders is that all movement and contact with other people is legal unless prohibited by specific provisions of the orders. They do not operate on the grounds that ‘Your Honour, it’s the vibe’.²⁰ There were no ‘loopholes’; actions were either lawful or unlawful according to the wording of the orders. Further confusion was created by attempts to provide lay explanations of orders on the NSW Health website and its social media sites. While lay explanations of law are laudable, those sources of information were sometimes contradictory or incorrect, making statements that were not substantiated by the content of the public health orders.²¹ Ultimately, in late 2022, more than 33,000 fines — over half of those issued for alleged breaches of the public health orders — were cancelled by the government after it became clear that they were invalid for lack of specificity under the *Fines Act 1996* (NSW).²²

Australian society, like all liberal democracies, is governed by the rule of law. The rule of law is a complex and much discussed concept that has spawned a vast literature over centuries, but it contains some basic elements that are relatively uncontested. One is that law should be known and knowable so that people and their legal advisers understand what is required of them to comply with the law. Laws must be publicly accessible, prospective, intelligible and consistent. They must be drafted so that it is ‘possible for professionals at least to get a reliable picture of what the law at any given time requires’.²³ As the late Joseph Raz wrote, ‘ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse’ and law that is changed too frequently will leave people ‘constantly in fear that it has changed since they last learned what it was’.²⁴ While there is some provision in the rule of law for less formal legal orders and emergencies, the plea that extraordinary times call for extraordinary measures must be kept in check. The use of public health orders during the COVID-19 pandemic has raised concerns about compliance with the rule of law. Questions have been asked about the publication of public health orders in accessible

¹⁹ Hamish Goodall, ‘NSW Police Minister David Elliott “Delighted” after Lockdown “Loopholes” Closed by State Government’, *7news.com.au* (Web Page, 16 August 2021) <<https://7news.com.au>>; Samantha Maiden, ‘Byron Bay COVID Case under Investigation by NSW Police’, *News.com.au* (Web Page, 10 August 2021) <<https://www.news.com.au>>.

²⁰ In the classic Australian film, *The Castle* (Miramax, 1997) 0:55:12–0:58:20, when asked to specify the section of the *Australian Constitution* on which he is relying, the protagonist’s endearing, but less than competent, lawyer replies, ‘There is no one section. It’s just the vibe of the thing’.

²¹ For example, NSW Health tweeted on 8 August 2021: ‘Masks need to be worn whenever outdoors’: @NSWHealth (NSW Health) (Twitter, 8 August 2021, 11:03am AEST) <<https://twitter.com/nswhealth/status/1424174432235376643>>. In fact, masks were not mandated outdoors by a public health order until 23 August 2021: *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) cls 3.15(2), 4.16(2).

²² Georgina Mitchell, ‘More than 33,000 COVID Fines Withdrawn after Government Concedes They Are Invalid’, *The Sydney Morning Herald* (online, 29 November 2022) <<https://www.smh.com.au>>.

²³ Jeremy Waldron, ‘The Rule of Law’, *Stanford Encyclopedia of Philosophy* (Web Page, 22 June 2016) [5.1] <<https://plato.stanford.edu/entries/rule-of-law>>.

²⁴ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 214. See also John Rawls, *A Theory of Justice* (Oxford University Press, rev ed, 1999) 209.

formats and the lack of obligation to maintain enduring, accurate records of orders.²⁵ This article identifies rule of law concerns in its discussion of the clarity, intelligibility, accuracy and rationality of public health orders.

Rather than analysing a moving target — the multiple versions of the public health orders that were in force during the Delta variant lockdown and multiple government descriptions of their content — this article predominantly focuses on a single order: the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) (the ‘PHO’) which was in force between 13–14 September 2021, at the height of the NSW lockdown. The order is substantially similar to multiple orders in force in the preceding weeks.

IV The PHO: It’s All About the Land

The starting point for analysing the Delta variant public health orders is a recognition that while public health orders can apply directly to individuals,²⁶ most of the Delta variant orders applied to land. That is, with the exception of the self-isolation orders that applied to people diagnosed with COVID-19 and their close contacts,²⁷ the public health orders did not apply directly to people (eg, specific individuals, people over 65, people with underlying health conditions). Rather, the orders captured people by their presence on land. While there were some categories of people who were singled out for particular rules (eg, ‘authorised’ workers), those categories were still connected to land — ‘authorised workers’ being people who lived in ‘areas of concern’ with high rates of COVID-19, but who were nonetheless allowed to leave their local area because they were performing essential services.²⁸ Because categories of land were the trigger for the PHO, careful attention needed to be paid to those categories. If categories did not logically correspond with risks of transmission or were legally incorrect, the effectiveness of orders could be compromised, infringing basic freedoms but providing limited, or no, public health gain.

The PHO divided NSW into three geographical categories with gradations of restrictions. The lowest level of restrictions applied to ‘general areas’, the next level to ‘stay-at-home areas’, and the highest level of restrictions to ‘areas of concern’ (colloquially known as ‘hotspots’). At the height of the lockdown in August and September 2021, most of NSW was defined as a stay-at-home area, including Greater Sydney and multiple local government areas in regional NSW. The ‘areas of concern’ were a large swathe of local government areas and individual suburbs in Sydney’s west and southwest, where rates of infection were higher than in other

²⁵ O’Brien and Waters (n 10) 354–5.

²⁶ David J Carter, ‘The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis’ (2020) 43(1) *University of New South Wales Law Journal* 117.

²⁷ In 2021 there were four orders titled *Public Health (COVID-19 Self-Isolation) Order* (No 1 to No 4), with multiple amendments: NSW Government, ‘Public Health Orders Relating to Self-Isolation’, *NSW Legislation* (Web Page, 14 October 2022) <<https://legislation.nsw.gov.au/information/covid19-legislation/self-isolation>>.

²⁸ *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) cl 4.3 (‘PHO’). See NSW Government, ‘Authorised Workers’, *NSW Legislation* (Web Page, 15 September 2021) (no longer available at June 2023).

parts of the city or state.²⁹ These are also lower socio-economic areas of Sydney, which raised questions about the equitable application of the public health orders. There is not space here to address these complex issues, but suffice to say, it became clear that the impact of public health orders bore more harshly on communities where people were less able to work remotely, lived in multi-generational and/or crowded housing and were more intensively policed.³⁰

Within geographical areas, further categories of land were used to implement restrictions. These related to categories of premises, primarily those ‘open to the public’ and ‘residential premises’ or ‘places of residence’. Office and other work premises were not specifically closed, but they were effectively emptied of people by the prohibition on leaving a place of residence for work that could practicably be done from home,³¹ as well as the requirement for employers to allow workers to work from home.³² If non-residential premises had people inside them, they were limited to one person per four square metres.³³

In stay-at-home areas and areas of concern, most premises normally open to the public were closed, including swimming pools, gyms, shops and hairdressers.³⁴ The exceptions included premises that sold food or drink to be consumed off the premises, supermarkets, chemists, and shops selling pet supplies or hardware, garden or office supplies.³⁵ The key public health motivation for the closure of publicly accessible premises was that those premises allow *multiple unrelated households* from a wide range of geographical areas to mix, increasing the likelihood that the virus would spread.

The combined effect of closing publicly accessible premises, requiring people to work from home, and the stay-at-home orders was to decant people out of public and non-residential space into residential premises. In residential premises that were freestanding or terrace homes, the public health orders achieved their objective: they largely prevented people from unrelated households mixing. In this sense, NSW suburbs carried out one of the primary functions for which they were constructed — preventing the spread of disease.

It is no accident that Australians overwhelmingly live in freestanding houses set in spacious gardens. It is the consequence of the Garden Suburb Movement, actively promoted by British and Australian planners in the late 19th and early 20th centuries.³⁶ Based on the writings of Ebenezer Howard,³⁷ the Garden Suburb Movement aimed to remedy the ills of British Industrial Revolution cities, which were unplanned, high density and above all else, dangerous to their inhabitants’ health. In 1841, life expectancy in England and Wales generally was 41 years; in

²⁹ PHO (n 28) sch 1.

³⁰ Kurt Iveson and Alistair Sisson, ‘Transmission and Territory: Urban Borders during COVID-19’ (2023) 104 *Political Geography* 102910.

³¹ PHO (n 28) sch 2(1).

³² Ibid cls 2.10(1), 3.18(1), 4.19.

³³ Ibid cls 3.8, 4.9.

³⁴ Ibid cls 3.3, 4.4.

³⁵ Ibid cls 3.5, 4.6.

³⁶ Robert Freestone, *Model Communities: The Garden City Movement in Australia* (Nelson, 1989); Graeme Davison, ‘The Past and Future of the Australian Suburb’ (1993) 31(2) *Australian Planner* 63.

³⁷ Ebenezer Howard, *Garden Cities of To-Morrow* (Swan Sonnenschein, 1902).

Manchester and Liverpool it was 26.³⁸ In the 19th century, the development of germ theory and railways provided the incentive and means to get populations out of crowded, unsanitary city centres and into the quasi-rural suburbs, where families no longer lived in multi-family buildings, but in their own freestanding homes, separated from neighbours by green grass and trees.³⁹ The outbreak of bubonic plague in the unplanned, working class Rocks area of Sydney⁴⁰ provided an incentive to accelerate the construction of freestanding suburban housing, and by the 1920s, 81% of investment in all building work in Sydney went towards the development of low-density suburbs.⁴¹

Fast forward to the late 20th century and Australian cities faced problems with suburban sprawl. Peri-urban areas lacked infrastructure, incentivising governments to implement urban consolidation policies.⁴² These aimed to fit new development within a city's existing footprint, and the only way to do that is to build up. Between 1996 and 2006, NSW built 10,000 attached dwellings a year, and by 2011, a quarter of Sydney's population lived in strata title apartments.⁴³ Some of those apartments are contained in community title developments, which are planned developments with multiple high-rise buildings, townhouses and/or freestanding homes, along with extensive, privately owned common property (eg, roads, parks, recreational facilities).⁴⁴

In the context of a pandemic, strata title housing has two salient features: common property and a body corporate. Common property includes lifts, corridors, paths, car parks, recreational facilities and gardens (all of the spaces outside individual lots) and is accessible by all residents. The body corporate — called an 'owners corporation' in NSW strata schemes and an 'association' in community schemes — is the governing body with responsibility for the management of the scheme and its property. The body corporate is made up of all owners, not tenants, and while it might be assisted by a strata or building manager, the body corporate is the ultimate authority in a strata scheme. All aspects of strata schemes are private: that is, common property is private property, and a body corporate is a private legal entity.

If public health orders were going to confine an entire city's population to their homes, the orders needed to account for the vast physical and legal differences

³⁸ Kingsley Davis, 'The Urbanization of the Human Population' (1965) 213(3) *Scientific American* 40, 44.

³⁹ Harold Platt, 'From Hygeia to the Garden City: Bodies, Houses, and the Rediscovery of the Slum in Manchester, 1875–1910' (2007) 33(5) *Journal of Urban History* 756.

⁴⁰ Grace Karskens, 'Tourists and Pilgrims: (Re)visiting the Rocks' (2003) 27(79) *Journal of Australian Studies* 29, 33; Paul Ashton, '"This Villa Life": Town Planning, Suburbs and the "New Social Order" in Early Twentieth-Century Sydney' (2010) 25(4) *Planning Perspectives* 457, 457.

⁴¹ Ashton (n 40) 473.

⁴² Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (Routledge, 2017) 10.

⁴³ *Ibid.*

⁴⁴ The easiest way to understand community title developments under the *Community Land Development Act 2021* (NSW) ('CLDA') and the *Community Land Management Act 2021* (NSW) ('CLMA') is to explore the websites for large developments: see, eg, 'Home', *Jacksons Landing* (Web Page, March 2023) <<https://jacksonslanding.net.au>>; 'Home', *Breakfast Point* (Web Page, March 2023) <<https://www.breakfastpoint.com>>.

between the majority of homes in NSW — freestanding housing — and the significant minority of homes — 800,000 residential strata lots⁴⁵ and over 66,000 social and public housing apartments.⁴⁶ Unfortunately, the public health orders almost completely failed to do this. They used a single category of ‘place of residence’ or ‘residential premises’ and applied the same rules to all homes whether a freestanding house on a 500 m² lot or a strata scheme with 500 residents.

The *PHO* did not define ‘place of residence’ or ‘residential premises’. Clause 1.4 stated:

A reference to a type of premises in this Order has the same meaning as it has in the instrument (the *standard instrument*) set out in the *Standard Instrument (Local Environmental Plans) Order 2006* [(NSW)].

However, the Standard Instrument does not contain any definition of ‘place of residence’ or ‘residential premises’. The Standard Instrument’s Dictionary defines ‘residential accommodation’ as ‘a building or place used predominantly as a place of residence’, so perhaps that is what the *PHO* meant by ‘residential premises’ or a ‘place of residence’. ‘Residential accommodation’ then has a broad definition in the Standard Instrument, and includes boarding houses, dwelling houses, group homes, hostels, multi-dwelling housing, semi-detached dwellings, residential flat buildings, and seniors housing. Whether using a plain English interpretation of the phrase ‘place of residence’ or the Standard Instrument definition of ‘residential accommodation’, both categories capture a huge range of housing.

The key problem with the terms ‘place of residence’ and ‘residential premises’ is that these terms refer to *land* and its use, not to buildings. In land law, buildings are fixtures, which form part of the realty; they are not separate legal entities. As a result, the terms ‘place of residence’ and ‘residential premises’ capture *all parts* of a parcel of residential land. In relation to a freestanding house, the backyard and driveway are part of a place of residence just as much as the living room and kitchen. In a strata scheme, common property lifts, corridors, foyers, paths, car parks and gardens are all part of the place of residence. Crucially, ‘place of residence’ and ‘residential premises’ does not mean an individual apartment or house. This does not matter for freestanding housing because the surrounding garden, garage, paths and so on are only accessible by the same people as the house. It matters very much for a strata or community scheme, because the common property can be accessible by between two and 2,000 unrelated households.⁴⁷

The failure to specifically define ‘residential premises’ or ‘place of residence’ for the purposes of the public health orders produced two serious flaws. The first was that the orders did not account for the fact that publicly accessible places are not the only spaces in which unrelated households can mix. The second was that the

⁴⁵ Hazel Easthope, Sian Thompson and Alistair Sisson, *Australasian Strata Insights 2020* (City Futures Research Centre, UNSW, 2020) 7 (*‘Australasian Strata Insights 2020’*).

⁴⁶ ‘Social Housing Residential Dwellings Dashboard’, *Department of Communities and Justice* (NSW) (Web Page, 28 March 2022) <<https://www.facs.nsw.gov.au/resources/statistics/social-housing-residential-dwellings>>.

⁴⁷ For example, Breakfast Point, one of Sydney’s largest community title schemes, has 1,737 dwellings, predominantly apartments: ‘Breakfast Point: 2016 Census QuickStats’, *Australian Bureau of Statistics* (Web Page) <<https://www.abs.gov.au/census/find-census-data/quickstats/2016/SSC10557>>.

orders created rules that made little or no sense for collectively owned and collectively accessible residential space.

A *'Open to the Public': Not the Only Places Unrelated Households Can Mix*

On 26 June 2021, a public health order closed multiple facilities that were open to the public, including gyms and swimming pools, indoors and outdoors.⁴⁸ However, gyms and pools inside strata and community schemes were not captured by these provisions as they were not open to the public. Although the public–private divide in strata schemes is often blurred in lay perception and even legal analysis, with the exception of a small number of large schemes that include retail premises, the common property of a strata scheme is not publicly accessible.⁴⁹ Just like the front path or driveway of a freestanding home, common property is accessible by residents and the people to whom they have given express (eg, visitors and delivery people) and implied (eg, doorknockers) invitations. That group does not include the public. Although the 26 June order did not oblige them to do so, many schemes voluntarily closed their recreational facilities on the assumption that as they allowed unrelated households to mix, they posed a risk to residents' health.

It is not clear why pools and gyms were legally allowed to remain open inside strata schemes. From late June to September 2021, NSW was in the grip of ever-tightening restrictions on movement, and at daily press conferences, the Premier, Minister for Health and Chief Medical Officer implored people not to leave their homes unless absolutely necessary. Families and friends were prohibited from seeing each other, children were excluded from school, businesses and their customers were excluded from their premises. It was an unprecedented suspension of freedom of movement, association, work, recreation and privacy, all justified by public health. In this context, it seemed contradictory to allow scores of unrelated households inside high-density apartment buildings to continue to mix freely in confined indoor spaces to use pools and gyms. On 21 August 2021, the author wrote directly to the Chief Medical Officer, raising questions about the discrepancy. Seven days later, on 28 August 2021, the Chief Medical Officer wrote to strata managers stating, 'Given the risk of COVID-19 transmission communal areas such as gyms, lounges and theatres should be closed at this time'.⁵⁰ The Chief Medical Officer would have been relying on legal advice provided to her about strata schemes, but that advice did not seem to have been informed by a clear understanding of the law relating to common property for the following reasons.

Strata managers are agents who may be employed by owners corporations.⁵¹ There is no obligation to employ a strata manager, and many schemes, particularly

⁴⁸ *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW) cl 24 (commencing 26 June 2021).

⁴⁹ Cathy Sherry, 'Does Discrimination Law Apply to Residential Strata Schemes?' (2020) 43(1) *University of New South Wales Law Journal* 307, 311–14.

⁵⁰ Copy of letter on file with author. See also Jimmy Thompson, 'Chant Calls for Roll Updates and Strata Gym Closures', *FlatChat* (Web Page, 1 September 2021) <<https://www.flatchat.com.au/chant-letter>>.

⁵¹ *Strata Schemes Management Act 2015* (NSW) s 52 ('SSMA').

older schemes in lower income areas of Sydney, do not employ professional strata management. That said, the kinds of schemes that have facilities such as gyms and pools would have professional management.

However, strata managers have no independent authority in relation to a scheme or its common property. Common property is owned by all lot owners as tenants in common in proportion to their unit entitlement,⁵² and ultimate authority for the scheme and its property rests with those owners acting through the owners corporation.⁵³ Owners corporations may delegate some or all of their powers to a strata manager, but they may not delegate determinations of levies or decisions that according to legislation must be made by the owners corporation.⁵⁴ Although lay people frequently refer to ‘the strata’ as the source of authority in schemes, there is no such entity.

A strata manager could only have the power to close common property gyms or pools if an owners corporation had delegated that power to the manager. A specific delegation like this is unlikely to have been anticipated and expressed in a strata management agency agreement, but it could be captured in a general delegation, although only if the owners corporation has that power itself. So, does the owners corporation have the power to close a gym or a pool? On the one hand, the authority of *Lin v Owners — Strata Plan No 50276* would suggest that as owners are tenants in common of common property, like any tenant in common they cannot be excluded from their own land.⁵⁵ They have the right to ‘occupy the whole’, a right which passes to a tenant on the grant of a lease. On the other hand, owners corporations clearly have the power to regulate the use of common property and frequently do so with reference to facilities. For example, pools and gyms are regulated by access hours and rules on use, all of which are valid. A temporary closure of a pool or gym during a public health crisis could rightly be characterised as regulation of common property. This is bolstered by the wording of s 9 of the *Strata Schemes Management Act 2015* (NSW), which states that the owners corporation has the management and control of common property ‘for the benefit of the owners of lots in the strata scheme’, although noticeably not for the benefit of all residents, almost 50% of whom are tenants.⁵⁶

This raises the difficult question of what is for the benefit of lot owners? The closure of public gyms and pools seemed to indicate that these facilities presented a real risk for transmission of COVID-19 and leaving them open inside a strata scheme could be dangerous or even fatal for residents. Alternatively, some lot owners and residents might have argued that as people were confined to their homes, access to privately owned recreational facilities was essential for people’s physical and mental health. One of the key challenges of the pandemic has been balancing public health risks of activities that bring people together with the mental health and economic consequences of keeping people apart.

⁵² *Strata Schemes Development Act 2015* (NSW) s 28 (‘SSDA’).

⁵³ *SSMA* (n 51) s 9.

⁵⁴ *Ibid* s 52.

⁵⁵ *Lin v Owners — Strata Plan No 50276* (2004) 1 STR (NSW) 57 (Gzell J).

⁵⁶ *Australasian Strata Insights 2020* (n 45) 8.

Whatever the correct answer to this dilemma, one thing is certain: it is not the proper role of private citizens, whether owners corporations, the managers performing their tasks or the lawyers advising them, to determine these risks. By failing to close recreational facilities in strata schemes, the government was asking lay members of owners corporations to make a public health judgement about the risks of these facilities not only to themselves, but to third parties (other resident owners and tenants). That is a judgement lay people are not qualified to make. The fact that these facilities were situated on private property is no reason to default to private owners. Publicly accessible gyms, pools and retail premises are also private property, and the government did not expect their owners to make a public health judgement about the risks that their premises posed; the government simply closed them. Nor was the fact that strata owners were paying for the use of facilities a reason to leave them open. Commercial tenants were paying rent for premises they were not legally permitted to use. Finally, the residential nature of facilities was not a relevant reason to leave them unregulated. The prohibition on visitors to residential premises in force at the time was a serious suspension of one of the most basic rights associated with private residential land, the right to invite guests into your own home.⁵⁷

Even if some members of an owners corporation, the strata committee or strata manager had come to the conclusion that gyms and pools presented an unacceptable risk, the decision to close facilities could have been met by resistance and/or anger from other owners and residents. As Easthope, Randolph and Judd state, strata schemes have a system of ‘negotiated governance’,⁵⁸ which can be fraught at the best of times. Problems with governance include lack of participation by many lot owners, aggression at meetings, allegations of mismanagement and self-interest, poorly trained strata and building managers, and a real or perceived lack of understanding of the law.⁵⁹ While there are owners corporations, strata committees and strata professionals that work well, the research of Easthope, Randolph and Judd demonstrates that there are significant numbers of schemes with moderate to severe governance problems. The NSW government is aware of these problems, as they are confirmed by its own research.⁶⁰ Difficulties in strata management identified by both academic and government research relate to governance outside of a global pandemic, and in relation to relatively straightforward matters such as parking and noise. If many schemes struggle to govern themselves in this context, it is unrealistic to expect those same schemes and people to manage the health risks of a pandemic.

Easthope, Randolph and Judd’s research highlighted the genesis of the problem — the shift in urban governance from the public sector (local and state government) to private individuals pursuant to neoliberalism.⁶¹ Urban consolidation has facilitated the creation of thousands of small private governments — owners corporations — responsible for individual buildings, which now make up a

⁵⁷ PHO (n 28) cls 3.10, 4.11.

⁵⁸ Hazel Easthope, Bill Randolph and Sarah Judd, *Governing the Compact City: The Role and Effectiveness of Strata Management* (Final Report, May 2012) 41 (‘*Governing the Compact City*’).

⁵⁹ Ibid 46–64.

⁶⁰ NSW Fair Trading, ‘Making NSW No 1 Again: Shaping Future Communities’ (Strata and Community Title Law Reform Discussion Paper, 15 September 2012).

⁶¹ *Governing the Compact City* (n 58) 43.

significant proportion of our cities. Questions about the capacity and willingness of private citizens to perform functions imposed upon them by private governance structures, created with property law, have been the subject of decades of debate in the United States,⁶² and to a lesser extent Australia.⁶³ These debates are a subset of broader political debates about the responsibility imposed on, and autonomy granted to, small groups in liberal democracies and/or welfare states.⁶⁴ Academic debate aside, on the ground in strata schemes

[m]any owners and executive committee members [have] expressed frustration at the devolution of responsibility for representation and service delivery from government to owners corporations without sufficient accompanying governmental support.⁶⁵

The failure to close pools and gyms inside strata schemes, at the same time as publicly accessible pools and gyms were closed, is a perfect illustration of this phenomenon.

B Mandating Masks on Private Residential Land

On 22 June 2021, public health orders mandated masks in indoor settings in which unrelated households could mix — retail premises, places of worship and other publicly accessible places.⁶⁶ The mask mandate did not apply to residential premises with the result that masks were not required to be worn on the common property in strata schemes. This was despite the fact that the corridors and lifts of schemes are areas in which unrelated households mix, and are often poorly ventilated. It is widely accepted that poor indoor ventilation is a significant risk for the transmission of COVID-19.⁶⁷ As the entire population of Sydney was subject to stay-at-home orders, with the ability to leave their homes for exercise and essential items multiple times a day, the use of common property was likely to be significantly higher than in ordinary periods, and higher than at publicly accessible premises.

After agitation from the strata sector, in particular the Owners Corporation Network,⁶⁸ a mandate to wear masks on indoor common property was introduced on

⁶² Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press, 1994); Evan McKenzie, *Beyond Privatopia: Rethinking Residential Private Government* (Urban Institute Press, 2011); Robert Nelson, *Private Neighbourhoods and the Transformation of Local Government* (Urban Institute Press, 2005).

⁶³ Sherry, *Strata Title Property Rights* (n 42); Cathy Sherry, 'Judicially Identified Limits on the Body Corporate By-Law Making Power: *Cooper v The Owners — Strata Plan No 58068*' (2021) 96 *Australian Law Journal* 125, 131–9.

⁶⁴ Gregory S Alexander, 'Dilemmas of Group Autonomy: Residential Associations and Community' (1989) 75(1) *Cornell Law Review* 1; David T Beito, Peter Gordon and Alexander Tabarrok (eds), *The Voluntary City: Choice, Community and Civil Society* (University of Michigan Press, 2002); Nomi Maya Stolzenberg, 'Return of the Repressed: Illiberal Groups in a Liberal State' (2001) 12(2) *Journal of Contemporary Legal Issues* 897.

⁶⁵ *Governing the Compact City* (n 58) 2.

⁶⁶ *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021* (NSW) cl 5(1)(d).

⁶⁷ Yuguo Li, William W Nazaroff, William Bahnfleth, Pawel Wargocki, Yinping Zhang, 'The COVID-19 Pandemic Is a Global Indoor Air Crisis That Should Lead to Change: A Message Commemorating 30 Years of Indoor Air' (2021) 31(6) *Indoor Air* 1683.

⁶⁸ Jimmy Thompson, 'NSW Health Finally Gets the Strata Mask Message', *FlatChat* (Web Page, 4 July 2021) <<https://www.flatchat.com.au/nsw-health-strata-mask-message>>.

13 July 2021,⁶⁹ three weeks after the mandate came into force for other indoor spaces. The public health order defined ‘common property’ as

- (a) common property within the meaning of the *Strata Schemes Development Act 2015*,
- (b) association property within ... the Community Land Development Act 1989, and
- (c) [for company title premises] a part of the premises used as common property ... or that no person has the exclusive right to occupy.⁷⁰

While this demonstrates some attempt to capture diverse forms of housing, the definition did not capture public and social housing apartments, boarding houses or apartment buildings with a single owner, all of which contain spaces in which multiple unrelated households can gather.⁷¹ Subsequent serious outbreaks in public housing towers and social housing buildings demonstrated the risk of COVID-19 transmission within these premises.⁷²

The drafting of the mask mandate highlights the fundamental confusion within the *PHO* about the phrases ‘residential premises’ and ‘place of residence’. By 13 September 2021, cl 3.15(2) stated:

A person in a stay-at-home area who is over the age of 12 years of age must wear a fitted face covering while the person is —

- (a) in an indoor area or outdoor area other than a place of residence, or
- (b) in an indoor area on common property for residential premises ...⁷³

The clause uses both ‘place of residence’ and ‘residential premises’. While it might be tempting to assume that the term ‘place of residence’ in sub-cl (a) means an individual home (eg, an apartment), if that were the case, then sub-cl (b) would be otiose. Having required everyone to wear a mask outside their individual home, there would be no need to mandate masks on common property. In any event, ‘place of residence’ does not mean individual home; it refers to a parcel of residential land, which is why sub-cl (b) was necessary. Left on its own, sub-cl (a) would only require people to don a mask as they stepped off common property onto a public street. What drafters were attempting to achieve with the use of the different phrases ‘place of residence’ and ‘residential premises’ within the clause remains unclear.

⁶⁹ *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW) (as amended by the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Amendment (No 4) Order 2021*) cl 17(1)(a1).

⁷⁰ *Ibid* cl 17(6).

⁷¹ The government did produce management guidelines: Sydney Metropolitan Emergency Management Region, *Multi-Agency Emergency Management Guidelines to Support a COVID-19 Outbreak in a Public Housing Setting* (Report, March 2021) (‘*Multi-Agency Emergency Management Guidelines*’). However, they had no force of law, and were only intended to ensure that masks were available to public housing tenants and that their use was ‘promoted’. Unlike in private strata title apartment buildings, masks were not legally mandated in public housing.

⁷² Megan Gorrey, ‘“Scared as Hell”: COVID-19 Cluster Emerges in Sydney’s Public Housing Towers’, *The Sydney Morning Herald* (online, 16 September 2021) <<https://www.smh.com.au>>; Zena Chamas, ‘Police Enforcing Strict Lock-In a “Worst Nightmare” for Vulnerable Sydney Social Housing Residents’, *The Guardian* (online, 15 September 2021) <<https://www.theguardian.com/australia-news>>.

⁷³ *PHO* (n 28) (as amended by *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment (No 7) Order 2021* (NSW) sch 1 [20], [34]).

Although the mandate to wear masks was extended to outdoor areas in Greater Sydney on 23 August 2021, it was not extended to outdoor common property.⁷⁴ While some outdoor common property is only accessible by a single household (eg, balconies in some schemes), most outdoor common property is accessible by multiple households, and can include relatively small courtyards, gardens and restricted paths. Outdoor association property in community title schemes can be more expansive, including parks, tennis courts and pavements, but residents of large associations can number in their thousands. For example, Jackson's Landing in Pyrmont has over 2,500 residents,⁷⁵ and Breakfast Point, in the inner west of Sydney, has over 4,000 residents.⁷⁶ As a result, it was incongruous that people were required to wear masks in a large public park, but not on the paths, courtyards or open space of a strata or community scheme.

The initial failure to mandate masks on common property produced the same invidious default position as the failure to close pools and gyms. That is, lay members of strata committees, strata managers and also their lawyers, were required to make a public health judgement that they were not qualified to make. Research on face masks has evolved over the course of the pandemic,⁷⁷ making an assessment of the necessity for masks on common property extremely difficult for lay people. However, knowing that masks were mandated in other indoor areas and that owners corporations owe a duty of care to residents for injuries sustained on common property,⁷⁸ many strata committees felt compelled to consider the issue.⁷⁹ Thirty-six per cent of residents of NSW strata schemes are over the age of 40,⁸⁰ and an indeterminate number of residents are immunocompromised or have underlying health problems.

Strata schemes could have passed by-laws requiring all residents, their visitors and tradespeople to wear masks on common property. By-laws can be made 'in relation to the management, administration, control, use or enjoyment of the lots or the common property',⁸¹ and are valid if they regulate activities that have a meaningful effect on others,⁸² as mask wearing does. However, like all decisions of

⁷⁴ *PHO* (n 28) (as amended by *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment Order 2021* (NSW) sch 1 [1]–[9], [11], [12], [14]–[29]) cls 3.15(2), 4.16(2).

⁷⁵ 'About Us', *Jacksons Landing* (Web Page, March 2023) <<https://jacksonslanding.net.au/about-jacksons-landing>>.

⁷⁶ 'Breakfast Point: 2016 Census QuickStats' (n 47).

⁷⁷ Fiona McDonald and Claire J Horwell, 'Facemasks for Public Use during the COVID-19 Pandemic: An Examination of Responses in England and Australia' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 150, 151–2.

⁷⁸ *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449; *Morgan v Owners of Strata Plan 13937* [2006] NSWSC 1019; *Trevallyn-Jones v Owners Strata Plan No 50358* (2009) 14 BPR 27, 113.

⁷⁹ Jimmy Thompson, 'Strata Experts Split over Using "Mask-Up" By-Laws', *FlatChat* (Web Page, 15 July 2021) <<https://www.flatchat.com.au/by-laws-for-masks>>.

⁸⁰ *Australasian Strata Insights 2020* (n 45) 8.

⁸¹ *SSMA* (n 51) s 136.

⁸² In *Cooper v Owners of Strata Plan No 58068* (2020) 103 NSWLR 160, Basten JA held (at 174–5 [61]) that there was no legislative basis to make a by-law that regulates activity that has no effect on others because such a by-law 'lacks a rational connection with the enjoyment of other lots and the common property'. Conversely, a by-law that regulates activity that has a meaningful effect on others is prima facie valid: Sherry, 'Judicially Identified Limits on the Body Corporate By-Law Making Power' (n 63).

owners corporations, the creation of by-laws occurs through a process of ‘negotiated governance’ with all of the challenges noted above. Further, new by-laws rightly require time and formality; trigger-happy regulation of other people and their property is deeply undesirable in strata schemes, potentially violating the sanctity and security of people’s homes. As a result, by-laws must be voted on at a properly convened meeting of the owners corporation, garner special majority agreement, and then be recorded on the Torrens title register.⁸³ Like ordinary legislation, by-laws are not designed to meet the time pressures of a public health crisis.

This problematic state of affairs could have been avoided if the public health orders had been drafted with a proper definition of ‘place of residence’: that is, by defining ‘place of residence’ as *an individual household*, the relevant category for the prevention of disease transmission. For example, the Singaporean regulations defined ‘place of residence’ as

- (a) in relation to a subdivided building, an apartment or unit or a flat or lot in that building that is used as a complete and separate unit for the purpose of habitation or business;
- (b) in relation to a boarding premises in Singapore, a room comprised in the boarding premises for the accommodation of one or more boarders or lodgers at those premises, but not a room with shared facilities such as a communal living room, bathroom, laundry or kitchen; and
- (c) in relation to a building in Singapore used as specified accommodation or a specified hostel, a room in the building for the accommodation of one or more guests or residents of the specified accommodation or the specified hostel.⁸⁴

The Singaporean regulation mandated mask wearing from the moment people stepped outside the front door of their own household, achieving the primary purpose of COVID-19 restrictions, namely, to minimise the spread of the disease between unrelated households.

It should be noted that the lack of definition of ‘place of residence’ or ‘residential premises’ in the NSW public health orders did not stem from a lack of detail. The orders were sufficiently fine-grained to address Lord Howe Island, tanning salons, waxing salons, gaming lounges, group dance classes, vessels for snorkelling, scuba diving and marine animal watching, and a range of other premises and activities. In this context, it was reasonable to expect that sufficient specificity would be given to the single most important category of land in stay-at-home orders: people’s homes.

Ultimately, the failure to close gyms and pools inside strata schemes, and to initially mandate masks on common property, highlights a lacuna in public health thinking. Public health policy focuses on publicly accessible places as though they are the only areas in which unrelated households can mix. To the extent that people live in freestanding or terraced housing, this is true; for the significant segment of the population who live in strata or community title schemes, it is not. This housing contains privately owned, non-publicly-accessible space that is used by multiple

⁸³ *SSMA* (n 51) s 141.

⁸⁴ *COVID-19 (Temporary Measures) (Control Order) Regulations 2020* (Singapore) reg 2.

unrelated households. It is essential that public health understanding of land that presents risks for the spread of viral diseases is expanded to include common property within strata and community title schemes — not so that residents can be subjected to draconian public health orders, such as those discussed below, but so that protective measures can be appropriately applied to strata schemes, and owners and occupiers can be given effective support and guidance. Further, public health officials must be provided with accurate advice about who owns that land, and how the powers and responsibilities that usually flow from land ownership are modified by strata and community title legislation.

C *Nonsensical and Unworkable Provisions: Workers in a Place of Residence*

In addition to problems with mask mandates, the inadequately defined category ‘place of residence’ made significant sections of the *PHO* nonsensical for strata schemes. This created acute problems for strata committees, strata managers and — most importantly — the lawyers advising them. Lawyers cannot advise clients on the basis of the ‘vibe’ of legislation or what they thought the government was trying to achieve. They have professional obligations to advise on the basis of what the law actually says. Law that is so unclear that even professionals cannot ascertain its meaning offends the rule of law.

One particular area of confusion related to the authorisation of workers to enter residential premises. Before discussing the specific problems for strata schemes, it must be noted that these provisions repeatedly contained what could only be described as a serious mistake.

Clauses 3.11(1) and 4.12(1) stated: ‘A worker is authorised to visit a place of residence ... to carry out work other than prescribed work.’ The Dictionary defined ‘prescribed’ work as:

- (a) cleaning,
- (b) repairs and maintenance,
- (c) alterations and additions to buildings,
- (d) work carried out as part of a trade, including electrical work or plumbing.

‘Work’ was defined to include work done as a volunteer or for a charitable organisation and ‘prescribed work’ was permitted in circumstances defined in cls 3.11(2) and 4.12(2).

The upshot of cls 3.11(1) and 4.12(1) was to authorise *any work at all* in other households, other than ‘prescribed work’. The *PHO* required residents of stay-at-home areas to work from home unless it was not reasonably practicable to do so,⁸⁵ and residents of areas of concern to stay at home unless they worked in essential services.⁸⁶ This prohibited workers such as academic tutors entering someone else’s home, because tutoring could be done remotely. However, other work, such as mobile massage or hairdressing services could not be done remotely, and workers

⁸⁵ *PHO* (n 28) sch 2(2).

⁸⁶ *Ibid.*

were thus authorised to leave their own homes. Clauses 3.11(1) and 4.12(1) then authorised these workers to enter other people's residences in stay-at-home areas and areas of concern. Lest these examples seem fanciful, the inability to get a haircut during lockdown was a pressing concern for many, with long queues forming at salons as soon as restrictions were eased.⁸⁷ The blanket authorisation of all workers to enter homes, if they could not do their work from their own home, was an extraordinary provision in the context of prohibitions on a single visitor — including close family members — to a home.⁸⁸ It is hard not to conclude that the provision was a mistake, and yet it repeatedly appeared in orders throughout the lockdown.

Moving to specific problems for strata schemes, the basic rule in stay-at-home areas was that 'prescribed work' (cleaning, repairs, maintenance, alterations, additions and trade work) could be done in an indoor area if:

- there were no more than two workers in the 'room' and no other person was in the room; or
- the work was necessary.⁸⁹

The common property of many strata and community schemes is extensive and it is not possible for residents to clean this area themselves. In the context of a pandemic of a disease transmissible via surfaces,⁹⁰ cleaning of high-touch areas such as lift buttons and balustrades was essential. Despite these facts, the *PHO* made the *legal* cleaning of common property in stay-at-home areas impossible for two reasons. First, common property is not a 'room'; it is all of the space that falls outside individual lots on a strata plan of subdivision,⁹¹ or lot 1 community property on a community plan of subdivision.⁹² As people need to access common property at all times to enter and exit their homes, it is impossible to ensure that no one, other than the workers, is in that 'room'. Second, cleaning work did not qualify as permissible on the ground that it was 'necessary'. This is because, although 'necessary' was defined in cl 3.11(3)(a) to include work that was 'urgently' needed to be done 'to ensure the health, safety or security of the place of residence or persons residing at the place of residence',⁹³ 'cleaning' was given a narrower, specific definition. Under cl 3.11(3)(c), cleaning was only 'necessary', if it was carried out in a place of residence that was unoccupied and the cleaning was necessary for the sale or lease of the premises. Those criteria could only ever apply to an individual apartment or house, not the common property of a strata or community scheme. Rules of statutory interpretation require specific provisions of legislation to qualify more general provisions, thus sub-cl (c) overrode sub-cl (a) with the result that cleaning of common property was *prima facie* illegal in stay-at-home areas.⁹⁴

⁸⁷ Samantha Lock, Mostafa Rachwani and Rafqa Touma, 'With Queues at the Pubs and Beauty Salons, Sydney Reopens after More Than 100 Days in Lockdown', *The Guardian* (online, 11 October 2021) <<https://www.theguardian.com/australia-news>>.

⁸⁸ *PHO* (n 28) sch 2.

⁸⁹ *Ibid* cl 3.11(2).

⁹⁰ Li et al (n 67) 1683.

⁹¹ *SSDA* (n 52) s 4.

⁹² *CLDA* (n 44) ss 8–10.

⁹³ *PHO* (n 28) cl 3.11(3)(a)(ii).

⁹⁴ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 370 (Brennan CJ).

In ‘areas of concern’ or so-called ‘hotspots’ the provisions on workers in residences were stricter still. Workers were only allowed to enter a place of residence to do prescribed work that was ‘necessary’, but again, necessary cleaning was limited to work done on an unoccupied premise being offered for lease or sale.⁹⁵ It is hard not to conclude that the government was more receptive to the concerns of the real estate industry, which profits from the sale and leasing of homes, than the concerns of people actually living in those homes.

Despite the prohibition on cleaning, the drafting of the public health orders was sufficiently confusing for owners corporations and strata managers that most schemes continued to employ cleaners. However, there was considerable concern about whether strata cleaners, many of whom lived in the lower socio-economic ‘hot spots’ of Sydney, were performing ‘essential’ work, and thus were, or should be, permitted to leave their local government area.

In addition to their nonsensical application to common property, the provisions authorising workers in a place of residence created risks for strata residents that the government did not seem to have considered. In stay-at-home areas, the provisions allowed homeowners to have any work done to their properties, so long as there were only two workers and no one else in a room. That provision allowed owners of non-strata properties to make a judgement about their own appetite for risk and to minimise that risk by leaving their homes when workers were present. However, for strata residents, it meant that every apartment in a building could have two workers in their residence, creating the potential for large numbers of workers accessing common property corridors and lifts. Residents who invited workers into their apartments were in effect making decisions about the level of risk to which other residents, including vulnerable residents, were exposed. In addition to the health concerns, the noise of renovations in adjacent apartments is more disruptive than renovations in a neighbouring freestanding home. This noise was occurring at a time when everyone was confined to their apartments, including workers and school children. Again, questions must be asked about the government’s preparedness to place the needs of those who profit from homes — in this instance, the building sector — over the needs of residents of those homes.

V Targeting Low-Income Residents of High-Density Housing: ‘High COVID-19 Risk Premises’

Throughout the Delta variant outbreak there was a *Public Health (COVID-19 Self-Isolation) Order 2021* (NSW) which required anyone who had tested positive to COVID-19 to isolate in their ‘residence’.⁹⁶ It also required ‘close contacts’ to do the same.⁹⁷ A close contact was defined as a person identified by an authorised contract tracer to have likely come into contact with a positive person, and who was at risk of developing COVID-19.⁹⁸

⁹⁵ *PHO* (n 28) cl 4.12(2)–(3).

⁹⁶ *Public Health (COVID-19 Self-Isolation) Order 2021* (NSW) cl 5.

⁹⁷ *Ibid* cl 6.

⁹⁸ *Ibid* cl 1.3.

With one notable exception, the self-isolation orders also paid no heed to the physical nature of strata schemes and the risks they presented. Somewhat incongruously, the self-isolation orders used a third term ‘residence’, rather than ‘place of residence’ or ‘residential premises’, but the term suffers from the same definitional problem — for a person who lives in a strata scheme, their lot and the entire common property is their ‘residence’. As a result, the orders completely failed to address the obvious risk that COVID-positive residents and their close contacts presented if they moved through common property to access laundries, garbage rooms or recreational facilities. This point needs to be made clear — despite the extraordinary restrictions on movement during the Delta outbreak for all people, including those who were COVID-negative, with one minor exception (discussed below) at no point was it illegal for a COVID-*positive* resident of a strata scheme to leave their apartment and mix with unrelated households on common property.

NSW Health eventually addressed these risks on its website, recommending that COVID-positive residents avoid using common property, but law is not made by website. As a result, private citizens — strata committees, strata managers, lawyers and residents — were left to address the risk on their own, with the same lack of medical expertise and ambiguous legal authority discussed above in relation to facilities and masks. The government provided no assistance or even guidance on how COVID-positive residents were meant to take out their garbage, do washing or pick up food deliveries left at the front door of buildings. While many schemes developed a newfound sense of community and co-operation during lockdown, that could not guarantee assistance to all COVID-positive residents of all buildings in Sydney.

In early September 2021, COVID-19 began to spread in a social housing building in inner Sydney.⁹⁹ In response, the government made *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* (NSW). This extended self-isolation orders from individuals to entire apartment buildings. It allowed the Minister to make a declaration that premises with more than two dwellings were ‘high COVID-19 risk premises’ if a single resident tested positive or was simply a close contact, and a public health officer believed there was a risk of transmission between residents.¹⁰⁰ All residents of the building, as well as any non-residents present at the time of the declaration, became ‘affected persons’, *even if they were COVID-negative and not a close contact*. Pursuant to the Minister’s direction, affected persons were not permitted to leave their ‘residence’ for any reason, other than an emergency or if authorised by a medical officer or the Commissioner of Police.¹⁰¹ They were not permitted to leave for food or exercise. Non-residents, which included visitors and workers, could be ordered to go to a quarantine facility or hospital or to ‘reside in a dwelling in the high COVID-19 risk premises until medically cleared’.¹⁰²

There were strict provisions imposing obligations on affected persons to provide information to the police.¹⁰³ A person residing or simply present at a

⁹⁹ Chamas (n 72).

¹⁰⁰ *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* (NSW) cl 9 (‘September PHO’).

¹⁰¹ *Ibid* cl 12.

¹⁰² *Ibid* cl 13.

¹⁰³ *Ibid* cl 18.

declared premise had to respond to any request made by police about who was residing at or present on the premises. If police knocked at the door, affected persons were legally obliged to open the door. In addition to affected persons, at the direction of the Commissioner of Police ‘a person involved in the management of high COVID-19 risk premises’ had to provide information that assisted in identifying affected persons.¹⁰⁴ This section captured strata and building managers, as well as real estate agents and arguably lawyers. There was an obligation to ‘ensure’ (as opposed to make reasonable efforts) that any information provided was true and accurate.¹⁰⁵ The potential consequences of failing to comply with these ministerial directions were fines of up to \$11,000 (100 penalty units) and imprisonment for up to six months.¹⁰⁶

In contrast to the main public health orders (the *PHO*), the government seemed to have finally turned its attention to strata schemes in the high COVID-19 risk premises order. The order was clearly aimed at apartment buildings, and it contained provisions specific to strata. For example, included in the narrow category of people permitted to enter the premises were people ‘entering for the purposes of undertaking functions or providing services necessary for the ordinary operation of the premises’.¹⁰⁷ Unlike the drafting of the main public health order, when this order was drafted the government seemed to be aware that cleaning is essential in apartment buildings, particularly to prevent the spread of disease.

However, the fundamental confusion about private lot property and common property remained. Clause 12(1) of the order required an ‘affected person’ to remain in their ‘residence’, which, as noted, includes the common property — the very space in which the virus could be transmitted between households, intensifying the building outbreak. It took a full three weeks for the order to be amended with the insertion of cl 12(5) which mandated that ‘affected persons’ could not use any part of common property unless authorised by a public health officer.¹⁰⁸ However, as noted, ‘affected persons’ was a blanket category, capturing all residents, including those who were neither COVID-positive nor a close contact. For most of the period in which it was in force, all the order did was:

- lock all residents of a building away from the rest of the community, regardless of the lack of risk that COVID-negative people presented; and
- increase the risk that the virus would spread within the building by failing to require COVID-positive residents and their close contacts to remain in their apartments.

The order was so poorly drafted and irrational that it must be considered a violation of the rule of law.

¹⁰⁴ Ibid cl 15.

¹⁰⁵ Ibid cls 15(2), 18(2).

¹⁰⁶ *Public Health Act* (n 13) s 10.

¹⁰⁷ *September PHO* (n 100) cl 9(f).

¹⁰⁸ *Public Health (COVID-19 Self-Isolation) Order (No 3) Amendment (No 3) Order 2021* (NSW) sch 1 [2] (commenced 28 September 2021).

Only a small number of buildings were declared to be high COVID-19 risk premises. One was a church-run aged care facility for men in inner Sydney, while the others were private strata schemes in low-income areas. The numbers of COVID-positive cases in some buildings were relatively low. For example, in an 83-dwelling premise in Wollongong, there were only four dwellings with COVID-positive residents, and a further 61 with close contacts.¹⁰⁹ While there was a serious outbreak in the public housing towers in Waterloo in inner Sydney, declarations were never made in relation to these buildings,¹¹⁰ possibly as a result of failures during the lockdown of 3,000 public housing residents in Melbourne in 2020, and the subsequent damning report by the Victorian Ombudsman.¹¹¹ Another possible explanation for the limited number of lockdowns of buildings in Sydney is the logistical challenge of feeding residents that lockdowns create. Delivery of food to public housing tower residents in Victoria was described as ‘chaotic’,¹¹² and in NSW, contingency plans for the delivery of food hampers to public housing tenants who ‘could not meet their own needs’ was grim, with hampers containing ready meals, noodles and pasta, but no fresh fruit or vegetables.¹¹³ The early 2022 Shanghai lockdown produced distressing footage of thousands of residents screaming from their apartments at night as food supplies dwindled.¹¹⁴

Having initially claimed that strata schemes did not merit being a special case,¹¹⁵ when the government finally turned its attention to high-density housing, the response was positively draconian, subjecting all residents and managers of some strata schemes to exceptionally intrusive orders. Only low-income or social housing schemes were subject to high COVID-19 risk declarations, although there were cases in multiple schemes across Sydney, including high-income schemes. As Silva states,

evidence exists (and is often overlooked) to strongly suggest that it is persons who are socially and politically marginalised who are often subject to coercive measures in the name of public health. ... The expediency of coercive public measures might be unconsciously too tempting not to use against marginalised populations, especially when public health workers are stretched to — or beyond — capacity, such as during a pandemic.¹¹⁶

To the author’s knowledge, only two countries have locked in entire apartment buildings: Australia and China.¹¹⁷ In early 2022 in Shanghai, 28 million people were

¹⁰⁹ Letter, ‘Notice Declaration of High COVID-19 Risk Premises, 75–79 Keira St Wollongong 2500’, 16 September 2021 (copy on file with author).

¹¹⁰ Gorrey (n 72).

¹¹¹ Victorian Ombudsman, Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 ‘Hard Lockdown’ in July 2020 (Report, December 2020).

¹¹² Ibid 4.

¹¹³ *Multi-Agency Emergency Management Guidelines* (n 71) 20–2.

¹¹⁴ Eryk Bagshaw, ‘Why People Are Screaming from Their Apartments in Shanghai’, *The Sydney Morning Herald* (online, 11 April 2022) <<https://www.smh.com.au>>.

¹¹⁵ Sue Williams, ‘Lockdown on Elan, One of Sydney’s Biggest Apartment Towers, Eased after No More Positive COVID Cases’, *Domain* (Web Page, 27 June 2021) <<https://www.domain.com.au>>.

¹¹⁶ Diego S Silva, ‘COVID-19 in the Public Housing Towers of Melbourne: Upholding Social Justice when Invoking Precaution’ (2020) 44(5) *Australian and New Zealand Journal of Public Health* 430, 430.

¹¹⁷ Huizhong Wu, ‘Sealed In: Chinese Trapped at Home by Coronavirus Feel the Strain’, *Reuters* (online, 22 February 2020) <<https://www.reuters.com/article/us-china-health-quarantine-idUSKCN20G0AY>>.

confined to their individual apartments, with little or no outdoor access, for over two months. While rare, whole building lockdowns highlight a fundamental vulnerability of residents of high-density housing: with a single exit, it is possible to confine hundreds of people to their homes in a way that would not be possible if people lived in freestanding housing. This vulnerability may require considerably more attention in future COVID-19 outbreaks or other pandemics.

VI Conclusion

Public health orders and the restrictions they imposed were arguably a necessary and effective response to the COVID-19 Delta variant. NSW had considerably fewer cases, serious illnesses and fatalities as a result.¹¹⁸ However, that does not mean that the government's response should not be subject to scrutiny, particularly given the extraordinary effect that orders had on fundamental freedoms, including movement, association, work, recreation and privacy. The COVID-19 pandemic is not over, and future pandemics are likely. Having limited experience in managing pandemics in the past century,¹¹⁹ we have a lot to learn about legal and other responses. That is particularly the case in relation to strata title, a form of housing with collectively owned common property, that did not exist during the last global pandemic, the Spanish flu.¹²⁰

One of the key failures of the NSW government during the Delta variant outbreak was a failure to consider physical and legal differences in housing. If the key response to a pandemic is to confine millions of people to their homes, attention to those homes is imperative. For the majority of the population who live in freestanding or terraced housing, stay-at-home orders achieved their aim of preventing unrelated households mixing, performing the precise public health function that their initial development intended: that is, to minimise the spread of disease. However, for the significant minority of people who live in strata title apartments — over one million NSW residents — stay-at-home orders needed to be more accurately drafted, and underpinned by a proper understanding of land law. Unless legislation otherwise specifies, references to 'residence', 'residential premises' and 'place of residence' are references to land and its use; they are not references to buildings or individual apartments. Those phrases, used repeatedly in the public health orders, needed to be specifically defined as *the area occupied by a single household*, the relevant category in the context of a viral pandemic. The absence of definition produced nonsensical and unworkable results, offending the rule of law and potentially compromising public health.

¹¹⁸ See, eg, the data tables at 'WHO Coronavirus (COVID-19) Dashboard', *World Health Organization* (Web Page) <<https://covid19.who.int/data>> and compare the case numbers detailed in NSW Government, 'COVID-19 Weekly Surveillance Reports: Archive', *NSW Health* (Web Page) <<https://www.health.nsw.gov.au/Infectious/covid-19/Pages/weekly-reports-archive.aspx>>.

¹¹⁹ Gabrielle Wolf, 'COVID-19 in Historical Context: Australian Legal and Regulatory Responses to Past Influenza Pandemics' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 34–50.

¹²⁰ The Spanish flu affected Australia during 1918–19: *ibid* 37–44. The first strata title Act in Australia was the *Conveyancing (Strata Titles) Act 1961* (NSW), and strata or condominium legislation in most other nations dates from the same period or later.

By failing to account for strata schemes in the public health orders, the government-imposed obligations on private citizens (strata committees, their lawyers and strata and building managers) to make public health judgements that they were not qualified to make. This stood in contrast to the absence of expectation placed on private citizens in retail and commercial sectors. However, it was not clear that the government actually understood who they were imposing these obligations on in the residential sector. Repeated communication by NSW Health with strata managers indicates that the government erroneously believed that all strata schemes have professional management, and that authority in schemes rests with managers. It does not. The authority in all strata schemes rests with the owners. After decades of government facilitation of strata development, and a recent wholesale review of strata and community title legislation leading to new Acts,¹²¹ it is inexcusable that any government department does not have a clear understanding of the legal and physical structure of strata schemes which house a significant minority of the population.

Finally, when the government turned its attention to strata schemes and the obvious risks that they present for the transmission of COVID-19 between residents, its response was extreme and punitive. The provisions on ‘high COVID-19 risk premises’ offended the rule of law with their lack of rationality and efficacy and their differential application.

Multiple challenges remain in the management of high-density housing in the event of future COVID-19 variants or another pandemic. Can strata schemes require vaccination as a condition of entry for visitors and tradespeople or for the use of common facilities by residents? In the event of a more deadly strain, can schemes exclude all visitors from the building? Do schemes need to improve their ventilation, and what should they do if the majority of lot owners — almost 50% of whom are investors who do not live in schemes and are not at risk — refuse to agree or pay? If another lockdown occurs and COVID-positive people are confined to their apartments, who is responsible for assisting them with food, laundry and rubbish removal? Answers to these questions cannot be left to private citizens with no public health expertise or legitimate authority to determine civil liberties. Answers must come from government. This will only occur once governments recognise the physical and legal diversity of housing when providing advice to citizens and, most importantly, when drafting the terms of public health orders.

¹²¹ *SSMA* (n 51); *SSDA* (n 52); *CLMA* (n 44); *CLDA* (n 44).